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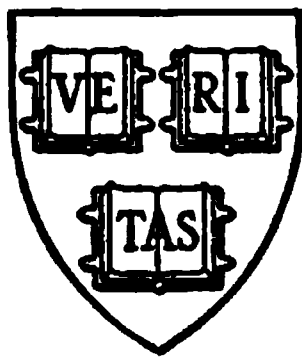
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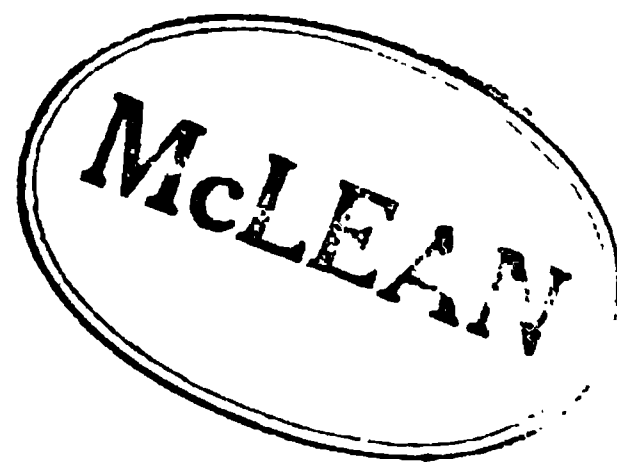


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PRACTICE
in
THE ORPHANS' COURTS
of
PENNSYLVANIA

JURISDICTION PROCEDURE
AND
FORMS

embracing
ADMINISTRATORS, EXECUTORS, GUARDIANS, TRUSTEES AND
COMMITTEES, THE PRICE ACT, RULE IN SHELLEY'S
CASE, CONDITIONS, EXECUTORY DEVICES, RE-
MAINDERS AND INHERITANCE

with
THE LAW OF WILLS
AND SETTLEMENT OF ESTATES IN PENN-
SYLVANIA AND COLLECTION OF
INHERITANCES IN FOREIGN
COUNTRIES

In Four Volumes

BY
WILLIAM F. JOHNSON
OF THE PHILADELPHIA BAR

VOL. 3

PHILADELPHIA
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Dedication

BY PERMISSION THIS VOLUME IS DEDICATED

TO

HON. CLEMENT B. PENROSE

PRESIDENT JUDGE OF THE ORPHANS' COURT OF PHILADELPHIA

JUNE 6TH, 1911

602317

CONTENTS

VOLUME III

PRACTICE

IN THE ORPHANS COURTS OF PENNSYLVANIA

CHAPTER I.

ORIGIN AND CHARACTER OF THE ORPHANS'	PAGE
COURT.	1

- | | |
|---|---|
| 1. Origin of the Orphans' Court. | 15. Salaries of Deputy Register and clerks in Philadelphia. |
| 2. Jurisdiction created by statute. | 16. Judges in separate Orphans' Courts. |
| 3. Orphans' Court not a court of Equity. | 17. Judges may hear Equity cases. |
| 4. Constitutional provisions. | 18. Duty not compulsory. |
| 5. Former jurisdiction of Register's Court. | 19. Additional law judge may arrange. |
| 6. The Orphans' Court a court of record. | 20. Compensation of judge. |
| 7. Seal of the court. | 21. Bill of costs in separate Orphans' Court. |
| 8. Separate Orphans' Courts. | 22. Fees of the clerk in Philadelphia. |
| 9. Clerks and assistants of separate Orphans' Courts. | 23. Fees of the clerk in Allegheny county. |
| 10. Jurisdiction of separate Orphans' Courts. | 24. Fees of the clerk of the Orphans' Court. |
| 11. Powers of injunction. | 25. Duties of the clerk generally. |
| 12. Stay of execution on appeal. | 26. Clerk to keep partition docket. |
| 13. Power to make rules. | |
| 14. Apartments, provision for. | |

CHAPTER II.

JURISDICTION OF THE ORPHANS' COURT.....	14
--	-----------

- | | |
|--|---|
| 1. General jurisdiction. | 5. Parties who do or do not come within its jurisdiction. |
| 2. Separate Orphans' Courts. | |
| 3. Particular jurisdiction. | 6. Power over strangers or persons acting as agents. |
| 4. Jurisdiction of partition under a will. | |

	PAGE
7. Power over debtors and parties to the proceedings.	
8. Territorial limits of jurisdiction.	
9. Jurisdiction of assets.	
10. Jurisdiction over real estate.	
11. Power over decedent's interest in partnership.	
12. Powers when jurisdiction has attached.	

CHAPTER III.

THE REGISTER OF WILLS..... 26

1. Character of office.	22. Exceptions to bond — notice, etc.
2. Appointment of deputy — powers.	23. Surety company may become sole surety.
3. Jurisdiction of register.	24. Administrator <i>c.t.a.</i> to give bond.
4. Register's docket.	25. Bonds to be held for uses.
5. Power of register to grant letters.	26. Oath of administrator.
6. Affidavit of death of decedent.	27. Duty to record inventories and appraisements.
7. Form of affidavit.	28. Records in Mercer and Crawford counties.
8. Issuance of letters 21 years from the death of the person.	29. Duty to certify copies of documents.
9. Register to fill vacant administration.	30. Register must give notice of bequests to public corporate body.
10. Letters granted by the court.	31. Commissions to examine witnesses.
11. State tax on letters.	32. Examination of accounts by the register.
12. Administration not impeached by later discovery of a will.	33. Publication of notice of filing account.
13. Right and preference of administration.	34. Accounts shall not be confirmed without notice.
14. Caveat against granting letters — form.	35. Register to account annually.
15. Renunciation of letters — form.	36. Fees of register.
16. Revocation of letters.	37. Fees of register in Allegheny County.
17. Form of petition to revoke letters.	38. Fees of register in Philadelphia.
18. Administrators <i>durante minoritate</i> .	39. Recovery of costs before register.
19. Letters void, when no bond is given.	40. Annual account of fees.
20. Bond of administrator — condition.	
21. Form of bond and affidavit of sureties.	

CHAPTER IV

ADMINISTRATION — WIDOW'S EXEMPTION — APPRAISEMENT 43

1. Notice of appointment.	3. Inventory required within thirty days.
2. Form of notice.	

	PAGE
4. Additional inventory.	
5. Debts to be included in the inventory.	
6. Executor must include debt due testator.	
7. Arrears of rent belong to the personal estate.	
8. Rents due life tenant go to the executor.	
9. Estates <i>pur autre vie</i> go to the executor.	
10. Appraisement — oath of appraisers.	
11. Method of appraisement.	
12. Appraisement of widow's exemption.	
13. Form of widow's demand.	
14. Form of appointment of appraisers.	
15. Form of oath of appraisers.	
16. Form of appraisement.	
17. Appraisement under act of 1909.	
18. Rule in Allegheny county.	
19. Proceedings on appraisement.	
20. Certain minor children entitled without demand.	
21. Guardian or administrator to make selection.	
22. Appraisement without letters.	
23. Form of petition under act of 1883.	
24. Form of order of court.	
25. Form of oath of appraisers.	
26. Form of appraisement.	
27. Widow's exemption extended to estate of husband dying outside of the state.	
28. Election to retain choses in action.	
29. Growing crops, when appraised.	
30. Exemption where real estate cannot be readily divided.	
31. Title to vest in widow or children.	
32. Fees of appraisers.	
33. Exceptions to appraisement.	
34. Sale of personalty.	
35. Filing of vendue list.	

CHAPTER V.

ADMINISTRATORS AND OTHER FIDUCIARIES — DISCHARGE AND REMOVAL..... 58

1. Administration in general.	14. Form of answer.
2. Kinds and forms of administration.	15. Form of replication.
3. Resignation of administrator, etc.	16. Form of order for security.
4. Discharge of administrator.	17. Form of order of removal.
5. Manner of procuring discharge.	18. Form of petition to remove for sickness or imbecility.
6. Effect of discharge.	19. Form of order of removal.
7. Proceedings for additional security.	20. Form of petition of administrator for discharge.
8. Removal for failure to give security.	21. Form of decree of discharge.
9. Enforcement of order.	22. Practice on petition.
10. Removal for cause shown.	23. Form of petition for discharge of trustee.
11. Procedure to remove.	24. Form of rule to show cause.
12. Petition by sureties.	25. Form of decree of discharge.
13. Form of petition for security or removal.	26. Rule of court in Philadelphia, as to discharge.
	27. Form of bond for delivery of estate to surety.

CHAPTER VI.

PAGE

POWERS OF AND PROCEDURE IN THE ORPHANS' COURT 73

- | | |
|---|---|
| 1. Procedure by petition and citation. | 32. Form of demurrer to petition. |
| 2. Interest of the petitioner. | 33. Form of plea to a petition. |
| 3. Other requisites of the petition. | 34. Form of disclaimer to a petition. |
| 4. Forms of petitions. | 35. Form of order on filing disclaimer. |
| 5. The order of court. | 36. Answer to petition. |
| 6. Power to fix return days and make rules. | 37. Form of answer. |
| 7. Terms and return days in Allegheny county. | 38. Replication. |
| 8. Terms and order of business in Philadelphia. | 39. Form of general replication. |
| 9. Saturday motion list, Philadelphia. | 40. Scandalous and impertinent matter. |
| 10. Saturday, previous memorandum of application. | 41. Right of petitioner to withdraw. |
| 11. Time limit on entering motion, Philadelphia. | 42. Reference to auditor, examiner or master. |
| 12. Audit list, Philadelphia. | 43. Hearing by auditor. |
| 13. Argument <i>in banc</i> , Philadelphia. | 44. Hearing by master or examiner. |
| 14. Placing causes on argument list, Philadelphia. | 45. Admission of evidence by auditor. |
| 15. Paper books of the argument, Philadelphia. | 46. Admission of evidence by examiner. |
| 16. Paper books on exceptions to adjudications, Philadelphia. | 47. Evidence and commissions, etc. |
| 17. Order of argument, Philadelphia. | 48. Depositions, rule in Allegheny. |
| 18. Striking from list, Philadelphia. | 49. Depositions of ancient, infirm and going witnesses. |
| 19. Exceptions, placed on list of course. | 50. Commissions outside the state, Allegheny. |
| 20. Process to be attested by the president judge. | 51. Depositions on motions and rules, Allegheny. |
| 21. Forms, immaterial variations. | 52. Auditor's report — notice to parties. |
| 22. Amendments. | 53. Form and substance of report. |
| 23. The citation. | 54. Filing of report. |
| 24. Notice of citations, etc. | 55. Return of testimony. |
| 25. Granting citations and rules in vacation. | 56. Re-committal of report. |
| 26. Service of citation. | 57. Effect of confirmation. |
| 27. Notice to heirs, legatees and distributees. | 58. Conclusiveness of findings of fact. |
| 28. Notice where minors are interested. | 59. Enforcement of orders and decrees. |
| 29. Separate Orphans' Courts to prescribe form of notice. | 60. Rule for attachment as for contempt. |
| 30. Decree <i>pro confesso</i> when no appearance is entered. | 61. Process directed to other counties. |
| 31. Pleadings — demurrer. | 62. Transfer of orders and decrees to other counties. |
| | 63. Rules and orders upon officers and attorneys. |

	PAGE
64. Perpetuation of testimony of lost records.	74. Clerk's certificate, attesting the judge.
65. Sending issues to the Common Pleas.	75. Form of register's certificate to letters.
66. Requests for issues, Allegheny county.	76. Form of judge's certificate.
67. Issue on distribution.	77. Writs of execution in the Orphans' Court.
68. Decrees in the Orphans' Court.	78. Manner of issuing executions.
69. Decrees, satisfaction of, Philadelphia.	79. Form and character of writ.
70. Decree, enforcement of, Philadelphia.	80. Special writs of execution when allowed.
71. Exemplifications of the record.	81. Costs in separate Orphans' Courts.
72. Form of certificate of the clerk.	82. Costs, generally.
73. Form of certificate of the judge.	83. Stenographer's fees.
	84. Counsel and witness fees.
	85. Liability for costs.

CHAPTER VII.

DEBTS OF THE DECEDENT — PREFERENCE — EVIDENCE AND COMPETENCY OF WITNESSES 104

- | | |
|---|--|
| 1. Debts of the decedent. | 18. Claims of relatives other than parent and child. |
| 2. Preference of payment. | 19. Right to recover on <i>quantum meruit</i> . |
| 3. Personalty the primary fund. | 20. Admissibility and sufficiency of evidence. |
| 4. Order of payment. | 21. The confidential relation. |
| 5. Claims for medical attendance. | 22. Competency of witnesses. |
| 6. Funeral expenses. | 23. Enlarged competency, act of 1891. |
| 7. Monument or tombstones. | 24. Scope and effect of acts. |
| 8. Wages of servants and laborers. | 25. One year's time for payment. |
| 9. Claims for rent. | 26. Limitation as to debts due the estate. |
| 10. Law of domicile as to preference. | 27. Proceedings to relieve decedent's land from lien of debts. |
| 11. General debts. | 28. Reference to master or examiner. |
| 12. Interest on claims. | 29. Decree of court. |
| 13. Notice to present claims. | 30. Exclusive power of Orphans' Court. |
| 14. Claims for services, attendance, etc. | |
| 15. Services in anticipation of will. | |
| 16. Claims for additional compensation. | |
| 17. Claims of relatives — parent and child. | |

CHAPTER VIII.

ASSETS WHICH COME INTO THE HANDS OF
EXECUTORS AND ADMINISTRATORS FOR
PAYMENT OF DEBTS—STATUS OF DEBTS . 124

PAGE

- | | |
|--|--|
| 1. Things which shall come into the hands of a legal representative. | 8. Beneficiary funds. |
| 2. Choses in action. | 9. Insurance money. |
| 3. Goods and chattels. | 10. Emblements. |
| 4. Assets for the payment of debts. | 11. Arrears due a soldier. |
| 5. Lands as assets. | 12. Status of debts determined at the death of decedent. |
| 6. What rents are assets. | 13. Debts which are liens. |
| 7. License and good will. | 14. Debts in form of judgments, order of. |
| | 15. Debts in form of mortgages. |

CHAPTER IX.

SALE OR MORTGAGE OF REAL ESTATE FOR
THE PAYMENT OF DEBTS..... 132

- | | |
|--|--|
| 1. Power to order sales or mortgages. | 23. Form of notice, Philadelphia. |
| 2. Power to order sales or mortgages in several counties. | 24. Fixing terms of sale. |
| 3. Order of sale when land lies in different counties. | 25. Form of order of sale. |
| 4. Order to sell. | 26. Notice of sale. |
| 5. Claims upon which a sale may or may not be ordered. | 27. Form of notice of sale. |
| 6. Mortgage debts. | 28. Authorization of legal representative to bid. |
| 7. Estates and property that may be sold. | 29. Form of leave to bid. |
| 8. The petition to sell. | 30. Consent of heirs, etc. |
| 9. Petitions—rule in Philadelphia. | 31. Form of return to leave to bid. |
| 10. Inventory must be exhibited. | 32. Return to order of sale—form. |
| 11. Form of petition. | 33. Form of confirmation <i>nisi</i> . |
| 12. Form of order of sale. | 34. Form of petition for private sale. |
| 13. Private sale. | 35. Form of affidavit of value. |
| 14. Legal representatives must first give security. | 36. Form of order for private sale. |
| 15. Form of bond. | 37. Form of return of private sale. |
| 16. Justification of sureties. | 38. Form of affidavit of notice. |
| 17. Form of approval. | 39. Form of final confirmation. |
| 18. Liability of surety. | 40. Form of return unsold. |
| 19. Appointment of auditor on petition. | 41. Form of order for alias. |
| 20. Petitions for sale not for payment of debts, Philadelphia. | 42. Terms and order of sale. |
| 21. Private sales in Philadelphia—rule. | 43. Lien creditor as purchaser. |
| 22. Notice of petition in Philadelphia. | 44. Proceedings on return—contest. |
| | 45. Investment of proceeds, <i>pendente lite</i> . |
| | 46. Expenses of guaranteeing investment. |
| | 47. Form of return under lien creditor act. |

	PAGE
48. Form of confirmation <i>nisi</i> .	63. Liability for purchase money.
49. Form of final confirmation.	64. Payment into court.
50. Return of sale, generally.	65. Title not affected by revocation of letters.
51. Postponement and rescission.	66. Defective qualification not to affect title.
52. Alias order and resale.	67. Rights of purchaser when sale is set aside.
53. Powers and duties of legal representative.	68. Enforcement of sale.
54. Deed to purchaser.	69. Mortgaging real estate.
55. Title of purchaser.	70. Form of petition to compel purchaser to comply with his bid.
56. Title by estoppel.	71. Form of petition to set aside sale on offer of higher bid.
57. Form of deed.	72. Form of order for citation.
58. Execution of deed when legal representative is incapacitated.	73. Form of decree setting aside, etc.
59. Deed when fiduciary dies.	
60. Power of surviving fiduciary.	
61. Rights and liabilities of purchaser.	
62. Right of purchaser as lien creditor.	

CHAPTER X.

ACTIONS BY AND AGAINST LEGAL REPRESENTATIVES 173

1. Legal representatives defined.	14. Legal representative compelled to apply for order of sale.
2. Substitution in actions.	15. Omissions or errors in pleading not to affect the question of assets.
3. May be compelled to become parties.	16. Suits to abate after one year, when.
4. Service of <i>sci. fa.</i> on nonresidents.	17. Form of notice.
5. Actions by executors, etc.	18. Form of affidavit of service.
6. May sue or distrain for rents due.	19. Abatement of actions.
7. Executors, etc., of life tenants may sue sub-tenants.	20. Venue of suits against non-resident legal representatives.
8. Suits upon tax sale bonds.	21. Form of substitution, on death of plaintiff.
9. Recovery on bonds for surplus at tax sale.	22. Form of substitution, on death of defendant.
10. Administrators <i>d.b.n.</i> may sue predecessors for assets.	23. Form of substitution, on death of defendant, before issuing execution.
11. No execution, without <i>sci. fa.</i> to legal representatives.	24. Form of substitution, on death of plaintiff when executor, etc., is defendant.
12. Widow, heirs and devisees to be made parties.	
13. Stay of execution until sale can be made.	

CHAPTER XI.

PAGE

**SPECIFIC PERFORMANCE OF CONTRACT OF
· DECEDENT 187**

- | | |
|---|---|
| 1. Jurisdiction of the Orphans' Court. | 10. Form of reference to an auditor. |
| 2. Act of 1899 — proceedings and notice. | 11. Form of approval of report. |
| 3. Parol contracts which may be enforced. | 12. Form of decree. |
| 4. Requisites of the petition. | 13. Form on death of joint vendor. |
| 5. Application of the act. | 14. Decree may be recorded. |
| 6. Notice of proceeding. | 15. Duty to execute deed. |
| 7. Form of petition on death of vendor. | 16. How deed may be made when executor is purchaser. |
| 8. Form of acceptance of notice by the widow, heirs and vendee. | 17. Contracts for the sale of real estate held in common. |
| 9. Form of citation. | 18. Form of deed by administrator in pursuance of decree. |

CHAPTER XII.

THE COLLATERAL INHERITANCE TAX... 198

- | | |
|---|--|
| 1. Parties liable or exempt. | 12. Appraiser — duties — appeal. |
| 2. Executors, when to pay on bequests. | 13. Form of appointment of appraiser. |
| 3. When tax is due on reversionary interests. | 14. Form of inventory and appraisal. |
| 4. Discount and interest. | 15. Penalty on appraiser for taking fee or reward. |
| 5. Duty of executors to collect. | 16. Appraiser's return to be recorded, etc. |
| 6. Tax on legacy, limited, contingent or conditional. | 17. Citation to parties in default, etc. |
| 7. Tax when legacy is charged on land. | 18. Compensation of register. |
| 8. Executors, etc., to notify register. | 19. Register's bond to the commonwealth. |
| 9. Executor's receipts — duty of auditor general. | 20. County treasurer to collect, when. |
| 10. Foreign executors to pay on stocks or loans assigned. | 21. Register's quarterly returns. |
| 11. Portion to be repaid when legatees must refund. | 22. Tax a lien — limitation. |

CHAPTER XIII.

GUARDIAN AND WARD 209

- | | |
|---|--|
| 1. Guardians by nature. | 5. Petition for appointment — rules in Philadelphia. |
| 2. Ages of capacity for minors. | 6. Ward's right to choose. |
| 3. <i>Prochein ami</i> and guardian <i>ad litem</i> . | 7. Form of petition by next friend. |
| 4. Appointment of guardians. | |

	PAGE
8. Form of affidavit of responsible person.	
9. Form of affidavit of value.	
10. Form of petition of minor over fourteen years.	
11. Notice to parent.	
12. Form of petition where father is profligate.	
13. Form of order and rule.	
14. Form of bond.	
15. Form of order of appointment.	
16. Acceptance of guardian.	
17. Executor or administrator not to be appointed.	
18. Others who will not be appointed.	
19. Corporation as guardian.	
20. Equitable powers over minor's estates.	
21. Revocation of appointment.	
22. Foreign guardians.	
23. Security — form.	
24. Necessity and requisites of security.	
25. Liability of the sureties.	
26. Extent of liability.	
27. Liability for proceeds of land.	
28. Discharge from liability.	
29. Adjudication of breach of bond.	
30. Form of certificate of appointment.	
31. Guardian to file inventory.	
32. Form of inventory.	
33. Affidavit — form.	
34. Appointment of guardian for nonresident minor.	
35. Appointment of guardians for absent minors.	
36. Payments to foreign guardians.	
37. Authority to foreign guardians to remove property.	
38. Rights and duties of guardian.	
39. Care and investment of funds.	
40. Relation of guardian to ward.	
41. Custody of the person.	
42. Guardian to collect funds due his ward.	
43. Releases and compromises.	
44. Suits by guardians.	
45. Suits against guardians.	
46. Guardian may appeal without making affidavit.	
47. Investments which a guardian may make.	
48. Order of maintenance.	
49. Allowance when minor resides beyond the state.	
50. Form of petition for allowance.	
51. Form of decree.	
52. Form of petition for repairs — decree.	
53. Maintenance of ward.	
54. Maintenance without prior order.	
55. Allowance by court for maintenance.	
56. Allowance to the guardian.	
57. Allowance to the father of the ward.	
58. Allowance to the mother of the ward.	
59. Allowance to step-parents and grandparents.	
60. Time of allowance.	
61. Services of ward as a set-off.	
62. Estate from which allowance may be made.	
63. Amount of allowance.	
64. Sale of minor's real estate.	
65. Sales by guardians or trustees.	
66. Day of hearing and notice.	
67. Petition and requisites.	
68. Bond — title given.	
69. Jurisdiction to sell or mortgage.	
70. Sales, etc., statutory.	
71. Form of petition to sell part of minor's land.	
72. Form of affidavit.	
73. Form of order of court.	
74. Sureties, approval of in Philadelphia.	
75. Affidavit with offer of security, Philadelphia.	
76. Rules as to trust companies, Philadelphia.	
77. Confirmation of sale.	
78. Duty of guardian to collect rents.	
79. Improvements and repairs.	
80. Form of petition for allowance.	
81. Form of order of court.	
82. Right to reimbursement and subrogation.	
83. Liability for ward's assets.	
84. Loss of fund by guardian.	

	PAGE
85. Liability for loss by predecessor.	109. Credits allowed or disallowed.
86. Liability for interest.	110. Exceptions to guardian's account.
87. Liability for interest on funds mixed with his own.	111. Balance after decree on account.
88. Liability for profits.	112. Costs of filing account.
89. Effect of guardian's acts on ward.	113. Costs of other proceedings.
90. Guardian's acts in partition.	114. Counsel fees for guardians.
91. Resulting trust by guardian.	115. Compensation of guardians.
92. Guardians must account.	116. Amount of compensation.
93. Triennial accounts.	117. Loss of compensation.
94. Power of court to compel accounting.	118. Discharge of guardian.
95. Form of petition for citation to account.	119. Discharge of domestic guardian, etc., of nonresident minor.
96. Form of citation.	120. Prerequisites to discharge, Allegheny County.
97. Answer to citation.	121. Discharge during minority, in Philadelphia.
98. Who may require an account.	122. Application for discharge.
99. Who may be cited.	123. Form of petition for discharge.
100. Loss by laches.	124. Form of request of wards.
101. Accounts by administrators of deceased guardians.	125. Form of order of court.
102. Accounts of guardian and trustee.	126. Removal of guardian.
103. Manner of stating accounts.	127. Grounds of removal.
104. Form of triennial account.	128. Manner of removal.
105. Manner of stating final account.	129. Form of petition for removal.
106. Form of final account.	130. Form of order for citation.
107. Credits and allowances.	131. Mode of procedure.
108. Necessary payments, insurance, taxes, etc.	132. Form of decree of removal.
	133. Release of guardian by ward.

CHAPTER XIV.

THE PRICE ACT.

UNFETTERING OF ESTATES, BY SALE, MORTGAGING, LEASING OR LETTING ON GROUND RENT 274

- | | |
|--|--|
| 1. Power of courts. | 8. Repairs and improvements. |
| 2. Purpose of the act. | 9. Alternate jurisdiction. |
| 3. Effect of the act. | 10. Application of the act. |
| 4. When the act is available. | 11. Power to invest in other real estate. |
| 5. Real estate held for or by minors. | 12. Petition — requisites. |
| 6. Land held in trust. | 13. Form of petition by guardian for private sale. |
| 7. Land subject to contingent remainder or executory devise. | 14. Form of consent of parties in interest. |

	PAGE
15. Form of order of sale.	
16. Form of petition for allotment to heirs.	
17. Form of certificate of tenants in common.	
18. Form of decree of court.	
19. Who may petition — notice.	
20. Manner and conditions of sale, etc.	
21. Effect of sale, etc.— bar of interests.	
22. Powers of fiduciaries to convey, etc.	
23. Provisions extended to consolidation of lands with mining leases.	
24. Purchase money, etc., substituted — security.	
25. Appeals.	
26. Limit upon accumulations.	
27. Scope and effect of limitation.	
28. Implied directions to accumulate.	
29. Capitalization of income during minority of life tenant.	
30. Accumulations for charity.	
31. Retention of contingent fund for future needs of the trust.	
32. Direction to pay incumbrances, etc.	
33. Effect on the estate limited.	
34. Allowance for maintenance of minors.	
35. Vesting of void accumulations.	
36. Construction of the act.	
37. Ground rent.	
38. Security in case of mortgaging and leasing.	
39. Acknowledgment of deed or mortgage.	
40. Power to ratify sales, etc.	
41. Leasing of minerals in Mercer county.	
42. Deeds by surviving trustees or successors.	
43. Irregularity in appointment not to affect title.	
44. Recording of deeds.	
45. Sale of vacant ground of minor.	
46. Form of decree for private sale.	
47. Form of return of private sale.	
48. Form of final decree.	
49. Form of order on guardian to join in sale.	

CHAPTER XV.

SALE OF REAL ESTATE FOR CONVERSION AND DISTRIBUTION 302

Power to sell and convert on petition of the widow and heirs.	6. Form of petition in a testate estate.
2. Valuation under act of 1874.	7. Form of appointment of appraisers.
3. All must join in petition.	8. Form of order to appraise.
4. Rules of court in Philadelphia.	9. Form of return of appraisers.
5. Form of petition for appraisers and sale of intestate's real estate.	10. Form of approval and order of sale.
	11. Effect of sale.

CHAPTER XVI.

PARTITION AND DOWER IN THE ORPHANS' COURT 307

1. Nature of partition.	3. Jury of inquisition.
2. Jurisdiction of the Orphans' Court.	4. Jurisdiction in case of a will.

	PAGE
5. Devise to children in unequal portions.	41. Form of return against division.
6. Petition when there are no lineal descendants.	42. Form of return of allotment.
7. Partition of tenancy in common.	43. Form of return of the sheriff.
8. Right of widow to petition.	44. Return of inquest.
9. Interests derived from different ancestors.	45. Confirmation of return.
10. Coal, timber and mineral rights.	46. Allotment when a higher price is bid.
11. Partition by three or more commissioners.	47. Rule to accept or refuse.
12. Jurisdiction when land lies in different counties.	48. Form of petition for rule.
13. Jurisdiction when lands lie in one or more counties.	49. Form of order for rule.
14. Construction of last named act.	50. Form of publication of notice.
15. Acts extended to tenants in common and the Common Pleas.	51. Form of acceptance of service.
16. Right to bring separate suits.	52. Form of rule to accept or refuse.
17. Proceeding by petition — notice.	53. Practice on rule.
18. The right to petition.	54. Interpretation of acceptance.
19. Parties to the proceeding.	55. Purpose of bidding.
20. Amendment of petition.	56. Form of bid.
21. Effect of adverse possession or claim of title.	57. Form of acceptance of purpart.
22. Time of proceedings.	58. Form of decree awarding purpart to bidder.
23. Rule to show cause.	59. Form of decree awarding purpart at acceptance.
24. Answer to petition.	60. Setting aside proceedings for fraud.
25. Precept for issue to the Common Pleas.	61. Preference as to lands in another county.
26. Form of petition for inquest.	62. Preference and election of heir confined to one share.
27. Form of order for inquest.	63. Title of allottee.
28. Form of order in Lancaster county.	64. Rents and liens.
29. Form of writ.	65. Securing of owelty.
30. Form of publication of notice.	66. Recognizance for owelty.
31. Form of affidavit of publication.	67. Form of recognizance.
32. Form of affidavit of service of notice.	68. Effect of recognizance.
33. Form of oath of appraisers.	69. Payment of owelty by non-residents.
34. The inquisition.	70. Interest on owelty.
35. Proceedings when the lands cannot be divided.	71. Rule to pay owelty.
36. Equalization of purparts.	72. Proceedings when estate is divided into fewer parts than there are heirs.
37. Appraisement of purparts — fewer than heirs.	73. Rule to show cause why the land should not be sold.
38. Residue after allotment.	74. When rule to show cause may be dispensed with.
39. Fixing time for payment of owelty.	75. Sale of purparts left over.
40. Appraisement and valuation.	76. Form of petition for sale of purpart.
	77. Form of order appointing trustee to make sale.
	78. Return days of writs and orders of sale.

	PAGE
79. Form of notice by publication.	106. Lien of recognizance.
80. Form of return of sale.	107. Appointment of auditor to ascertain liens.
81. Title not to be affected by revocation of letters.	108. Calculation of amounts due parties.
82. Widow's share of purchase money to be charged on the land.	109. Payment into court.
83. Valuation and charge of the widow's interest.	110. Payment into court, depository in Philadelphia.
84. The widow's share to remain a charge.	111. Title acquired by the sale.
85. Status of the dower interest.	112. Completion of title after death of trustee.
86. Assignment and proceedings on the recognizance.	113. When estate not liable for debts of decedent.
87. Payment into court, release and set-off.	114. Distributees must give security to refund.
88. The widow's interest when the estate consists of more than one tract.	115. Filing account after sale.
89. Widow's share held in common before partition.	116. Discharge of liens by sale.
90. Widow's share may be charged on part of the land.	117. Distribution and marshaling.
91. Widow's election of dower — citation.	118. Effect on liens and titles.
92. Form of petition for citation to elect.	119. Modes and rules of distribution.
93. Form of citation.	120. Claims upon distributive shares.
94. Form of election for or against.	121. Certificate of searches for liens.
95. Dower interest — collection of.	122. Conversion by sale.
96. Sale of dower interest by <i>vend. ex.</i>	123. Conclusiveness of proceedings.
97. Notice to nonresident life tenant.	124. Trustee for parties unknown, etc.
98. Satisfaction when presumption of payment has arisen.	125. Validating acts.
99. Executors, etc., to give security before sale.	126. Partition docket.
100. The sale.	127. Fees of sheriff and jurors.
101. Ascertainment of liens against the heirs.	128. Costs in partition generally.
102. Confirmation of the sale.	129. Costs when paid out of the estate.
103. Rights and duties of purchaser.	130. Right of appeal.
104. Purchaser to give recognizance.	131. Form of petition to sell in order to satisfy a recognizance.
105. Before suit on recognizance, refunding bond to be given.	132. Form of petition to have recognizance satisfied.
	133. Form of release of claim on recognizance.
	134. Form of deed after sale in partition.
	135. Form of bond securing widow.
	136. Form of warrant in bond.
	137. Form of mortgage accompanying bond.

CHAPTER XVII.

ADMINISTRATION ACCOUNT..... PAGE 382

- | | |
|---|--|
| 1. Nature of. | 15. Rules of court. |
| 2. When and where account must be filed. | 16. Form of exceptions. |
| 3. Citation to file account. | 17. Form of notice by register. |
| 4. Form of citation. | 18. Form of certificate of register. |
| 5. Answer to citation. | 19. Form of certificate of balance due. |
| 6. Duties of register. | 20. Transfer of balance to Common Pleas for lien. |
| 7. No account to be confirmed without notice. | 21. Interest in account. |
| 8. Notice to nonresident heirs. | 22. Effect of confirmation. |
| 9. Form of partial account. | 23. Jurisdiction of the Orphans' Court. |
| 10. Form of final, after partial account. | 24. Jurisdiction to ascertain the claims of creditors. |
| 11. Examination by the court. | 25. Ascertainment of claims against distributees. |
| 12. Practice on accounts filed. | |
| 13. Form of confirmation. | |
| 14. Exceptions. | |

CHAPTER XVIII.

REVIEW OF ACCOUNT BY PETITION.... 399

- | | |
|--------------------------------------|--------------------------------------|
| 1. Correction by petition of review. | 5. Form of order of court. |
| 2. Time of petition — and character. | 6. Form of answer. |
| 3. Practice on petition. | 7. Form of decree granting petition. |
| 4. Form of petition. | 8. Form of decree refusing petition. |

CHAPTER XIX.

FAMILY AGREEMENTS..... 407

- | | |
|---|--|
| 1. Family settlements favored by the law. | 4. Form of release of widow and heirs. |
| 2. Form of power of attorney. | 5. Form of agreement to refund. |
| 3. Form of bond of attorney. | 6. Agreement where there is a will. |

CHAPTER XX.

DISTRIBUTION OF BALANCE DUE BY ADMINISTRATOR, ETC..... 413

- | | |
|---|--|
| 1. Time of making distribution. | 6. Interest of fiduciaries in distribution. |
| 2. Stay or suspension. | 7. Difference between settlement and distribution. |
| 3. Manner of distribution. | 8. Payment into court — rules. |
| 4. Distribution when balance is not cash. | 9. Distribution to minors. |
| 5. Distribution in particular cases. | |

CHAPTER XXI.

	PAGE
DISTRIBUTION OF AN ESTATE—APPOINTMENT OF AUDITORS—AUDITING JUDGES, PRACTICE BEFORE.....	419
1. Auditors to settle and adjust assets to creditors.	
2. Appointment of auditors—rules.	
3. Notice by auditors, Philadelphia.	
4. Notice to persons beyond the jurisdiction.	
5. Duties, fees and expenses in Allegheny.	
6. Scope of duties, generally.	
7. Presentation of claims.	
8. Action at law by creditor.	
9. Objections to claims of other creditors.	
10. Proof of claims.	
11. Sufficiency of proof.	
12. Incompetent testimony.	
13. Compelling attendance of witnesses.	
14. Procedure before the auditor.	
15. Claims insufficiently proved.	
16. The two years' limitation.	
17. Effect of will as to debts.	
18. Bequest subject to payment of debts.	
19. Administration expenses and surcharge.	
20. Claims before the auditor.	
21. Claims of nonresidents.	
22. Claims of legal representatives.	
23. Annuities or charges.	
24. Set-off of debts due decedent against distributees.	
25. Marshaling assets—contribution and subrogation.	
26. Distribution under a will.	
27. Equalization of partial distributions.	
28. Distribution of further assets.	
29. Distribution at fiduciary's risk.	
30. Application of funds to payment of debts.	
31. Auditor's reports.	
32. Form of reports in Allegheny County.	
33. Exceptions to reports in Allegheny County.	
34. Confirmation, etc.	
35. Exceptions, in Philadelphia.	
36. Filing and confirmation, Philadelphia.	
37. Taxation of compensation, Philadelphia.	
38. Costs of audit and security, Philadelphia.	
39. Re-opening of audit.	
40. Adjudication before an auditing judge.	
41. Rules as to depositions, etc., Philadelphia.	
42. Attendance by parties, Allegheny.	
43. Receipts to be recorded, Allegheny.	
44. Time of payment over, Allegheny.	
45. Form of petition for adjudication—testate estate.	
46. Form of petition for adjudication—intestate estate.	
47. Procedure on petition.	
48. Rules in Philadelphia.	
49. Administration must be separated from distribution.	
50. Time of audit, Philadelphia.	
51. Division of audit lists, Philadelphia.	
52. Advertisement of lists, Philadelphia.	
53. Petition for adjudication, etc., Philadelphia.	
54. Examiner of continuing trusts, etc., Philadelphia.	
55. Copy of inventory, Philadelphia.	
56. Notice to ward, Philadelphia.	
57. Exceptions to adjudication, Philadelphia.	
58. Affidavit by accountant, Philadelphia.	
59. Partial suspension by exceptions, Philadelphia.	
60. Agreements for confirmation, Philadelphia.	
61. Re-commitment of adjudication.	
62. Liability of accountant for costs.	
63. Liability of the loser for costs.	
64. Apportionment of costs.	
65. Fixing amount of costs.	

	PAGE
66. Attachment and execution for costs.	73. Suit on refunding bond.
67. Security for costs.	74. Restitution.
68. Administrator, etc., when not liable to creditor.	75. Effect of distribution.
69. Distributee to give refunding bond.	76. Accounts and auditors' reports to be recorded.
70. Refunding bonds from heirs.	77. Acknowledgment of satisfaction.
71. Reciprocal bonds to refund.	78. Form of petition to compel distribution in kind.
72. Married ward's refunding bond.	79. Form of refunding bond.

CHAPTER XXII.

THE LAW OF INHERITANCE..... 456

1. Origin of Pennsylvania laws of inheritance.	23. Proceedings by husband or wife to obtain the inheritance.
2. Inheritance and guardianship by the twelve tables.	24. Who are proper and necessary heirs.
3. Intestate defined.	25. Adoption of children as heirs.
4. Time when heir's dominion begins.	26. Inheritance under adoption.
5. At what time there is a proper heir.	27. Adoption of adult as heir.
6. Intestacy — law of descent.	28. How illegitimates may inherit.
7. Restriction on wife's power to will — husband's election.	29. Capacity to inherit.
8. Married woman's separate personal estate.	30. Half-blood relation defined.
9. Lineal descent of realty — distribution of personalty.	31. Intent of act, as to illegitimates.
10. Heir at common law not to take to exclusion of others in the same degree.	32. The status of spurious children.
11. Inheritance by next of kin.	33. Posthumous children to inherit, equally.
12. Distribution to those in the same class.	34. Posthumous child as proper heir.
13. Inheritance <i>per capita</i> and <i>per stirpes</i> .	35. Inheritance by father or mother.
14. Inheritance of females <i>per stirpes</i> .	36. Degrees of cognation at the civil law.
15. Distribution <i>per capita</i> and <i>per stirpes</i> .	37. The mother's right to inherit.
16. Next of kin defined.	38. Inheritance of <i>agnates</i> — collaterals.
17. Real estate to vest in the blood of the ancestor from whom derived.	39. <i>Agnation</i> by adoption.
18. "The blood of the ancestor."	40. Females as <i>agnates</i> .
19. Rule as to blood of the first purchaser.	41. Inheritance by collateral heirs.
20. Purchaser defined.	42. Father and mother to take real estate in fee.
21. Husband or wife as heir.	43. Descent of realty to collaterals of the half-blood.
22. How husband may lose his right.	44. Representation of deceased grandparents.
	45. Restriction to blood of the ancestor.

	PAGE
46. Right of accretion — lapsed inheritance.	
47. Murderer not disinherited by his act.	
48. Rights of heirs fixed at death of decedent.	
49. Distribution of proceeds of real estate.	
50. Seven years' limitation on claimants.	
51. Proof of inheritance for record purposes.	
52. Advancements.	
53. Escheat of estate.	
54. Ante-nuptial contracts.	

CHAPTER XXIII.

ESCHEATS 484

- | | |
|---|---|
| 1. What estates and when they escheat. | 17. Appeals — supersedeas. |
| 2. Property in court, after seven years. | 18. Reversal or modification. |
| 3. When <i>cestui que trust</i> is unknown for seven years. | 19. Bond by escheator. |
| 4. Auditor general to appoint an escheator. | 20. Filing of copy of final decree. |
| 5. Jurisdiction of the Orphans' Court. | 21. Surrender of moneys — sale of personalty. |
| 6. Jurisdiction of court having custody. | 22. Collection of rents. |
| 7. Register to issue letters to escheator. | 23. Sale of real estate — security. |
| 8. Proceeding by petition and citation. | 24. Title of purchaser — incumbrances. |
| 9. Statement and description of real estate. | 25. Application of purchase money. |
| 10. Power of court over account and questions. | 26. Proceedings when real estate is in another county. |
| 11. Notice in case of real estate. | 27. Tax title saved. |
| 12. Recovery of property of intestate. | 28. Money to be paid into state treasury. |
| 13. Estate of commonwealth limited. | 29. Traverse within three years — Practice. |
| 14. Issue on dispute, trial, appeal, etc. | 30. Orders and decrees may be enforced by attachment. |
| 15. Finding and adjudication. | 31. Informant to receive one-third, on giving bond to refund. |
| 16. Exceptions. | 32. Dispute about the reward. |
| | 33. Bar after 21 years. |
| | 34. Fees. |
| | 35. Aliens and corporations. |

CHAPTER XXIV.

INJUNCTIONAL ORDERS 497

- | | |
|--|------------------------------------|
| 1. Power to grant injunctional orders. | 6. Form of order of allowance. |
| 2. Manner of exercising power. | 7. Form of writ to administratrix. |
| 3. Bond a prerequisite. | 8. Form of writ to purchaser. |
| 4. Form of bond for injunction. | 9. Form of rule to show cause. |
| 5. Form of petition. | 10. Procedure. |

CHAPTER XXV.

PROCEDURE TO RELIEVE LAND FROM CHARGES	PAGE 502
---	---------------------

- | | |
|---|---|
| 1. Petition for discharge of lien.
2. Owner may pay charge into court.
3. Proceedings.
4. Jurisdiction.
5. Moneys paid into court — distribution. | 6. Procedure on petition.
7. Form of notice.
8. Decree.
9. Deposit of fund with trust company.
10. Order of court to deposit. |
|---|---|

CHAPTER XXVI.

DECREES AND POWERS TO ENFORCE ..	506
---	------------

- | | |
|---|--|
| 1. Character of decree — conclusiveness.
2. <i>Res judicata</i> as applied to accounts.
3. <i>Res judicata</i> as to decrees of distribution.
4. Conclusiveness as to other matters.
5. Decree as evidence.
6. Enforcement of decrees.
7. Application for order to pay over.
8. Form of petition for attachment.
9. Form of order for rule to show cause.
10. Form of order for attachment.
11. Form of attachment.
12. Form of sheriff's return.
13. Form of bond for appearance.
14. Form of petition for attachment execution.
15. Enforcement of decree by execution.
16. Manner of issuing writ.
17. Proceedings when defendant has left or is about to leave.
18. Dissolution of writ when security is given.
19. Proceedings when defendant is wasting trust property. | 20. Form of petition for attachment.
21. Order to deliver property.
22. Disposition of trust property.
23. Non-appearance — sequestration.
24. Time within which to defend.
25. When final decree may be entered.
26. Form of writ of sequestration.
27. Duties of sheriff on writ of sequestration.
28. Form of petition for <i>fi. fa.</i>
29. Form of petition of ward for execution.
30. Form of <i>fi. fa.</i>
31. Form of <i>vend. ex.</i>
32. Form of petition to stay writ against administrator, etc.
33. Form of order staying writ.
34. Form of decree of distribution to foreign administrator.
35. Form of petition of foreign guardian to take his ward's money away.
36. Form of rule.
37. Form of decree. |
|---|--|

CHAPTER XXVII.

APPEALS FROM DECREES	523
-----------------------------------	------------

- | | |
|---|---|
| 1. Appeals authorized.
2. Time of taking appeal. | 3. The right of appeal.
4. Decree must be definitive |
|---|---|

	PAGE
5. Requisites of appeal.	
6. The appellate court to try appeal on the merits.	
7. Review by the Orphans' Court.	
8. Petition for rehearing.	
9. Petition for review.	

CHAPTER XXVIII.

WILLS—IN GENERAL..... 529

- | | |
|--|---|
| 1. What constitutes a will. | 16. Father may will custody of unmarried minor child. |
| 2. Distinction between a gift and a will. | 17. Tenant for life may will emblements and rents. |
| 3. <i>Donatio mortis causa</i> . | 18. Disposing memory. |
| 4. <i>Donatio mortis causa</i> and gift <i>inter vivos</i> . | 19. Manner of execution of will. |
| 5. Will in form of a letter. | 20. Signature by mark. |
| 6. Wills by other forms of direction. | 21. Signature by another at testator's request. |
| 7. Extrinsic evidence as to intent. | 22. Will <i>in extremis</i> , not signed. |
| 8. Conditional and joint will. | 23. Publication. |
| 9. Testament distinguished from will. | 24. Execution of will in New Jersey. |
| 10. Kinds of wills. | 25. Execution of will in New York. |
| 11. Will without naming executor. | 26. Execution of will in Ohio. |
| 12. Lord Coke on making a will. | 27. Execution of will in West Virginia. |
| 13. Competency to make a will. | 28. Execution of will in Maryland. |
| 14. Testator must be twenty-one years old. | 29. Execution of will in Delaware. |
| 15. Married woman's competency. | |

CHAPTER XXIX.

WILLS—PROBATE..... 544

- | | |
|---|---|
| 1. Proof of a will. | 12. Formal proof before register. |
| 2. Proof of lost will. | 13. Form of proof of signature of deceased witness. |
| 3. Probate of a will. | 14. Form of proof of unsigned will. |
| 4. Testator's knowledge of contents. | 15. Form of commission to take depositions. |
| 5. Execution and circumstances. | 16. Form of interrogatories. |
| 6. Register may compel production of will. | 17. Report of commissioner. |
| 7. Form of petition for citation. | 18. Form of decree of probate. |
| 8. Form of citation. | 19. Competency and credibility of witnesses. |
| 9. Register may compel attendance of witnesses. | 20. Proof of hand writing of witnesses. |
| 10. Form of subpoena to witnesses. | 21. Proof of testator's signature. |
| 11. Power to issue commissions to take depositions. | 22. Proof when will is unsigned. |

	PAGE
23. Proof when signed by mark.	
24. Alterations, erasures and interlineations.	
25. Will of married woman.	
26. Conclusiveness of probate.	
27. Probate within three years.	
28. Will to speak from the death of testator.	
29. Record of probated will.	
30. Copies of foreign wills, probate of.	
31. Filing certified copy of will made in another state.	
32. Exemplification of will to another county.	
33. Probate after letters of administration issued.	

CHAPTER XXX.

CODICILS 563

- | | |
|----------------------------------|---|
| 1. Origin of codicils as trusts. | 4. Office of a codicil in Pennsylvania. |
| 2. Codicils in England. | 5. Republication of will by codicil. |
| 3. Form of a codicil. | |

CHAPTER XXXI.

NUNCUPATIVE WILLS..... 566

- | | |
|---|--|
| 1. Nature of. | 4. Conditions of nuncupation. |
| 2. Manner of making will. | 5. Form of nuncupative will, written down. |
| 3. No testimony not reduced to writing to be received after six months. | 6. Form of probate. |
| | 7. Form of affidavit. |

CHAPTER XXXII.

WILLS TO CHARITABLE OR RELIGIOUS USES... 570

- | | |
|---|--|
| 1. Restraints upon gifts to charitable and religious uses. | 7. Void gifts to charities, etc. |
| 2. Effect of death within a calendar month from making of will. | 8. Charitable, etc., gifts not to fail, when. |
| 3. Effect of new will or a codicil. | 9. Court to appoint a trustee. |
| 4. Attestation of will. | 10. <i>Cy pres</i> , as applied to wills. |
| 5. Competency of witnesses. | 11. Donees and trustees. |
| 6. Gifts to charities or religious uses. | 12. Clause in will avoiding effect of death within a calendar month. |

CHAPTER XXXIII.

DOMICIL, REVOCATION AND REPUBLICATION 578

- | | |
|------------------------------------|-----------------------------------|
| 1. Domicil defined. | 4. Domicil as to devise of land. |
| 2. Domicil in a will. | 5. Revocation by will or codicil. |
| 3. Domicil as respects personalty. | 6. Revocation of will in England. |

	PAGE
7. Revocation of wills under the statute.	
8. Will as to personal estate — revocation.	
9. Revocation by cancellation and destroying.	
10. Revocation by revival of earlier will.	
11. Revocation by alienation, etc.	
12. Effect of marriage on will of single woman.	
13. Effect of marriage and birth of children on will.	
14. After-born child — kind of provision required.	
15. How far the will is revoked.	
16. Revocation by implication.	
17. Declarations of testator.	
18. Republication of will.	

CHAPTER XXXIV.

WILLS — CONTESTS OF 586

1. Caveat against probate of a will.	27. Form of decree of probate.
2. Form of caveat.	28. Granting of an issue.
3. Form of petition for appointment of administrator <i>pendente lite</i> .	29. Form of petition for a precept.
4. Security for costs.	30. Form of precept to the Common Pleas.
5. Form of bond on caveat.	31. Proceedings before the register.
6. Dismissal of cause for want of bond.	32. Party who may contest a will.
7. Register's duties on caveat.	33. Issue upon the right to contest.
8. Appeals from register's order granting an issue	34. Notice to parties in interest.
9. Rules as to appeals — Philadelphia.	35. Rule as to petitions and citations in Philadelphia.
10. Rules as to appeals — Allegheny.	36. Rule in Philadelphia on failure to answer.
11. Form of appeal from probate in Allegheny.	37. Parties to a contest, addition, etc.
12. Petition to be filed on appeal, Philadelphia.	38. Loss of right by laches.
13. Form of issue, Philadelphia.	39. Fixing security for costs.
14. Form of appeal, Philadelphia.	40. When an appeal lies.
15. Form of petition for issue, for undue influence, etc.	41. Petition on appeal — request for issue.
16. Form of decree.	42. Hearing.
17. Form of petition for citation, for illegal execution.	43. When an issue will be granted.
18. Form of order awarding citation.	44. The issue — form and scope.
19. Order of contested will.	45. Parties to the issue.
20. Time of hearing appeals, Philadelphia.	46. Trial of the issue.
21. Hearings to continue, Philadelphia.	47. Testamentary capacity.
22. Judge to determine question, <i>nisi</i> , Philadelphia.	48. Delusions and aberrations.
23. Final decree — contains what.	49. Presumptions and burden of proof.
24. Appeals from orders as to costs.	50. Undue influence.
25. Replication and joinder.	51. Acts of beneficiaries and others.
26. Form of order dismissing appeal.	52. The burden of proof.
	53. Evidence.
	54. Expert testimony and opinions.
	55. Declarations of beneficiaries, etc.

	PAGE
56. The writing itself as evidence.	60. Form of order to file decision
57. Province of the court and jury.	in the Orphans' Court.
58. Verdict and judgment.	61. Appeals.
59. Form of certificate after trial.	62. Costs.
	63. Effect of contest.
	64. <i>Res judicata</i> .
	65. Protection of rights in equity.

CHAPTER XXXV.

LETTERS TESTAMENTARY AND OTHER FORMS —APPOINTMENT AND RENUNCIATION OF EXECUTORS 617

- | | |
|--|---|
| <ul style="list-style-type: none"> 1. Issuance of letters testamen-
 tary. 2. Appointment of executor. 3. Married woman as executor. 4. Debtor or creditor made ex-
 ecutor. 5. Right to letters. 6. Acceptance and renunciation. 7. Form of renunciation. 8. Form of certificate granting
 letters. 9. Form of letters testamen-
 tary. 10. Revocation of letters. 11. Letters of administration
 <i>c.t.a.</i> 12. Power of acting executor over
 real estate. 13. Powers of acting executor and
 adm. <i>c.t.a.</i> | <ul style="list-style-type: none"> 14. Administrator <i>c.t.a.</i>, powers
 of. 15. Surviving or acting execu-
 tor's powers. 16. Executor, nonresident, bond. 17. Appointment of administra-
 tor <i>de bonis non</i>. 18. Bond of administrator <i>de</i>
 <i>bonis non</i>. 19. Form of letters <i>de bonis non</i>. 20. Form of letters <i>pendente lite</i>. 21. Foreign letters have no force
 in Pennsylvania. 22. Ancillary letters, necessity
 for. 23. Power of foreign executor to
 revive judgment. 24. Transfer of public loans by
 foreign executors. 25. Transfer of funds to foreign
 executors. |
|--|---|

CHAPTER XXXVI.

OFFICE OF EXECUTOR, RIGHTS AND DUTIES.. 633

- | | |
|--|---|
| <ul style="list-style-type: none"> 1. Office of executor. 2. Possession of the goods of
 the testator. 3. Nature of executor's posses-
 sion. 4. Interest which executor has
 in the goods. 5. Debts which the executor is
 bound to pay. 6. Devastation or waste, as to
 debts. 7. Executor <i>de son tort</i>. | <ul style="list-style-type: none"> 8. Divided or conditional pow-
 ers. 9. Inventory and appraisement. 10. Assets of the estate. 11. Widow's exemption. 12. Payment of debts. 13. Notice of devises, etc., to
 bodies corporate. 14. Revival of judgment against
 debtor executor. 15. Executors authorized to vote
 corporate stock. |
|--|---|

CHAPTER XXXVII.

WIDOW'S ELECTION..... PAGE 644

- | | |
|--|--|
| 1. Widow's right to elect. | 10. Property widow may take — effect. |
| 2. Right to take under the intestate laws. | 11. Devise to wife in lieu of dower. |
| 3. Share in lieu of dower at the common law. | 12. Rights of remaindermen — merger. |
| 4. Right to occupy mansion house. | 13. Compensation to disappointed beneficiaries. |
| 5. How her right may be lost. | 14. Fund out of which compensation may be allowed. |
| 6. Election by the widow. | 15. Abatement — effect on different classes. |
| 7. Form of petition for citation to elect. | 16. Recording elections. |
| 8. Form of answer to citation. | |
| 9. Form of notice of election. | |

CHAPTER XXXVIII.

TENANT BY THE CURTESY — RIGHT TO ELECT FOR OR AGAINST THE WILL 652

- | | |
|---|-----------------------------|
| 1. Tenancy by the curtesy. | 5. Election by the husband. |
| 2. Nature of curtesy. | 6. Forfeiture by desertion. |
| 3. Curtesy initiate. | 7. Bar or loss of curtesy. |
| 4. Husband's right to curtesy under the statutes. | |

CHAPTER XXXIX.

INTERPRETATION OF WILLS..... 659

- | | |
|---|--|
| 1. Time from which a will speaks or takes effect. | 11. Consideration of the entire will. |
| 2. After acquired property. | 12. The force of general intent. |
| 3. Intention of the testator. | 13. Express words yield not to doubtful implication. |
| 4. Effect given to words. | 14. Latest clause as final intent. |
| 5. Precedents in the construction of wills. | 15. Effect of reference clause. |
| 6. Literal meaning to give way to actual meaning. | 16. Repetition and exchange of words. |
| 7. The rule as to disinheritance. | 17. Correction of language. |
| 8. Construction favorable to the heir and widow. | 18. Parol evidence, when admissible. |
| 9. Favor to the first taker. | 19. The residuary clause. |
| 10. Equality of standing. | 20. Effect of codicils upon a will. |
| | 21. Revocation by codicil. |

CHAPTER XL

PAGE

**LEGACIES, CHARACTER, KINDS, ADEMPTION
AND PREFERENCE..... 672**

- | | |
|---|--|
| 1. Nature of a legacy. | 24. Cumulative legacies. |
| 2. How legacies may be left. | 25. Bequest of pledged goods. |
| 3. Two bequests of the same thing. | 26. Discharge of debtor by will. |
| 4. Who may be legatees. | 27. Legacy to debtor. |
| 5. Alienation of thing given. | 28. Legacy to a creditor. |
| 6. <i>De dote uxori legata.</i> | 29. Void and lapsed legacies. |
| 7. Bequest of flock. | 30. Extension to collateral heirs. |
| 8. Bequest of house. | 31. Gift to classes — act of 1897. |
| 9. Error in name of legatee. | 32. Substituted legatees. |
| 10. <i>De falsa demonstratione.</i> | 33. Gifts to "heirs," "legal representatives," etc. |
| 11. <i>De falsa causa adjecta.</i> | 34. Provision for children dead when the will is made. |
| 12. Legacy after the death of the heir. | 35. Disposition of the lapsed fund. |
| 13. Revocation or transfer of legacy. | 36. Ademption of a legacy. |
| 14. Distinction between vested and contingent legacy. | 37. Ademption of legacy charged on land. |
| 15. Condition with a limitation. | 38. Ademption, when not wrought. |
| 16. Executory devise. | 39. Abatement of general legacies. |
| 17. Defeat of bequest conditional. | 40. Abatement of residuary legacies. |
| 18. Specific legacy defined. | 41. Abatement of specific and demonstrative legacies, etc. |
| 19. Courts averse to specific legacies. | 42. Exemptions from abatement. |
| 20. Specific legacies of money. | 43. Priority of widow. |
| 21. Legacies, when specific or otherwise. | |
| 22. Demonstrative legacies. | |
| 23. General legacies. | |

CHAPTER XLI.

**PAYMENT OF LEGACIES AND ANNUITIES —
INTEREST 691**

- | | |
|--|--|
| 1. Personal estate primarily liable. | 11. Interest on legacies by parents. |
| 2. When and to whom payment is to be made. | 12. Interest on legacy to widow or creditor. |
| 3. Jurisdiction of the Orphans' Court. | 13. Bequest of interest or income of fund. |
| 4. Time when due. | 14. Interest on specific legacies and annuities. |
| 5. Assent to legacy. | 15. Term of an annuity. |
| 6. Bequests in the alternative. | 16. Making up deficiencies in annuities. |
| 7. Release of legacy. | 17. Delay in distribution as affecting interest. |
| 8. Setting aside funds for annuities. | 18. Rate of interest. |
| 9. Interest, income and dividends. | |
| 10. Time of payment indicated by the will. | |

CHAPTER XLII.

	PAGE
RECOVERY OF LEGACIES CHARGED ON LAND —ACTIONS FOR LEGACIES—PROTECTION OF CONTINGENT INTERESTS, AND THOSE IN REMAINDER.....	700

- | | |
|---|--|
| 1. What creates a charge on land. | 19. Legatee required to give security. |
| 2. Request to pay not a charge. | 20. Payment into court. |
| 3. When intention is indicated by the will. | 21. Form of decree. |
| 4. Deficiency of personalty. | 22. Court to distribute the fund. |
| 5. Effect of blending estates. | 23. Charges, satisfaction of. |
| 6. Provisions for maintenance, etc. | 24. Action for legacy. |
| 7. Recovery of legacy charged on land. | 25. Demand before suit. |
| 8. Jurisdiction and procedure. | 26. Plea of "no assets" suspends suit. |
| 9. Executor not a party. | 27. Execution to be stayed for want of assets. |
| 10. Petition by legatee. | 28. Nonsuit when there are no assets. |
| 11. Form of petition. | 29. Costs in the discretion of the court. |
| 12. Form of order for citation. | 30. Ademption — conclusiveness of decree. |
| 13. Form of citation. | 31. Abatement of legacies. |
| 14. Form of appointment of auditor. | 32. Interests in remainder in personalty. |
| 15. Form of auditor's subpoena. | 33. Protection of contingent interests. |
| 16. Auditor's report. | 34. Security by holders of interests limited or conditional. |
| 17. Form of decree for petitioner. | |
| 18. Land lying in another county. | |

CHAPTER XLIII. ..

BENEFICIARIES UNDER A WILL.....	718
--	------------

- | | |
|--|--|
| 1. Uncertain designation of beneficiaries. | 10. Wife or husband divorced. |
| 2. Gifts to heirs. | 11. Gift to child unborn. |
| 3. "Heirs" in gifts of personalty. | 12. Illegitimate children. |
| 4. Other meanings of "heirs." | 13. Adopted children. |
| 5. Gifts to legal representatives, etc. | 14. Gifts by reference. |
| 6. Gifts to children and grandchildren. | 15. Words of exclusion from a class. |
| 7. Great grandchildren and step-children. | 16. Death of member — survivors. |
| 8. Gifts to "issue." | 17. Gifts to survivors. |
| 9. Gifts to next of kin. | 18. Gifts <i>per stirpes</i> and <i>per capita</i> . |
| | 19. Division "between" and "among." |

CHAPTER XXV.

	PAGE
PROCEDURE TO RELIEVE LAND FROM CHARGES	502

- | | |
|---|--|
| 1. Petition for discharge of lien. | 6. Procedure on petition. |
| 2. Owner may pay charge into court. | 7. Form of notice. |
| 3. Proceedings. | 8. Decree. |
| 4. Jurisdiction. | 9. Deposit of fund with trust company. |
| 5. Moneys paid into court — distribution. | 10. Order of court to deposit. |

CHAPTER XXVI.

DECREES AND POWERS TO ENFORCE ..	506
---	------------

- | | |
|---|---|
| 1. Character of decree — conclusiveness. | 20. Form of petition for attachment. |
| 2. <i>Res judicata</i> as applied to accounts. | 21. Order to deliver property. |
| 3. <i>Res judicata</i> as to decrees of distribution. | 22. Disposition of trust property. |
| 4. Conclusiveness as to other matters. | 23. Non-appearance — sequestration. |
| 5. Decree as evidence. | 24. Time within which to defend. |
| 6. Enforcement of decrees. | 25. When final decree may be entered. |
| 7. Application for order to pay over. | 26. Form of writ of sequestration. |
| 8. Form of petition for attachment. | 27. Duties of sheriff on writ of sequestration. |
| 9. Form of order for rule to show cause. | 28. Form of petition for <i>fi. fa.</i> |
| 10. Form of order for attachment. | 29. Form of petition of ward for execution. |
| 11. Form of attachment. | 30. Form of <i>fi. fa.</i> |
| 12. Form of sheriff's return. | 31. Form of <i>vend. ex.</i> |
| 13. Form of bond for appearance. | 32. Form of petition to stay writ against administrator, etc. |
| 14. Form of petition for attachment execution. | 33. Form of order staying writ. |
| 15. Enforcement of decree by execution. | 34. Form of decree of distribution to foreign administrator. |
| 16. Manner of issuing writ. | 35. Form of petition of foreign guardian to take his ward's money away. |
| 17. Proceedings when defendant has left or is about to leave. | 36. Form of rule. |
| 18. Dissolution of writ when security is given. | 37. Form of decree. |
| 19. Proceedings when defendant is wasting trust property. | |

CHAPTER XXVII.

APPEALS FROM DECREES.....	523
----------------------------------	------------

- | | |
|---------------------------|------------------------------|
| 1. Appeals authorized. | 3. The right of appeal. |
| 2. Time of taking appeal. | 4. Decree must be definitive |

5. Requisites of appeal.
6. The appellate court to try appeal on the merits.
7. Review by the Orphans' Court.

8. Petition for rehearing.
9. Petition for review.

PAGE

CHAPTER XXVIII.

WILLS—IN GENERAL..... 529

1. What constitutes a will.
2. Distinction between a gift and a will.
3. *Donatio mortis causa*.
4. *Donatio mortis causa* and gift *inter vivos*.
5. Will in form of a letter.
6. Wills by other forms of direction.
7. Extrinsic evidence as to intent.
8. Conditional and joint will.
9. Testament distinguished from will.
10. Kinds of wills.
11. Will without naming executor.
12. Lord Coke on making a will.
13. Competency to make a will.
14. Testator must be twenty-one years old.
15. Married woman's competency.
16. Father may will custody of unmarried minor child.
17. Tenant for life may will emblements and rents.
18. Disposing memory.
19. Manner of execution of will.
20. Signature by mark.
21. Signature by another at testator's request.
22. Will *in extremis*, not signed.
23. Publication.
24. Execution of will in New Jersey.
25. Execution of will in New York.
26. Execution of will in Ohio.
27. Execution of will in West Virginia.
28. Execution of will in Maryland.
29. Execution of will in Delaware.

CHAPTER XXIX.

WILLS—PROBATE..... 544

1. Proof of a will.
2. Proof of lost will.
3. Probate of a will.
4. Testator's knowledge of contents.
5. Execution and circumstances.
6. Register may compel production of will.
7. Form of petition for citation.
8. Form of citation.
9. Register may compel attendance of witnesses.
10. Form of subpoena to witnesses.
11. Power to issue commissions to take depositions.
12. Formal proof before register.
13. Form of proof of signature of deceased witness.
14. Form of proof of unsigned will.
15. Form of commission to take depositions.
16. Form of interrogatories.
17. Report of commissioner.
18. Form of decree of probate.
19. Competency and credibility of witnesses.
20. Proof of hand writing of witnesses.
21. Proof of testator's signature.
22. Proof when will is unsigned.

	PAGE
23. Proof when signed by mark.	
24. Alterations, erasures and interlineations.	
25. Will of married woman.	
26. Conclusiveness of probate.	
27. Probate within three years.	
28. Will to speak from the death of testator.	
29. Record of probated will.	
30. Copies of foreign wills, probate of.	
31. Filing certified copy of will made in another state.	
32. Exemplification of will to another county.	
33. Probate after letters of administration issued.	

CHAPTER XXX.

CODICILS 563

1. Origin of codicils as trusts.	4. Office of a codicil in Pennsylvania.
2. Codicils in England.	5. Republication of will by codicil.
3. Form of a codicil.	

CHAPTER XXXI.

NUNCUPATIVE WILLS..... 566

1. Nature of.	4. Conditions of nuncupation.
2. Manner of making will.	5. Form of nuncupative will, written down.
3. No testimony not reduced to writing to be received after six months.	6. Form of probate.
	7. Form of affidavit.

CHAPTER XXXII.

WILLS TO CHARITABLE OR RELIGIOUS USES... 570

1. Restraints upon gifts to charitable and religious uses.	7. Void gifts to charities, etc.
2. Effect of death within a calendar month from making of will.	8. Charitable, etc., gifts not to fail, when.
3. Effect of new will or a codicil.	9. Court to appoint a trustee.
4. Attestation of will.	10. <i>Cy pres</i> , as applied to wills.
5. Competency of witnesses.	11. Donees and trustees.
6. Gifts to charities or religious uses.	12. Clause in will avoiding effect of death within a calendar month.

CHAPTER XXXIII.

DOMICIL, REVOCATION AND REPUBLICATION 578

1. Domicil defined.	4. Domicil as to devise of land.
2. Domicil in a will.	5. Revocation by will or codicil.
3. Domicil as respects personalty.	6. Revocation of will in England.

	PAGE
7. Revocation of wills under the statute.	
8. Will as to personal estate — revocation.	
9. Revocation by cancellation and destroying.	
10. Revocation by revival of earlier will.	
11. Revocation by alienation, etc.	
12. Effect of marriage on will of single woman.	
13. Effect of marriage and birth of children on will.	
14. After-born child — kind of provision required.	
15. How far the will is revoked.	
16. Revocation by implication.	
17. Declarations of testator.	
18. Republication of will.	

CHAPTER XXXIV.

WILLS — CONTESTS OF 586

1. Caveat against probate of a will.	27. Form of decree of probate.
2. Form of caveat.	28. Granting of an issue.
3. Form of petition for appointment of administrator <i>pendente lite</i> .	29. Form of petition for a precept.
4. Security for costs.	30. Form of precept to the Common Pleas.
5. Form of bond on caveat.	31. Proceedings before the register.
6. Dismissal of cause for want of bond.	32. Party who may contest a will.
7. Register's duties on caveat.	33. Issue upon the right to contest.
8. Appeals from register's order granting an issue	34. Notice to parties in interest.
9. Rules as to appeals — Philadelphia.	35. Rule as to petitions and citations in Philadelphia.
10. Rules as to appeals — Allegheny.	36. Rule in Philadelphia on failure to answer.
11. Form of appeal from probate in Allegheny.	37. Parties to a contest, addition, etc.
12. Petition to be filed on appeal, Philadelphia.	38. Loss of right by laches.
13. Form of issue, Philadelphia.	39. Fixing security for costs.
14. Form of appeal, Philadelphia.	40. When an appeal lies.
15. Form of petition for issue, for undue influence, etc.	41. Petition on appeal — request for issue.
16. Form of decree.	42. Hearing.
17. Form of petition for citation, for illegal execution.	43. When an issue will be granted.
18. Form of order awarding citation.	44. The issue — form and scope.
19. Order of contested will.	45. Parties to the issue.
20. Time of hearing appeals, Philadelphia.	46. Trial of the issue.
21. Hearings to continue, Philadelphia.	47. Testamentary capacity.
22. Judge to determine question, <i>nisi</i> , Philadelphia.	48. Delusions and aberrations.
23. Final decree — contains what.	49. Presumptions and burden of proof.
24. Appeals from orders as to costs.	50. Undue influence.
25. Replication and joinder.	51. Acts of beneficiaries and others.
26. Form of order dismissing appeal.	52. The burden of proof.
	53. Evidence.
	54. Expert testimony and opinions.
	55. Declarations of beneficiaries, etc.

	PAGE
56. The writing itself as evidence.	60. Form of order to file decision
57. Province of the court and jury.	in the Orphans' Court.
58. Verdict and judgment.	61. Appeals.
59. Form of certificate after trial.	62. Costs.
	63. Effect of contest.
	64. <i>Res judicata</i> .
	65. Protection of rights in equity.

CHAPTER XXXV.

LETTERS TESTAMENTARY AND OTHER FORMS —APPOINTMENT AND RENUNCIATION OF EXECUTORS 617

- | | |
|--|--|
| 1. Issuance of letters testamentary. | 14. Administrator <i>c.t.a.</i> , powers of. |
| 2. Appointment of executor. | 15. Surviving or acting executor's powers. |
| 3. Married woman as executor. | 16. Executor, nonresident, bond. |
| 4. Debtor or creditor made executor. | 17. Appointment of administrator <i>de bonis non</i> . |
| 5. Right to letters. | 18. Bond of administrator <i>de bonis non</i> . |
| 6. Acceptance and renunciation. | 19. Form of letters <i>de bonis non</i> . |
| 7. Form of renunciation. | 20. Form of letters <i>pendente lite</i> . |
| 8. Form of certificate granting letters. | 21. Foreign letters have no force in Pennsylvania. |
| 9. Form of letters testamentary. | 22. Ancillary letters, necessity for. |
| 10. Revocation of letters. | 23. Power of foreign executor to revive judgment. |
| 11. Letters of administration <i>c.t.a.</i> | 24. Transfer of public loans by foreign executors. |
| 12. Power of acting executor over real estate. | 25. Transfer of funds to foreign executors. |
| 13. Powers of acting executor and adm. <i>c.t.a.</i> | |

CHAPTER XXXVI.

OFFICE OF EXECUTOR, RIGHTS AND DUTIES... 633

- | | |
|--|---|
| 1. Office of executor. | 8. Divided or conditional powers. |
| 2. Possession of the goods of the testator. | 9. Inventory and appraisement. |
| 3. Nature of executor's possession. | 10. Assets of the estate. |
| 4. Interest which executor has in the goods. | 11. Widow's exemption. |
| 5. Debts which the executor is bound to pay. | 12. Payment of debts. |
| 6. Devastation or waste, as to debts. | 13. Notice of devises, etc., to bodies corporate. |
| 7. Executor <i>de son tort</i> . | 14. Revival of judgment against debtor executor. |
| | 15. Executors authorized to vote corporate stock. |

CHAPTER XXXVII.

WIDOW'S ELECTION..... PAGE 644

- | | |
|--|--|
| 1. Widow's right to elect. | 10. Property widow may take — effect. |
| 2. Right to take under the intestate laws. | 11. Devise to wife in lieu of dower. |
| 3. Share in lieu of dower at the common law. | 12. Rights of remaindermen — merger. |
| 4. Right to occupy mansion house. | 13. Compensation to disappointed beneficiaries. |
| 5. How her right may be lost. | 14. Fund out of which compensation may be allowed. |
| 6. Election by the widow. | 15. Abatement — effect on different classes. |
| 7. Form of petition for citation to elect. | 16. Recording elections. |
| 8. Form of answer to citation. | |
| 9. Form of notice of election. | |

CHAPTER XXXVIII.

TENANT BY THE CURTESY — RIGHT TO ELECT FOR OR AGAINST THE WILL 652

- | | |
|---|-----------------------------|
| 1. Tenancy by the curtesy. | 5. Election by the husband. |
| 2. Nature of curtesy. | 6. Forfeiture by desertion. |
| 3. Curtesy initiate. | 7. Bar or loss of curtesy. |
| 4. Husband's right to curtesy under the statutes. | |

CHAPTER XXXIX.

INTERPRETATION OF WILLS..... 659

- | | |
|---|--|
| 1. Time from which a will speaks or takes effect. | 11. Consideration of the entire will. |
| 2. After acquired property. | 12. The force of general intent. |
| 3. Intention of the testator. | 13. Express words yield not to doubtful implication. |
| 4. Effect given to words. | 14. Latest clause as final intent. |
| 5. Precedents in the construction of wills. | 15. Effect of reference clause. |
| 6. Literal meaning to give way to actual meaning. | 16. Repetition and exchange of words. |
| 7. The rule as to disinheritance. | 17. Correction of language. |
| 8. Construction favorable to the heir and widow. | 18. Parol evidence, when admissible. |
| 9. Favor to the first taker. | 19. The residuary clause. |
| 10. Equality of standing. | 20. Effect of codicils upon a will. |
| | 21. Revocation by codicil. |

CHAPTER XL

PAGE

**LEGACIES, CHARACTER, KINDS, ADEMPMENT
AND PREFERENCE..... 672**

- | | |
|---|--|
| 1. Nature of a legacy. | 24. Cumulative legacies. |
| 2. How legacies may be left. | 25. Bequest of pledged goods. |
| 3. Two bequests of the same thing. | 26. Discharge of debtor by will. |
| 4. Who may be legatees. | 27. Legacy to debtor. |
| 5. Alienation of thing given. | 28. Legacy to a creditor. |
| 6. <i>De dote uxori legata.</i> | 29. Void and lapsed legacies. |
| 7. Bequest of flock. | 30. Extension to collateral heirs. |
| 8. Bequest of house. | 31. Gift to classes — act of 1897. |
| 9. Error in name of legatee. | 32. Substituted legatees. |
| 10. <i>De falsa demonstratione.</i> | 33. Gifts to "heirs," "legal representatives," etc. |
| 11. <i>De falsa causa adjecta.</i> | 34. Provision for children dead when the will is made. |
| 12. Legacy after the death of the heir. | 35. Disposition of the lapsed fund. |
| 13. Revocation or transfer of legacy. | 36. Ademption of a legacy. |
| 14. Distinction between vested and contingent legacy. | 37. Ademption of legacy charged on land. |
| 15. Condition with a limitation. | 38. Ademption, when not wrought. |
| 16. Executory devise. | 39. Abatement of general legacies. |
| 17. Defeat of bequest conditional. | 40. Abatement of residuary legacies. |
| 18. Specific legacy defined. | 41. Abatement of specific and demonstrative legacies, etc. |
| 19. Courts averse to specific legacies. | 42. Exemptions from abatement. |
| 20. Specific legacies of money. | 43. Priority of widow. |
| 21. Legacies, when specific or otherwise. | |
| 22. Demonstrative legacies. | |
| 23. General legacies. | |

CHAPTER XLI.

**PAYMENT OF LEGACIES AND ANNUITIES —
INTEREST 691**

- | | |
|--|--|
| 1. Personal estate primarily liable. | 11. Interest on legacies by parents. |
| 2. When and to whom payment is to be made. | 12. Interest on legacy to widow or creditor. |
| 3. Jurisdiction of the Orphans' Court. | 13. Bequest of interest or income of fund. |
| 4. Time when due. | 14. Interest on specific legacies and annuities. |
| 5. Assent to legacy. | 15. Term of an annuity. |
| 6. Bequests in the alternative. | 16. Making up deficiencies in annuities. |
| 7. Release of legacy. | 17. Delay in distribution as affecting interest. |
| 8. Setting aside funds for annuities. | 18. Rate of interest. |
| 9. Interest, income and dividends. | |
| 10. Time of payment indicated by the will. | |

CHAPTER XLII.

	PAGE
RECOVERY OF LEGACIES CHARGED ON LAND —ACTIONS FOR LEGACIES—PROTECTION OF CONTINGENT INTERESTS, AND THOSE IN REMAINDER.....	700

- | | |
|---|--|
| 1. What creates a charge on land. | 19. Legatee required to give security. |
| 2. Request to pay not a charge. | 20. Payment into court. |
| 3. When intention is indicated by the will. | 21. Form of decree. |
| 4. Deficiency of personalty. | 22. Court to distribute the fund. |
| 5. Effect of blending estates. | 23. Charges, satisfaction of. |
| 6. Provisions for maintenance, etc. | 24. Action for legacy. |
| 7. Recovery of legacy charged on land. | 25. Demand before suit. |
| 8. Jurisdiction and procedure. | 26. Plea of "no assets" suspends suit. |
| 9. Executor not a party. | 27. Execution to be stayed for want of assets. |
| 10. Petition by legatee. | 28. Nonsuit when there are no assets. |
| 11. Form of petition. | 29. Costs in the discretion of the court. |
| 12. Form of order for citation. | 30. Ademption — conclusiveness of decree. |
| 13. Form of citation. | 31. Abatement of legacies. |
| 14. Form of appointment of auditor. | 32. Interests in remainder in personalty. |
| 15. Form of auditor's subpoena. | 33. Protection of contingent interests. |
| 16. Auditor's report. | 34. Security by holders of interests limited or conditional. |
| 17. Form of decree for petitioner. | |
| 18. Land lying in another county. | |

CHAPTER XLIII. ..

BENEFICIARIES UNDER A WILL.....	718
--	------------

- | | |
|--|--|
| 1. Uncertain designation of beneficiaries. | 10. Wife or husband divorced. |
| 2. Gifts to heirs. | 11. Gift to child unborn. |
| 3. "Heirs" in gifts of personalty. | 12. Illegitimate children. |
| 4. Other meanings of "heirs." | 13. Adopted children. |
| 5. Gifts to legal representatives, etc. | 14. Gifts by reference. |
| 6. Gifts to children and grandchildren. | 15. Words of exclusion from a class. |
| 7. Great grandchildren and step-children. | 16. Death of member — survivors. |
| 8. Gifts to "issue." | 17. Gifts to survivors. |
| 9. Gifts to next of kin. | 18. Gifts <i>per stirpes</i> and <i>per capita</i> . |
| | 19. Division "between" and "among." |

CHAPTER XLIV.

PAGE

PROPERTY TRANSMITTED BY DEVISE .. 728

- | | |
|--|---|
| 1. Intention and power to pass estate. | 21. Liability of devisee for interest. |
| 2. Property which passes as personalty. | 22. Liability of assignee of devisee. |
| 3. Devises, nature of. | 23. Contribution and marshaling. |
| 4. Devises to pass the whole estate. | 24. What general devise includes — power to appoint. |
| 5. General devise passes after-acquired real estate. | 25. Interest of devisee in sum charged. |
| 7. Distinction between estate and easement or privilege. | 26. Release of charges on land. |
| 8. Appraisement of real estate directed by will. | 27. Devise on condition not to marry. |
| 9. Form of petition for valuation. | 28. Discharge of legacies by sales. |
| 10. Appraisers to be appointed. | 29. Distribution of proceeds. |
| 11. Form of notice. | 30. Devises subject to incumbrances. |
| 12. Oath of appraisers. | 31. Vested and contingent devises and legacies. |
| 13. Rights of the devisees and others. | 32. Vested gifts. |
| 14. Return, confirmation and record of the appraisement. | 33. Gift over in event of death before time of payment. |
| 15. Acceptance or refusal at the valuation. | 34. Implied gifts. |
| 16. Decree, adjudging the title. | 35. Contingent gifts. |
| 17. Fees of sheriff and appraisers. | 36. Vested but defeasible interests. |
| 18. Legatee's interest is personalty. | 37. Effect on lineal issue of death of lineal legatee. |
| 19. Extent of liability for charge. | 38. Construction of words importing failure of issue. |
| 20. Liability of executor. | 39. Purpose of act of 1897. |
| | 40. Construction since act of 1897. |

CHAPTER XLV.

THE RULE IN SHELLEY'S CASE 748

- | | |
|---|---|
| 1. Origin of the rule. | 13. Fees tail elongated. |
| 2. What the rule is. | 14. "Heirs" as a word of "purchase." |
| 3. Wolfe v. Shelley — facts. | 15. "Heirs of the body." |
| 4. Points of law. | 16. Remainder to "issue," etc. |
| 5. Answers to points. | 17. Remainder to "children." |
| 6. An English view. | 18. "Children" as a word of "limitation." |
| 7. Pennsylvania views. | 19. Limitation over on failure of issue. |
| 8. The Gross parallels. | 20. The rule in Wild's case. |
| 9. Words of "purchase" or "limitation." | 21. The rule as applied to equitable estates. |
| 10. Words of restriction must be unequivocal. | 22. Rule applied to personalty. |
| 11. "Heirs," etc., in remainder. | |
| 12. "Heirs" as "heirs of the body." | |

CHAPTER XLVI.

EXECUTORY DEVICES..... PAGE 760

- | | |
|--|--|
| 1. Definitions. | 9. Limitation over on failure of "heirs." |
| 2. Executory interests. | 10. Limitation over on death during minority, etc. |
| 3. Usual application of the term. | 11. Limitation <i>in futuro</i> , without particular estate. |
| 4. Limitation over after fee or fee tail. | 12. Limitation when particular estate is ineffectual. |
| 5. Limitation over on failure of issue. | 13. Incidents of executory devises. |
| 6. Failure in testator's lifetime. | 14. Failure and destruction of executory devises. |
| 7. Limitation over to children of first taker. | |
| 8. Indefinite failure of issue. | |

CHAPTER XLVII.

REMAINDERS, VESTED AND CONTINGENT..... 766

- | | |
|---|--|
| 1. Definition of a limitation of a remainder. | 21. Designation of remainderman. |
| 2. Definition of freehold estate. | 22. Condition subsequent. |
| 3. Remainders distinguished from future bequests. | 23. Cross-remainders. |
| 4. Contingent <i>quasi</i> -remainder. | 24. Remainders distinguished from executory devises. |
| 5. Remainders distinguished from conditional limitations. | 25. Examples of vested and contingent remainders. |
| 6. A vested remainder. | 26. Concurrent contingent remainders. |
| 7. A contingent remainder. | 27. Presumption of vesting a remainder. |
| 8. Fundamental distinction. | 28. Remainder to class, contingent upon birth. |
| 9. Classes of contingent remainders. | 29. Vesting in interest and vesting in possession. |
| 10. Contingent may become vested remainders. | 30. "When," "then" and similar expression. |
| 11. Vested remainder defined by our courts. | 31. "Then living" and similar phrases. |
| 12. Contingent remainders defined by our courts. | 32. Implications of gift from direction to pay. |
| 13. Remainders to a class. | 33. Substitutionary limitations. |
| 14. The rule in Wild's case. | 34. Effect of substitution on remainder. |
| 15. Who are within a class. | 35. "Survivor" construed as "other." |
| 16. How heirs as a class are determined. | 36. Who may take as "other," or "others." |
| 17. Time when remainder accrues. | 37. Alienation of remainders and reversions. |
| 18. Accruing by implication. | 38. Destruction of remainders. |
| 19. Construction of "or" and "and." | |
| 20. Substitutionary limitation. | |

CHAPTER XLVIII.

PAGE

**CONDITIONS IN A WILL—RESTRAINT UPON
ESTATES, LIFE ESTATES, ETC..... 783**

- | | |
|--|---|
| 1. Conditions in a will. | 25. Dividends, etc., from stock. |
| 2. Conditions precedent. | 26. Apportionment of income. |
| 3. Effect of annexing condition. | 27. <i>Falsa demonstratio</i> . |
| 4. Particular conditions. | 28. Gifts of the same class. |
| 5. Conditions subsequent. | 29. Appurtenances, fixtures, etc. |
| 6. Forfeiture how effected. | 30. Goods, chattels, movables, etc. |
| 7. Forfeiture in restraint of marriage. | 31. Income, rents, profits, etc. |
| 8. Forfeiture for contesting will. | 32. What passes as money. |
| 9. Deductions from devises and legacies. | 33. Interest in partnership. |
| 10. Legatees claiming by representation or substitution. | 34. Directions to sell—exclusion of gifts. |
| 11. Legacies and devises to widows. | 35. "Inclusive" and "exclusive" applied. |
| 12. Estoppel by election to take under a will. | 36. Restriction of the widow's interest. |
| 13. Agreements or promises to devise or bequeath. | 37. Provisions for maintenance, etc. |
| 14. Will referring disputes to persons named. | 38. Estate, portion, etc. |
| 15. Agreements as to construction of wills, etc. | 39. Devises subject to charges. |
| 16. Compromise of contests. | 40. Life estate without a devise over. |
| 17. When gift of income carries the corpus. | 41. Absolute bequests of personality. |
| 18. Implied gifts. | 42. Cutting down of absolute gift. |
| 19. Words necessary to pass an absolute estate. | 43. Precatory and explanatory words. |
| 20. Creation of life estate or interest. | 44. Estate not cut down by restraint or alienation. |
| 21. Leasehold <i>pur autre vie</i> . | 45. Definite failure of issue. |
| 22. Relation of life tenant to remainderman. | 46. Estates tail and failure of issue. |
| 23. Right to corpus or chattels in specie. | 47. The rule against perpetuities. |
| 24. Power over real estate. | 48. Power of appointment in a will. |

CHAPTER XLIX.

806

FORMS OF WILLS..... 806

- | | |
|---|--|
| 1. Common form. | 7. With power to sell. |
| 2. Attestation. | 8. Devising realty with life estate and remainder over, with executory devise. |
| 3. Attestation when will is signed by another at direction of testator. | 9. Clause in restraint of remarriage. |
| 4. Attestation of execution by mark. | 10. Clause providing in case of failure of issue. |
| 5. Bequeathing all to wife. | 11. Clause appointing a guardian. |
| 6. With residuary clause. | |

	PAGE
12. Devise for life, with remainder.	
13. Devise in lieu of dower.	
14. Limitation over on failure of issue.	
15. Power of sale and conversion of residue.	
16. Spendthrift trust.	
17. Separate use trust.	
18. Power of appointment.	
19. Clause in trust complying with the rule against perpetuities.	
20. Clause with trust and power to convey.	
21. Clause avoiding the rule in Shelley's case.	
22. Clause charging a legacy on land devised.	
23. Old-time will charging legacies on land devised, reserving manor for widow and charging her maintenance on the land.	
24. Life estate to wife and remainder to children in equal shares.	
25. Directing conversion and division.	
26. Disposing of realty for life, etc., and personalty in trust.	
27. A codicil giving power to sell and convey, and to complete land contracts.	
28. Clause on condition that wife does not re-marry.	
29. Clause of sole and separate use to daughter.	
30. Clause of spendthrift trust.	
31. Clause charging land with support of widow.	
32. Clause of devise directing the payment of a legacy, without charging the land.	
33. Age of competency to make a will.	

CHAPTER L.

POWERS OF EXECUTORS, PLEADINGS AND REMOVAL 819

1. Custody of property.	20. Sales of life estates with limited remainders.
2. Power over the real estate.	21. Manner of proceedings.
3. Powers as to realty under the will.	22. Executors or trustees may convey by attorney.
4. Naked power to sell, meaning of.	23. Executors, etc., may join in incorporation.
5. Interpretation of power to sell.	24. How proceeds are to be held.
6. Effect of power to sell.	25. Consent in writing by <i>cous-tuis que trustent</i> .
7. Right to take land as such.	26. Orphans' court given jurisdiction.
8. Execution of a power to sell.	27. Discretionary power of executor, as trustee.
9. Manner of sale and consideration.	28. Pleas by executors.
10. Control of exercise of power, by the courts.	29. Judgment against the executor's own goods.
11. Discretionary power to sell.	30. Judgment at the common law.
12. Setting sale aside and resale.	31. Process against executor, etc., for disability.
13. Liability of purchaser, as to purchase money.	32. Dismissal of executor, etc., for disability.
14. Extent of power to sell.	33. Removal, when executor, etc., is lunatic, etc.
15. Duration of power to sell.	34. Proceedings when executor, etc., has removed from the state.
16. Effect of sale.	
17. Conversion of realty into personalty.	
18. Contract for sale of land by trustee as individual.	
19. Purchase by executor for his own use.	

	PAGE
35. Surety of executor, etc.— protection of.	
36. Security when executrix mar- ries without securing mi- nors' interests.	
37. Decree of land at a valua- tion under a will.	
38. Effect of decree.	
39. Form of petition to ratify sale by executor.	
40. Form of release by widow and heirs.	
41. Form of decree.	
42. Form of petition for author- ity to sell.	
43. Form of condition in bond of nonresident executor.	

CHAPTER LI.

DISINCUMBERING ESTATES OF LEGACIES AND CHARGES UNDER WILLS..... 840

1. Act of February 20, 1853 — petition.	10. Curtilage of reservation, how determined.
2. Annual report.	11. Appointment of commission- ers.
3. Discharge of estate.	12. Duty of commissioners.
4. Rights to remain.	13. Discharge from charges by will or otherwise.
5. Purpose of the act.	14. Owners may pay into court.
6. Legatee's right to take cor- pus on giving security.	15. When money may be paid into court.
7. Security under the act of 1871.	16. Discharge of dower, etc., when presumption of pay- ment has arisen.
8. Security where the corpus is converted.	17. Form of release of legacy charged on land.
9. Form and discharge.	

CHAPTER LII.

PROCEEDINGS ON PRESUMPTION OF DEATH— INVESTMENT OF FUNDS..... 850

1. Presumption of death.	13. Decision — probate — hear- ing, etc.
2. Proceedings upon estate of one presumed to be dead.	14. Investment of trust moneys.
3. Orphans' Court to direct ad- vertisement, before letters.	15. Investment in bonds of mu- nicipal corporations.
4. Competency of witness, though interested.	16. Investment in ground rents, etc.
5. Duty of Orphans' Court.	17. Form of petition to register.
6. Court to order issuance of letters.	18. Form of certificate of regis- ter.
7. Revocation of letters, if per- son be alive.	19. Form of decree directing ad- vertisement.
8. Security to refund — invest- ment.	20. Form of advertisement.
9. Proceedings after revocation.	21. Form of decree upon hearing.
10. Costs.	22. Form of advertisement.
11. Probate of will of one pre- sumed to be dead.	23. Form of order to issue let- ters.
12. Citation and hearing.	24. Form of refunding bond.

CHAPTER LIII.

TESTAMENTARY GUARDIANS..... PAGE 860

- | | |
|--|--|
| 1. Common law ages of man. | 7. Mother's right to appoint. |
| 2. The common law as to ages of woman. | 8. Guardian of devised estate. |
| 3. Guardian by nature. | 9. Manner of appointment. |
| 4. Testamentary guardian. | 10. Duties of guardian. |
| 5. Drunken husband loses his right. | 11. Power to mortgage or sell lands divided by county lines. |
| 6. Appointment of testamentary guardian. | 12. Private sale authorized. |

CHAPTER LIV.

EXECUTORS' ACCOUNTS, AUDITS, DISTRIBUTION AND DISCHARGE..... 864

- | | |
|---|---|
| 1. Filing of accounts. | 22. Distribution. |
| 2. When executor will be cited. | 23. Distribution of death benefits. |
| 3. When executor will not be cited. | 24. Advancements. |
| 4. Petition for citation. | 25. Surcharge of executor, etc. |
| 5. The citation. | 26. Party barred from distribution. |
| 6. Statement of account by an auditor. | 27. When the Orphans' Court has no jurisdiction. |
| 7. Form of appointment of auditor. | 28. Liquor license. |
| 8. Notice of filing account. | 29. Co-executors. |
| 9. Manner of account. | 30. Liability of co-executors. |
| 10. Blending of accounts. | 31. Decree of distribution. |
| 11. Accounts of deceased executors. | 32. Transmission of funds to domicile. |
| 12. Supplemental accounts. | 33. Questions for argument. |
| 13. Form of account of proceeds of realty. | 34. Argument list, Allegheny. |
| 14. Form of account of personalty. | 35. Notice and time of hearing, Allegheny. |
| 15. Form of account after partition. | 36. Attorney's briefs of the argument, Allegheny. |
| 16. Form of account for deceased executor. | 37. Form of rule to take depositions. |
| 17. Exceptions to account. | 38. Form of notice of rule. |
| 18. Appointment of auditor in Philadelphia. | 39. Form of protocol to letters rogatory. |
| 19. Notice of appointment, Philadelphia. | 40. Discharge of executor or administrator. |
| 20. Time of report, Philadelphia. | 41. Discharge on his own application. |
| 21. Form of appointment on exceptions. | 42. Dismissal or release. |
| | 43. Discharge of sureties. |

CHAPTER LV.

PAGE

**COLLECTION OF INHERITANCE OR LEGACIES
IN EUROPEAN COUNTRIES 884**

- | | |
|--|----------------------------------|
| 1. Classes of estates. | 8. Treaty with Germany. |
| 2. Treaties and conventions. | 9. Treaty with Great Britain. |
| 3. Treaty with Austria-Hungary. | 10. Treaty with Greece. |
| 4. Transfer of fund from domestic to foreign guardian. | 11. Treaty with The Netherlands. |
| 5. Treaty with Bavaria. | 12. Treaty with Prussia. |
| 6. Treaty with Belgium. | 13. Treaty with Italy. |
| 7. Treaty with France. | 14. Treaty with Russia. |
| | 15. Treaty with Spain. |
| | 16. Treaties with Scandinavia. |

CHAPTER LVI.

ISSUES AND INVESTMENTS, ETC..... 892

- | | |
|---|---|
| 1. Demand for issue before an auditor. | 11. Form of decree authorizing investment. |
| 2. Awarding the issue. | 12. Form of petition to invest. |
| 3. Form of issue. | 13. Form of decree. |
| 4. Verdict and decree. | 14. Form of petition to invest in improvements. |
| 5. Costs. | 15. Form of petition of guardian. |
| 6. Appeals. | 16. Form of petition for leave to pay into court. |
| 7. Form of petition for an issue. | 17. Form of order of court. |
| 8. Form of precept for an issue. | 18. Form of petition for leave to draw out. |
| 9. Form of pleadings in the Common Pleas. | 19. Subjects treated of in volume 2. |
| 10. Form of verdict. | |

CHAPTER LVII.

TESTAMENTARY TRUSTS—ACTIVE AND PASSIVE—SEPARATE USE AND SPENDTHRIFT.... 902

- | | |
|---|--|
| 1. Origin of testamentary trusts. | 13. Trusts not to fail for want of a trustee. |
| 2. Heir and trustee at the civil law. | 14. Appointment to fill vacancy. |
| 3. Particular things in trust. | 15. Appointment when co-executor is alive. |
| 4. Kinds of trusts. | 16. Dismissal of trustee for misbehavior. |
| 5. How a trust may be created. | 17. Vacancy by declination, to be filled. |
| 6. Testamentary trust, how created. | 18. Transfer of estate to foreign trustee. |
| 7. How an active trust is created. | 19. Removal of trustees in Philadelphia. |
| 8. Active and continuing trust. | 20. Executors may renounce. |
| 9. Executory trust defined. | 21. Appointment of trustee <i>durante absentia</i> . |
| 10. Words sufficient to create a trust. | |
| 11. Precatory words. | |
| 12. Parties requisite to a trust. | |

	PAGE
22. Trustees to give bond.	
23. Distribution of such estate.	
24. Form of petition to fill vacancy.	
25. Trust <i>ex maleficio</i> under a will.	
26. Limitation on resulting trusts.	
27. Time when limitation begins to run.	
28. Active and passive trusts.	
29. Management of the estate.	
30. Trust to protect remainders.	
31. Termination of trust by accomplishment.	
32. Rights of the <i>cestui que trust</i> .	
33. Time of vesting, etc.	
34. Devolution of the legal title.	
35. Surviving trustees may execute trust.	
36. Deeds by surviving executor, etc.	
37. Right to follow trust funds.	
38. Jurisdiction of the Orphans' Court.	
39. Termination of trust in various ways.	
40. Conveyance at end of trust.	
41. Distribution.	
42. Creation of separate use trust.	
43. No particular words necessary.	
44. Necessity for trustee.	
45. Power of married woman over the estate.	
46. Rights of husband.	
47. Rights and powers of trustee.	
48. Termination of separate use trust.	
49. Spendthrift trusts.	
50. Beneficiary of a spendthrift trust.	
51. Trust annexed to absolute estate.	
52. Necessity for trustee.	
53. Protection of trust fund.	
54. Trustee of a spendthrift trust.	

CHAPTER LVIII.

TRUSTEES, THEIR RIGHTS AND DUTIES.... 928

1. How to become a trustee.	19. Transfer of stocks and securities.
2. Who may be a trustee.	20. Power to contract debts, etc.
3. Appointment of trustee.	21. Assets in the hands of the trustee.
4. Petition for appointment.	22. Liability for loss by negligence.
5. Notice to parties.	23. Liability for rents.
6. Who may be appointed.	24. Liability for funds deposited.
7. Security by trustee.	25. Other liabilities and duties.
8. Form of bond.	26. Expenditures by trustee.
9. Form of certificate of appointment.	27. Investments.
10. Rights and liabilities of sureties.	28. Liability for interest.
11. Right of surety to demand statement.	29. Control of trustee's discretion.
12. Personal representatives of sureties, may cite trustees to account.	30. Control of discretion as to sales, etc.
13. Citation to trustee to file account.	31. Power of sale and mortgaging.
14. Removal for failure to give new bond.	32. Duties in regard to sale.
15. Liability of surety preserved.	33. Purchases by trustees.
16. General powers of trustees.	34. Making deeds and mortgages.
17. Expenditure of trust fund, how authorized.	35. Accounts of trustees.
18. Powers over the estate.	36. By whom an account may be demanded.
	37. Petition for citation.

	PAGE
38. Credits and allowances.	
39. Interest and other expenses.	
40. Charges to principal and income.	
41. Counsel fees and legal expenses.	
42. Compensation of trustee.	
43. Commissions in discretion of the court.	
44. Commissions on realty.	
45. Increase or decrease of compensation.	
46. Allowance of compensation.	
47. Forfeiture of compensation.	
48. Finality of account.	
49. Orders to pay over.	
50. Removal and discharge.	
51. Removal in Philadelphia.	
52. Insufficient grounds of removal.	
53. Discharge of trustee on his own application.	
54. Procedure by petition.	
55. Liability of co-trustees.	
56. Surviving trustees.	
57. Successors in the trust.	
58. Termination of a trust.	
59. Power of conveyance by married woman.	
60. Payment of funds to non-resident trustee.	
61. Form of petition to improve real estate.	

CHAPTER LIX.

TRUST COMPANIES..... 961

1. Origin of trust companies as administrators, etc.	13. Regulation of deposits and withdrawals.
2. Authority to act as executors, etc.	14. Foreign surety companies.
3. Deposit of money by order of court.	15. Trust funds to be kept separate.
4. Power to act as sole surety.	16. Trust funds and investments.
5. Capital to be liable.	17. Qualification of trust companies.
6. Executors, etc., authorized to deposit.	18. Examiners.
7. Court may appoint an examiner.	19. Special examinations — revocation.
8. Trust funds to be kept separate.	20. Rule in Philadelphia — petition, etc.
9. Oath in execution of trust.	21. Annual statement.
10. Burial companies may accept trusts.	22. How approved.
11. Distribution of assets of trust companies.	23. Examiners, reports, fees.
12. Rules in Allegheny County.	24. Effect of report.
	25. Capital of corporations.
	26. Trust and surety docket.
	27. List of estates.
	28. Application as surety.

GLOSSARY

Following are the foreign words and phrases used in this volume, which have not been explained in the preceding volumes, each of which has its own glossary.

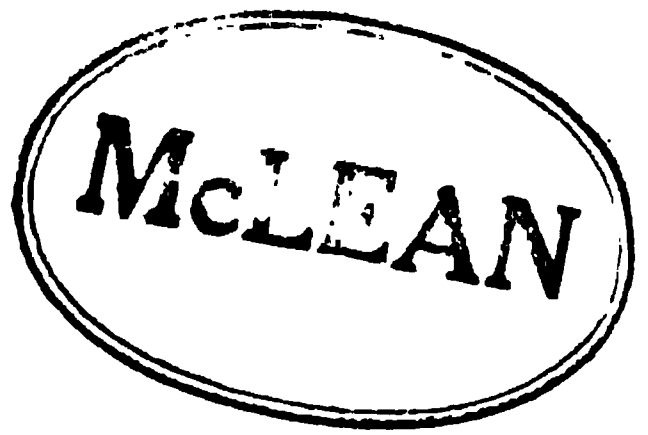
	PAGE	PAR.
<i>Ad materiam subjectam</i> — to the subject matter	833—	30
<i>Agnates</i> — collateral heirs	474—	38
<i>A mensa et thoro</i> — from bed and board	49—	
<i>Amici curiæ</i> — friends of the court	449—	65
<i>Animo disponendi</i> — in disposing mind	540—	22
<i>Animo et facto</i> — “in spirit and in truth”	567—	2
<i>Animo revocandi</i> — in revoking mind	546—	2
<i>Animus testandi</i> — attesting mind	533—	5
<i>Assets in maines l' executors</i> — assets in the hands of execu- tors	124—	1
<i>Acoutrer</i> — adulterer	354—	83
<i>Bona et catalla</i> — goods and chattels	126—	3
<i>Bona peritura</i> — perishable goods	60—	2
<i>Cæteris paribus</i> — for equal reasons	59—	2
<i>Caveat</i> — that you take heed	557—	26
<i>Caveat emptor</i> — let the purchaser beware	159—	53
<i>Cestui que use</i> — the one for whose use	915—	31
<i>Cestui que vie</i> — the beneficiary for life	46—	9
<i>Consanguinei</i> — of the same blood	475—	38
<i>Consobrini</i> — cousins	475—	38
<i>Contra tabulas</i> — against the will	469—	26
<i>Courtoise</i> — politeness	655—	n27
<i>Cum duo inter se pignantia reperiuntur in testamento, ulti- mum ratum est</i> — where two things repugnant to each other are found in a will, the last is to be confirmed	730—	3
<i>Cum onere</i> — with the burden	690—	43
<i>Cum testamento annexo</i> — with the will annexed	617—	1
<i>Curia advisare vult</i> — the court will take counsel	712—	n7
<i>Cy pres</i> — as near as	575—	10
<i>De son tort</i> — of his wrong	16—	5
<i>De terris testatoris</i> — of the lands of the testator	184—	15
<i>Donatio mortis causa</i> — gift in anticipation of death	17—	5
<i>Durante absentia</i> — during absence	638—	7
<i>Durante minoritate</i> — during minority	32—	18
<i>During minore ætate</i> — during the age of minority	59—	2

	PAGE	PAR.
<i>Eadem ratione</i> —by the same reason	472-	32
<i>Ejusdem generis</i> —of the same class	796-	28
<i>En ventre sa mere</i> —unborn child	584-	14
<i>Eo instanti</i> —at that instant	342-	63
<i>Erroris sub imos</i> —error in the court below	753-	10
<i>Et tout le court</i> —and the whole court	581-	n19
<i>Ex necessitate rei</i> —from the necessity of the thing	747-	40
<i>Ex parte materna</i> —on the part of the mother	464-	18
<i>Ex parte paterna</i> —on the part of the father	408-	1
<i>Ex vi termini</i> —from the force of the term	922-	44
<i>Feme covert</i> —married woman	557-	26
<i>Fiduciaries</i> —persons charged with trust	58-	
<i>Haeres, heire</i> —heir	685-	n31
"Id certum est quod certum reddi potest"—that is certain		
which can be made certain	662-	6
<i>Ideo consideratum est per curiam</i> —that which was con-		
sidered by the court	833-	30
<i>In extremis</i> —at the end	540-	22
<i>In foro conscientiae</i> —in the court of conscience	103-	85
<i>In jure uxoris</i> —in right of his wife	653-	1
<i>Inops consilii</i> —devoid of counsel	719-	2
<i>In plenum omnia</i> —all on a level	475-	40
<i>In praesenti</i> —at the present time	530-	1
<i>In rerum natura</i> —in the nature of things	758-	20
<i>In terrorem</i> —in fear	740-	27
<i>Inter vivos</i> —among the living	18-	5
<i>Jus ad rem</i> —right to the thing	342-	63
<i>Jus in re</i> —right in the thing	342-	63
<i>Leges scriptae</i> —written laws	107-	6
<i>Lucida intervalla</i> —lucid interval	538-	18
<i>Mal adroit</i> —in a bad or clumsy manner	18-	6
<i>Ne unques executor, neo unques administravit come execu-</i>		
<i>tor</i> —that he never was executor, nor ever administered		
as executor	832-	28
<i>Nihil interest</i> —it matters nothing	675-	9
<i>Non compos mentis</i> —not of sound mind	557-	26
<i>Non sanæ memoriæ</i> —not of sound memory	538-	18
<i>Non tenent insimul</i> —they do not hold in the same right	321-	21
<i>Nullius filius</i> —nobody's child	471-	28
<i>Omne magus in se minus continet</i> —the more worthy con-		
tains in itself the less worthy		
.	805-	48
<i>Opus pium et charitativum</i> —work of piety and charity	107-	6

GLOSSARY.

xli

	PAGE	PAR.
<i>Patruel, id est</i> — that is, children of brothers	475-	38
<i>Per discent</i> — by inheritance	833-	28
<i>Perquisition</i> — by purchase	464-	18
<i>Per stirpes</i> — by the right of ancestry	721-	4
<i>Pie poudre</i> — dust on the feet, county fair court in old Eng- land	637-	6
<i>Plene administravit</i> — he has fully administered	833-	28
<i>Privement enfeint</i> — quick with child	750-	4
<i>Pro bono et commodo</i> — for the good and convenience	60-	2
<i>Pro possessore habetur qui dolo desit possidere</i> — he is counted a possessor who by fraud ceases to possess	637-	6
<i>Proximi cognati</i> — next of kin	473-	34
<i>Proximior</i> — next of kin	463-	16
<i>Pur autre vie</i> — for the life of another	46-	9
<i>Quasser</i> — to quash, annul	177-	n30
<i>Quasi a patre cognati</i> — as it were, descendant of the father .	475-	38
<i>Quasi de son tort</i> — as it were, of his wrong	861-	6
<i>Quicquid plantatur solo, solo credit</i> — for he alone shall reap by whom it is planted	124-	
<i>Qui timent et oavent, vitant</i> — whoso fear are wary and avoid	637-	6
<i>Quod nihil capiat breve</i> — that he takes nothing by his writ	833-	28
<i>Reddendo singula singulis</i> — by giving what is single to what is single	545-	1
<i>Res gestæ</i> — the things connected with	612-	53
<i>Rogatio testium</i> — calling to witness	568-	4
<i>Scæran</i> — share, portion of estate	685-	n34
<i>Sed ipso jure</i> — but by the law itself	458-	4
<i>Similis casus et simile judicium eodem tempore</i> — Similar judgment for a similar cause, every time	661-	5
<i>Termes de la ley</i> — terms of the law	124-	n1
<i>Tortfeasor</i> — wrong doer	51-	19
<i>Ut res magis valeat quam pereat</i> — that a thing shall have effect is more worthy than that it should be void	805-	48
<i>Venit ornamentum ejus</i> — the ornament passes also	674-	4
<i>Verba intentioni debent inservire</i> — words ought to be made subservient to the intent	717-	34
<i>"Victus victori in expensis condemnatus est"</i> — The loser is condemned to pay the expenses of the winner	447-	n21
<i>Virtute officii</i> — by virtue of the office	908-	14
<i>Voluit non dixit</i> — he said not what he willed	753-	10
<i>Vulgo quæritos</i> — spurious children	472-	32



PRACTICE

IN THE ORPHANS' COURTS OF PENNSYLVANIA

CHAPTER I.

ORIGIN AND CHARACTER OF THE ORPHANS' COURT.

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|---|---|
| 1. Origin of the Orphans' Court. | 15. Salaries of Deputy Register and clerks in Philadelphia. |
| 2. Jurisdiction created by statute. | 16. Judges in separate Orphans' Courts. |
| 3. Orphans' Court not a court of Equity. | 17. Judges may hear Equity cases. |
| 4. Constitutional provisions. | 18. Duty not compulsory. |
| 5. Former jurisdiction of Register's Court. | 19. Additional law judge may arrange. |
| 6. The Orphans' Court a court of record. | 20. Compensation of judge. |
| 7. Seal of the court. | 21. Bill of costs in separate Orphans' Court. |
| 8. Separate Orphans' Courts. | 22. Fees of the clerk in Philadelphia. |
| 9. Clerks and assistants of separate Orphans' Courts. | 23. Fees of the clerk in Allegheny county. |
| 10. Jurisdiction of separate Orphans' Courts. | 24. Fees of the clerk of the Orphans' Court. |
| 11. Powers of injunction. | 25. Duties of the clerk generally. |
| 12. Stay of execution on appeal. | 26. Clerk to keep partition docket. |
| 13. Power to make rules. | |
| 14. Apartments, provision for. | |

1. Origin of the Orphans' Court.

The name Orphans' Court was imported into Pennsylvania by William Penn, the first English proprietor, and was adopted from the Court of Orphans of London.¹ In the Duke of York's laws (p. 205) is found the enactment "that the justices of each respective county court shall sit twice every year to inspect and take care of the estates, usage and employment of orphans, which shall be called 'the Orphans' Court.'"

This statute was enacted in 1693 for Pennsylvania, then a colony of Great Britain, and the name has remained.

¹ The history of this court may be found in the Intestate Laws of Pennsylvania by Eben Greenough Scott, Esq., in the preparation of which Chief Justice George W. Woodward took a deep interest.

By act of October 28, 1701, the management and settlement of decedents' estates was added to the jurisdiction and by act of March 27, 1713, a record was authorized to be kept and probating of wills and the issuance of letters of administration and letters testamentary were added. Out of these laws a system developed which found succinct and cogent expression in the subsequent acts of 1832, 1833, 1834 and amendments, which constitute the jurisdiction of the Orphans' Court of the present.

2. Jurisdiction created by statute.

It was said by Sergeant, J.:²

"It seems to have been the policy of the legislature to confer on the Orphans' Court the superintendence of the property of decedents, in almost every respect and to make all persons accountable in that court, into whose hands such property may come; and indeed to enable it to hear and determine, by proceedings different from those of the common law, almost all judicial transactions immediately arising from the decease of testators or intestates. In the recent codes further jurisdiction is vested in this court over many subjects never before possessed."

Judge Rhone in his excellent treatise said:³

"This court, as at present constituted, is a court of a peculiar nature both as respects its jurisdiction, powers, and the forms of its proceedings, partaking of the characters of a court of common law, a court of equity, and an ecclesiastical court. The process of the court would seem, in some respects, to resemble that of the English ecclesiastical courts, whose proceedings are regulated according to the practice of the civil and canon law; or, rather according to a mixture of both, collected and new modeled by their own particular usages and the interpretation of the courts of common law. * * * Hence, in the Orphans' Court practice are found the motion, rule, *feri facias* and subpoena of the common law courts; the petition of Chancery and the citation of Doctors Commons; and, mingled with them, the order, decree and sequestration derived through these equity and ecclesiastical tribunals, from the civil and canon laws."

3. Orphans' Court not a court of equity.

Chief Justice Gibson said:⁴

"Although the Orphans' Court has been called a Court of Equity, in respect to the few subjects within its jurisdiction, the ancillary powers of such a court have not been given to it. It is a special tribunal for specific cases; and its resemblance to a court of equity consists in its practice of proceeding by petition and answer containing the substance but not the technical subtleties and nice distinctions of a bill in equity; by which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so called. As the Orphans' Court, therefore, has not the general powers of a

² Wimmer's Ap., 1 Wharton, 96.

³ Vol. 3, Rhone's Orphans' Court Practice, p. 249.

⁴ Brinker v. Brinker, 7 Pa. 53. (See also, Trunkey, J., in Miskimin's Ap., 114 Pa. 530.)

court of equity, it cannot entertain a bill of discovery; but it can reject an answer to a petition."

Notwithstanding the obiter remarks in Johnson's Appeal^{4a} the Orphans' Court is not a court of general but limited jurisdiction, as conferred by statute.^{4b} It has been seen that it is neither a court of Equity nor Chancery, but in such matters as are by statute committed to it; for example, petition for specific performance of contract under the act of February 24, 1834, it exercises the power and authority of a court of chancery and the proceedings are analogous to chancery practice.^{4c}

But in the settlement of estates, their partition and distribution, chancery powers are exercised by the Orphans' Court⁵ and the judge is said to perform the duties of a chancellor.⁶ Its jurisdiction over the subjects and persons that come within its domain is as unlimited as a Court of Chancery.⁷ Its proceedings are equitable and the method is by petition, answer and replication. Rules to show cause are almost universal before decrees are made, except such as follow orderly and in due course.⁸ It has, however, no jurisdiction to settle a partnership account of decedent with claimant and resort must be had to a bill in equity⁹ unless the executor should be the surviving partner. (Brown's Ap., 89 Pa. 139.)

As to the subjects and persons coming within its domain, the Orphans' Court has exclusive jurisdiction¹⁰ and as extensive as the demands of justice.¹¹ All persons who hold trust property are amenable to it.¹² It has exclusive jurisdiction to ascertain the amount of a decedent's estate and to direct its distribution.¹³

4. Constitutional provisions.

Under the constitution of 1790, it was provided by sections 1 and 7 that "the register of wills, together with the said judges [Common Pleas] or any two of them, shall compose the Register's Court of each county," but this court was abolished by section 22 of article 5 of the constitution of 1873, which is as follows:

"In every county wherein the population shall exceed one hundred and fifty thousand the General Assembly shall, and in any other county may, establish a separate Orphans' Court to consist of one or more judges, who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in, or which may hereafter be conferred upon the Orphans' Courts, and thereupon the jurisdiction of the judges of the Court of Common Pleas within such

^{4a} Johnson's Ap., 114 Pa. 132.

^{4b} Farrar v. Denning, 11 Supr. C. 62, citing President, Etc., v. Groff, 14 S. & R. 181; Weyand v. Weller, 39 Pa. 443.

^{4c} Chess' Ap., 4 Pa. 54.

⁵ Dickinson's Est., 148 Pa. 142.

⁶ Chess' Ap., 4 Pa. 54.

⁷ Barkley's Est., 10 Pa. 390; Kittera's Est., 17 Pa. 423.

⁸ Worthington's Est., 6 Supr. C. 484.

⁹ Weigley, Ex., v. Coffman, Ex., 144 Pa. 489, citing Miller's Est., 136 Pa. 349.

¹⁰ Shollenberger's Ap., 21 Pa. 341.

¹¹ Bell's Ap., 71 Pa. 465.

¹² Bank's Ap., 123 Pa. 356; Watt's Est., 158 Pa. 1.

¹³ Weimer v. Karch, 153 Pa. 385.

county, in Orphans' Court proceedings shall cease and determine. In any county in which a separate Orphans' Court shall be established, the register of wills shall be clerk of such court, and subject to its directions in all matters pertaining to his office; he may appoint assistant clerks, but only with the assent and approval of said court. All accounts filed with him as register or as clerk of said separate Orphans' Courts shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may in its discretion appoint. In every county, Orphans' Courts shall possess all the powers and jurisdiction of a Register's Court, and separate Register's Courts are hereby abolished."

Under this section separate Orphans' Court judges are elected in the counties where it applies.

By section 9 of article 5 the judges of the Court of Common Pleas, "learned in the law," are made judges of the Orphans' Court in counties where they are judges of all the courts. This is also enacted by the act of May 19, 1874 (section 2), P. L. 206.

5. Former jurisdiction of Register's Court.

By section 31 of the act of March 15, 1832, P. L. 135, it was provided that appeals might be taken to the Register's Court "from all the judicial acts and decisions of the several Registers," within three years. Section 40 provided:

"The testimony of all witnesses examined in any cause litigated before any Register's Court, shall be taken in writing, and made a part of the proceedings therein, upon which testimony the court having jurisdiction of such cause by appeal, may affirm, reverse, alter or modify the decree of the Register's Court."

Section 41 provided for the issuing of a precept, at the request of either party, for an issue to the Common Pleas, to try any dispute upon a matter of fact arising in the Register's Court. These matters were by the constitutional provision, *supra*, vested in the Orphans' Court.

6. The Orphans' Court a court of record.

Section 2 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law; its proceedings and decrees, in all matters within its jurisdiction, shall not be reversed or avoided collaterally in any other court, but they shall be liable to reversal, modification, or alteration on appeal to the Supreme Court, as hereinafter directed."

The record of the Orphans' Court, when an auditor has found an amount to be due a creditor is *prima facie* evidence that said amount is due, in an action at law.¹⁴ Under the above section the decrees of this court cannot be attacked collaterally except for fraud, or for want of jurisdiction apparent upon the face of the record.¹⁵

¹⁴ Phillips v. R. Co., 107 Pa. 465.

¹⁵ M'Pherson v. Cunliff, 11 S. & R. 422; Snyder v. Markel, 8 Watts, 416; Lockhart v. John, 7 Pa. 137; George's Ap., 12 Pa. 260; McKee v. McKee, 14 Pa. 231; Gilmore v. Rodgers, 41 Pa. 120; Dixey's Exs. v. Laning, 49 Pa. 143; White's Est., 163 Pa. 388.

The decree of the Orphans' Court, but not the opinion of the judge, may be assigned for error, on appeal.¹⁶

7. Seal of court.

Section 55 of the act of April 14, 1834, P. L. 351, provided that "every Orphans' Court shall have a seal for the use of the said court, having engraven thereon such words and devices as are inscribed on the seal now in use in the respective court; and such seal may be renewed, under the direction of such court, as often as occasion shall require."

8. Separate Orphans' Courts.

Section 3 of the act of May 19, 1874, P. L. 206, carrying into effect the constitution, enacted that "in the counties of Philadelphia, Allegheny and Luzerne the Orphans' Court shall be a separate court of record." By various enactments other counties have been added, as follows:

Berks County, act of June 13, 1883, P. L. 97; Schuylkill County, act of March 28, 1895, P. L. 31; Westmoreland County, April 11, 1901, P. L. 71; Montgomery County, May 2, 1901, P. L. 117; Lancaster County, July 11, 1901, P. L. 655; Lackawanna County, July 11, 1901, P. L. 657; Fayette County, May 25, 1907, P. L. 260.

Prior to the new constitution, the county of Philadelphia had a system and practice somewhat dissimilar from that throughout the state though subject to the general state laws, which will be found in the rules of court and the cases interpreting them. It was enacted in section 8 of the act of February 3, 1843, P. L. 9, that:

"Two of the judges of the said Court of Common Pleas shall have power to hold an Orphans' Court, or any other court, created by any former law, in the same manner as though an additional judge had not been appointed by this act; but each of said four judges shall have equal jurisdiction in criminal or civil courts."

Section 57 of the act of April 14, 1834, P. L. 352, supplying section 3 of the act of March 29, 1832, provided:

"The Orphans' Court of the city and county of Philadelphia shall be held during every term of the Court of Common Pleas of the city and county, at such times and as often as the judges thereof shall think necessary or proper, and the Orphans' Court of every other county of this commonwealth shall be held during the first week of each term of the Court of Common Pleas of the respective county and at such other times as the judges thereof shall think necessary and proper."

The provision as to term time in Philadelphia has been followed in all the acts, *supra*, establishing separate Orphans' Courts. It has been held that where a separate Orphans' Court has been established it may act upon a petition previously presented.¹⁷

9. Clerks and assistants of separate Orphans' Courts.

By the act of May 6, 1909, P. L. 431, section 5 of the act of May 19, 1874, as amended by the act of April 13, 1887, is amended to read as follows:

¹⁶ Fullerton's Est., 146 Pa. 61.

¹⁷ Miller's Est. (No. 2), 22 Lanc. L. R. 398.

"The register of wills of each and every county containing over one hundred and fifty thousand inhabitants, in which a separate Orphans' Court is or may be hereafter established, shall be clerk of such Orphans' Court, and subject to its directions in all matters pertaining to his office; and he may appoint assistant clerks, but only with the consent and approval of said court, who shall receive annual salaries, payable monthly by the treasurer of said respective counties, as follows, to-wit:

In counties containing over two hundred and fifty thousand inhabitants, the first assistant, thirty-five hundred dollars; the second assistant, twenty-five hundred dollars, and the third assistant, eighteen hundred dollars; and in counties not containing over two hundred and fifty thousand inhabitants, the first assistant, twenty-five hundred dollars; the second assistant, two thousand dollars, and the third assistant fourteen hundred dollars; the annual salaries of all other assistants to be fixed by the judge or judges of said court; but said annual salaries not to exceed fifteen hundred dollars each, in the larger counties, and twelve hundred dollars each in the smaller counties, as above classified; which salaries shall be paid out of the fees of said office paid into the treasury of the county, upon bills attested by said register, and countersigned by a judge of said court. But in the event that the fees received in said office of register of wills be not sufficient to fully pay the register and his assistants, then payment shall be made in full to the said register of wills; but to his assistants in manner as follows,—namely, where there are more than one assistant, then the balance of fees remaining to the credit of said office of register of wills shall be divided among each of said assistants in proportion as his salary shall stand to the whole."

The act of April 25, 1889, P. L. 52, contained the same provisions as to counties of less than one hundred and fifty thousand inhabitants, but limiting the assistance to one clerk, at two thousand dollars per year.

By act of June 12, 1893, P. L. 462, it is provided that

"In each of the counties of the commonwealth containing forty thousand inhabitants, and not heretofore created a judicial district under section 5, article 5, of the constitution, there shall be elected one person to fill the offices of * * * clerk of the Orphans' Court, register of wills and recorder of deeds, etc."

None of the separate Orphans' Courts constituent acts, besides the original and Berks County act provided for more than one clerk.

10. Jurisdiction of the court.

Section 6 of the act of 1874 provides: "The said court shall have and exercise all jurisdiction and powers now vested in, or which may hereafter be conferred upon the Orphans' or Registers' Courts of this commonwealth, and all accounts filed in the office of the register of wills or in the Orphans' Court, shall be audited by the court without expense to the parties, except where all parties in interest, in a pending proceeding, shall nominate an auditor whom the court may, in its discretion, appoint."

11. Powers of injunction.

"Section 7. The said courts shall have power to prevent, by order, in the nature of writs of injunction, acts contrary to law or equity,

prejudicial to property over which they shall have jurisdiction: *Provided*, That security shall be given as is now required by law in cases of writs of injunction."

12. Appeals, when execution stayed.

"Section 8. No appeal shall stay the execution of a final decree, unless notice of such appeal and security be given within twenty days after the time that such decree has been made."

13. Power to make rules.

"Section 9. The said courts shall have power to make all rules necessary for the exercise of the power hereby conferred, or which may hereafter be conferred."

The act of March 18, 1875, P. L. 29, further enacted that

"The judges of the separate Orphans' Courts of this commonwealth, respectively, shall have power, and are hereby authorized, to establish, in their discretion, such rules and regulations as they may deem proper for the publication of advertisements of notices of the auditing of accounts of executors, administrators, guardians or trustees, of notices of sales of real estate under proceedings in said court, of notices to parties in proceedings in partition, and all other cases within their jurisdiction: *Provided*, That said court shall have supervision of and regulate the cost of such publication in all cases, as well by special order in particular cases, as by general rules. Said courts shall establish a bill of costs to be chargeable to parties and to estates before them for settlement, for the services of the clerks of said courts, respectively, in the transaction of business of said courts."

14. County commissioners to provide apartments.

"Section 10. The commissioners of said county shall provide proper and suitable apartments in which said Orphans' Court shall be held, and its business conducted, and in which the records thereof shall be safely and securely kept."

These provisions of the act of 1874 are all repeated almost verbatim in the several county acts.

15. Salaries of deputy register and clerks in Philadelphia.

The act of April 4, 1907, P. L. 48, provides:

"The salaries or compensation of the deputy register, clerks and employees in the office of the register of wills of any county of this commonwealth having a population of one million,¹ or over, shall be as follows: Deputy register, at the rate of twenty-five hundred dollars per annum; one chief clerk, seventeen hundred dollars; one assistant chief clerk, sixteen hundred dollars; one bookkeeper and cashier, fifteen hundred dollars; transcribing clerks, recording clerks, inventory clerks, index clerks, compare clerks, miscellaneous clerks and stenographer, each at twelve hundred dollars per annum; custodians of records and a messenger, each, at one thousand dollars per

¹ This means Philadelphia alone. The population of Allegheny County exceeded one million in 1910, but the act, *supra*, was intended to apply to Philadelphia only.

annum. Such salaries and compensation to be paid monthly by the treasurer of such county, according to existing laws."

(For fees of registers and clerks of the Orphans' Court, see *infra*.)

16. Judges in separate Orphans' Courts.

Section 3 of the act of May 19, 1874, provided for three judges learned in the law, in Philadelphia, either of which may hold said court, and one each in Allegheny and Luzerne Counties. The act of April 28, 1887, P. L. 72, provided for an additional judge in Philadelphia, and the act of March 22, 1907, P. L. 26, for an associate judge. The act of May 5, 1881, P. L. 12, provided for an associate judge in Allegheny County.

Section 2 of the act of May 24, 1878, P. L. 131, provided that in the courts having but one judge he should be styled "the president judge," and section 1 provided where there are two or more such judges, the one "who shall be oldest in commission and continuous service" shall be president judge; and if two or more shall commence their term at the same time "they shall draw lots for a commission as president of said court."

By section 3, if the president judge is reëlected he shall continue as president. By section 4 when two or more are elected at the same time, they shall draw lots for priority of commission.

Under act of March 29, 1832, P. L. 190, a suitor may have his cause continued when the president judge is absent, until he shall attend.

17. Judges of separate Orphans' Courts may hear equity cases.

Section 1 of the act of April 18, 1905, P. L. 208, provides:

"That in addition to the powers now possessed and exercised by the judges of the separate Orphans' Courts of this commonwealth, said judges shall, when called upon by the president or other law judge of any Court of Common Pleas, as hereinafter provided, have power to hear and determine all issues and other matters in equity so fully and effectually, and to dispose thereof in the same manner, as may be done by the Courts of Common Pleas or the law judges thereof sitting in equity, in accordance with the laws, rules, regulations and practice governing the exercise of equity jurisdiction in this commonwealth. And whenever any service shall be rendered, in pursuance hereof, by a judge of such Orphans' Court, he shall be deemed to be specially presiding in, and to have the powers of, the Court of Common Pleas of the proper county, sitting in equity."

18. Duty not compulsory upon the judge.

"Section 2. Nothing in this act shall be construed to make it compulsory upon the judges of the said Orphans' Court to render the services aforesaid; but whenever the proper despatch of business requires it, [and] an arrangement can be made with a judge of such Orphans' Court for such service, the president judge of the Court of Common Pleas of the proper county shall certify all matters or issues to be heard and determined by such Orphans' Court judge, specially presiding as aforesaid."

19. Additional law judge may arrange for service.

"Section 3. In districts having one or more additional law judges, whenever the president judge shall be absent from the district or disabled by sickness, and occasion should occur, it shall be competent for the additional law judge, and in districts having more than an additional law judge, for the one oldest in commission, being then in the district, to arrange for the service herein provided for, and to make the necessary certificates, in like manner and to the same intent, effect and purpose as the same could be done by the said president judge."

20. Compensation of judge sitting in equity.

"Section 4. No additional compensation shall be received by the said Orphans' Court judges for any service rendered in pursuance hereof; but they shall be entitled to be paid such mileage and other actual expenses as provided by law for judges of this commonwealth when holding court outside of the district for which they shall have been commissioned."

This act has been declared constitutional.¹⁸

21. Separate Orphans' Court bill of costs.

Section 1 of the act of March 24, 1877, P. L. 37, provides:

"That in counties wherein separate Orphans' Courts are now or may be established, the said courts shall establish a bill of costs to be chargeable to parties and to estates for the probate of wills and testaments, and granting of letters testamentary and of administration, and for all the services of the register of wills of such county in the transaction of the business of his office: *Provided*, The tax to be paid to and received by the register for the use of the commonwealth shall not be less than the sum now or hereafter fixed by law."

The same act fixes the form of the bond of the register in counties of 300,000 inhabitants and upwards.

22. Fees of clerk of the Orphans' Court.

Under section 2 of the act of March 18, 1875, P. L. 29, the Orphans' Court of Philadelphia fixed the following bill of costs for the clerk:

Account, order to file.....	\$1.00
Account, certified copy of, per page.....	.50
[Page means a page of cap or brief paper.]	
Account of trustee, filing:	
Under \$1,000	8.50
Over \$1,000	13.50
Acknowledgment of deed .....	.50
Adjudication of each account:	
Not exceeding \$100	1.00
And for each additional \$100, to not exceeding \$900.....	1.00
Between \$900 and \$10,000.....	10.00
Between \$10,000 and \$100,000.....	15.00
Over \$100,000	20.00
Adjudication, certified copy of, per page.....	.50

¹⁸ Morgan v. Reel, 213 Pa. 81.

Affidavit .....	.25
Appearance bond on attachment	2.00
Appeal to Supreme Court, certificate of record and bond	5.00
Attachment	1.00
Auditor's report, certified copy of, per page .....	.50
Auditor's report, filing	1.00
Auditor's report, recording, per page .....	.50
Certificate	1.00
Certificate, duplicate .....	.50
Citation	1.00
Commitment	1.00
Decree, certified copy of, per page .....	.50
Examiner's report, certified copy of, per page .....	.50
Examiner's report, filing	5.00
Exemplification of record, per page .....	.50
<i>Fieri facias</i>	1.00
Guardian, petition for appointment of, filing and bond:	
If only one minor	2.50
If more than one minor, for first bond	2.00
Each succeeding bond	1.00
Injunction, filing bond	2.50
Injunction, order in nature of	1.00
Inquest, one description	5.00
Each additional description .....	.50
Inventory, guardians' .....	.50
Marriage license .....	.50
Master's report, filing	5.00
Minor's certificate and oath .....	.50
Money paid into court:	
Commissions, 1 per cent. up to \$1,000 and 1/2 per cent. on any excess of \$1,000	
Mortgage, filing petition and bond for leave to	2.50
Order to file account	1.00
Order to pay	1.00
Order of sale, one description	3.00
Each additional description .....	.50
Order of sale, certified copy of, per page .....	.50
Petition, certified copy of, per page .....	.50
Purchase money, filing petition and bond for	2.50
Refunding bond	2.50
Sale, petition for, filing and taking bond	2.50
Students, certificate of preliminary examination .....	.25
Students, application for admission and certificate	1.00
Subpœna .....	.25
Trustee, petition and bond for, filing	2.50
Trustee, filing account of, under \$1,000	8.50
Over \$1,000	13.50
<i>Venditioni exponas</i>	1.00
Widow's claim for \$300	1.50

23. Fees of the clerk in Allegheny County.

The table of fees of the clerk of the Orphans' Court was established under the act of March 18, 1875, P. L. 29.

Section 1, rule 22, provides:

"No petition will be filed of record, nor citation, rule or certificate be issued by the clerk except where otherwise specially ordered for cause shown, until the costs thereon shall have been paid; and such payment shall not prejudice the question of the liability for costs as between the parties to the record as thereafter determined by the court.

Fees.

Recording auditor's report, examiner's report, etc., per page cap or brief paper	\$.50
Inquest, one description.....	3.00
Widow, claim for \$300.....	.50
Petition and citation to file account and return thereto.....	2.00
Petition for allowance.....	.50
Petition for discharge of liens and precept to sheriff.....	5.00
Return to mortgage and confirmation.....	1.00
Rule for attachment, and attachment.....	1.00
Appearance bond on attachment.....	1.00
Commitment	1.00
Order of sale and bond, one description	2.00
Each additional description .....	.50
Return of sale and confirmation.....	2.00
Confirmation of account.....	1.25
Advertising audit list, not exceeding.....	3.00
Attendance at hearing of audit, preparing schedules, etc., first page of cap or brief paper.....	4.00
Each additional page.....	1.00
Filing and entering petition and order for guardian.....	1.00
Bond of guardian.....	.50
Certificate of appointment.....	.50
Petition for appointment of guardian for person.....	1.00
Filing guardian's inventory.....	.50
Guardian's statement .....	.50
Appeal to Supreme or Superior Court, certificate of record and bond	3.00
Appeal to Orphans' Court.....	1.00
Precept to Court of Common Pleas.....	2.00
Certified copy of petition, decree, order of sale, account, report of auditor or examiner, exemplification of record, etc., per page of cap or brief paper.....	.50
Filing petition and bond for trustee, injunction and to mortgage	2.50
Certificate .....	.50
Subpœna .....	.25
Entering receipt .....	.50
<i>Fieri facias</i>	1.00
<i>Venditioni exponas</i>	1.00

For receiving and disbursing money paid into court, one per centum for first five hundred dollars, and one-half of one per centum per dollar above that sum.

24. Fees of the clerk of the Orphans' Court.

The act of April 28, 1899, P. L. 113, amending the 6th section of the act of April 2, 1868, established the fees of clerks of the Orphans' Court generally, as follows:

"For filing and entering petition for appointment of guardian and issuing appointment.....	\$1.00
Filing and entering list of property selected and retained by widow under act of assembly.....	.50
Entering judgment, order or rule of court.....	.25
Confirmation of accounts, executors, administrators or guardians	1.25
Filing petition for pension, order, copy and seal.....	.45
All proceedings on inquisition on real estate, including petition, order, return, confirmation, rule and recording.....	2.75
Taking and docketing recognizances.....	.40
All proceedings for sale of real estate.....	3.50
Filing and entering bond.....	.30
Entering motion and rule of court thereon.....	.25
Issuing subpoena and seal.....	.30
Each name after the first on such subpoena.....	.02
Issuing citation with seal and recording or filing petition therefor .....	.50
Issuing attachments with seal and recording or entering petition therefor .....	.50
Copy of record, or any paper filed, or any part thereof for every eight words .....	.01
Every search where no other service is performed.....	.15
Filing any paper not specially provided for.....	.15
Recording a draft.....	.25
Making out order under seal, to auditors appointed to apportion intestate's property among creditors, and to auditors appointed to settle and adjust accounts of administrators, executors or guardians.....	.75
Filing auditor's report, and entering approval of court thereon	.20
Copy of said report for either party, each item.....	.01
Accounts of administrators, executors or guardians, and auditor's reports for every eight words or sixteen figures....	.01
Certificate and seal.....	.30
Receiving and distributing money paid into court for every dollar under five hundred.....	.02
For each dollar exceeding five hundred.....	.01

Same fee for services not herein specially provided for, as for similar services.

25. Duties of the clerk, generally.

By section 56 of the act of April 14, 1834, P. L. 351, it was provided that the clerk shall have the custody of the records and the seal of the respective court and keep the same at the place of holding such court, and in the apartments provided by law for that purpose: He shall faithfully perform, under the direction of the court, all the duties appertaining to his office."

Under section 18 of the act of April 25, 1850, P. L. 569, he is "required to place upon record, in a fair legible hand, in a book or books to be provided for that purpose, all accounts of executors, administrators and guardians, as well as all reports of auditors appointed by the Orphans' Courts * * * omitting the testimony and documents accompanying the same; the fees for this service to be one-half of the amount now allowed by law for the recording of deeds."

26. Clerk to keep partition docket.

The act of April 4, 1889, P. L. 23, provides that the clerk of the Orphans' Court is "required to enter in a book, to be procured for that purpose, to be called a partition docket, all the proceedings in partition in every case in the respective court, from the commencement to the final judgment and decree thereon, and which shall be and the same is hereby made the record of said court. For which service he shall be entitled to receive the same fees as the recorder of deeds receives for recording, to be taxed and paid as part of the costs of such proceedings."

CHAPTER II.

JURISDICTION OF THE ORPHANS' COURT.

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|---|---|
| 1. General jurisdiction. | 7. Power over debtors and parties to the proceedings. |
| 2. Separate Orphans' Courts. | 8. Territorial limits of jurisdiction. |
| 3. Particular jurisdiction. | 9. Jurisdiction of assets. |
| 4. Jurisdiction of partition under a will. | 10. Jurisdiction over real estate. |
| 5. Parties who do or do not come within its jurisdiction. | 11. Power over decedent's interest in partnership. |
| 6. Power over strangers or persons acting as agents. | 12. Powers when jurisdiction has attached. |

I. Jurisdiction of the Orphans' Court.

It has been seen that the Orphans' Court is not a court of Equity, although there have been a few tangent *dicta* to that effect,¹ but it is a court of such jurisdiction under the statutes as authorizes it to adjudicate questions according to equitable principles, as for example in the settlement of the accounts of fiduciaries brought within its forum by statutes.² It does not come within the strict rules and forms of Equity practice, but it only assimilates them by reason of proceeding by petition, answer and replication.³ This distinction is to be borne in mind, because the proceedings in the Orphans' Court are subject to be moulded by the court all through so that justice and equity may be done, even after both the appellate courts have spoken upon the formalities of the proceeding;⁴ whereas in Equity practice, in the Equity side of the Court of Common Pleas, not only the formalities of pleading must be strictly observed, but the rules of practice as laid down by the Supreme Court must be followed as having the binding force of law.⁵ In the Orphans' Court there are no jury trials, for the good reason that no statute authorizes any,⁶ but when a question of fact arises, upon which the judge wishes the advice of a jury, the issue is framed and certified to the Common Pleas for trial.

The Orphans' Court has no probate jurisdiction⁷ because the statute has reposed that jurisdiction with the register of wills.

¹ Comth. v. Judges, 4 Pa. 301; Johnson's Est., *supra*.

² Bayley's Ap., 60 Pa. 354; Kidder's Est., 1 Kulp, 412; Farrer v. Denning, 11 Supr. C. 62.

³ Steffy's Ap., 76 Pa. 94; Brinker v. Brinker, 7 Pa. 53; P. & L. Dig., vol. 14, col. 24247.

⁴ DeHaven's Est., 24 Lanc. L. R. 97.

⁵ Gibbon's Ap., 104 Pa. 587; Hinnersthit v. U. Tr. Co., 206 Pa. 91; Cassidy v. Knapp, 167 Pa. 305; Traction Co. v. R. Co., 180 Pa. 432; Palethorpe v. Palethorpe, 184 Pa. 585.

⁶ Okeson's Ap., 2 Gr. 303.

⁷ Mitchell v. Mitchell, 6 Phila. 351.

2. Separate Orphans' Courts.

When a separate Orphans' Court is established, the register of wills, both by the constitution and the act of May 19, 1874, P. L. 206, becomes clerk of that court,⁸ and where a county having a separate Orphans' Court is divided, only that which remains within the old county is subject to the jurisdiction.⁹ The judge of a separate Orphans' Court, it has been held, has no power to hold Orphans' Court beyond his county.¹⁰ Thus it is seen that the Orphans' Court is a court of special statutory jurisdiction, and to ascertain the same it is essential to have recourse to the statutes which declare it.

3. Particular Jurisdiction of the Orphans' Court.

Section 19 of the act of June 16, 1836, P. L. 784, thus particularizes the matters within the jurisdiction of the several Orphans' Courts:

"I. The appointment, control, removal and discharge of the guardians of minors, and the settlement of their accounts.

II. The removal and discharge of executors and administrators, deriving their authority from the register of the respective county, and the settlement of their accounts.

III. The distribution of the assets and surplusage of the estates of decedents, after such settlement, among creditors and others interested.

IV. The sale of real estates of decedents.

V. The partition of the real estates of intestates among the heirs.

VI. The specific execution of contracts made by decedents to sell and convey any real estate of which such decedent shall die seised.

VII. Proceedings for the recovery of legacies.

VIII. All cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent.

And such jurisdiction shall be exercised under the limitations and in the manner provided by law."

4. Jurisdiction in partition under a will.

Section 1 of the act of May 9, 1889, P. L. 146, provides:

"The jurisdiction of the several Orphans' Courts of this commonwealth, in the partition and valuation of the real estates of decedents, shall extend to all cases of testacy, without respect to the minority of the parties, their relationship to the testator, or the fact of a widow's election not to take under the will, and the proceedings in such cases shall be in the same manner and with like force and effect as is now provided by law in the partition of the real estate of persons dying intestate."

The act of June 16, 1893, P. L. 464, validated partitions had prior to the above act.

The jurisdiction of the Orphans' Court is neither advisory nor anticipative.¹¹ There must be the basis of a proceeding initiated un-

⁸ French v. Comth., 78 Pa. 339.

⁹ Comth. v. Harding, 87 Pa. 343.

¹⁰ Livingston's Ap., 88 Pa. 209.

¹¹ Willard's Ap., 65 Pa. 265; Potter's Est., 4 D. R. 329; Whitaker's

der some statutory authority, before it can act and exercise its powers.¹²

5. Parties who do or do not come within its jurisdiction.

In order to come within its jurisdiction the parties must be interested and amenable to it.¹³ The relief sought must also be within its power. For example, it cannot compel an executor or trustee *de son tort* to account.¹⁴ So it has no jurisdiction of a contract made between persons living as to the disposition of property of a decedent.¹⁵ And where there is a foreign guardian who is not a party to the proceeding, the court will not determine the ownership of a fund deposited in bank.¹⁶ But nonresident legatees may be cited under section 19, of the act of June 16, 1836, P. L. 784, to show whether a claimant is a creditor of the decedent or whether his property is commingled with the estate in the executors' account.¹⁷ It was queried by Penrose, J., whether the Orphans' Court had any jurisdiction over specific bequests of articles withdrawn from the power of the executor.¹⁸

A clerk of the court is amenable, even after the expiration of his term, for a trust fund paid into court for a minor who had no guardian, which fund he appropriated;¹⁹ so is a removed administrator, who may be compelled to file an account;²⁰ so, also, may an executrix and the residuary legatees be compelled to pay an annuity, by order of the court, on petition, and if she has married she may be compelled to give security.²¹ The funds belonging to a minor will be followed through various hands and ordered restored to the proper custodian.²²

And in the case of a guardian who sells lands of his ward in such a manner as to give no title, he may be compelled to make restitution to the purchaser.²³ The Orphans' Court may also ratify an executor's sale made without authority and cite the purchaser to appear and protect his interests.²⁴ But where a guardian manages property for a ward after he comes of age, as to that, it cannot cite

Est., 14 Phila. 254; Cobleigh's Est., 8 Lack. L. N. 107; Fabian's Est., 4 C. C. 204; Teller's Est., 215 Pa. 263; 15 D. R. 53; Glanding's Est., 15 D. R. 985; Siegfried's Est., 25 Lanc. L. R. 235; Good v. Good, 19 Lanc. L. R. 174; Mulley's Est., 10 Kulp, 523; Beaver's Est., 18 Phila. 90; Cobleigh's Est., 23 Supr. C. 271.

¹² White's Est., 2 W. N. C. 383; Morton's Est., 201 Pa. 269; Jacoby's Est., 201 Pa. 442; Scully's Est., 11 D. R. 176.

¹³ Hopkins' Est., 11 Phila. 42; Brooke's Ap., 102 Pa. 150.

¹⁴ Delbert's Ap. (No. 2), 83 Pa. 468, citing Peebles' Ap., 15 S. & R. 39; Power's Est., 10 W. N. C. 208.

¹⁵ Wood's Est., 7 D. R. 655.

¹⁶ Harrisburg Natl. Bank's Ap., 84 Pa. 380.

¹⁷ Hopkins' Est., 11 Phila. 42.

¹⁸ Wood's Est., 7 D. R. 484.

¹⁹ Heth's Est., 32 Pitts. L. J. 318.

²⁰ Bradley's Est., 9 Phila. 327.

²¹ Coxe's Ap., 120 Pa. 98.

²² Beishlag's Est., 7 D. R. 127; Odd Fellows' Savings Bank's Ap., 123 Pa. 356.

²³ Kreimendahl's Est., 17 Supr. C. 496.

²⁴ Musselman's Ap., 65 Pa. 480.

him to account.²⁵ The same is true of an assignment of mortgages in trust which took effect before assignor's death.²⁶ However, it is different where the trustee of a gift *mortis causa*, in fraud of the widow, is also executor of the will of the donor;²⁷ and where an executor comes into possession of funds which he misapplies the Orphans' Court and not the Common Pleas is the proper forum to compel him to deliver.²⁸ Where a widow is administratrix and files an account, the Orphans' Court will not adjust a transaction subsequently between her and the owner of a farm charged with dower, nor for rent claimed by the heirs after the death of testator.²⁹

On exception, items of rent, taxes, insurance and repairs will be stricken from an administration account, when the transactions are subsequent to the death of the decedent.³⁰ It is only with the consent of all the heirs that such a commingled account can pass.³¹ So that the court will not pass upon the action of an auditor upon such accounts,³² nor compel an administrator to account for rents and profits of land claimed by one under an agreement of sale from decedent.³³ But where an administrator acting under a power of attorney from one of the heirs receives the share of such heir and has submitted himself to the jurisdiction he may be compelled to account to the administrator of such heir.³⁴ Where by agreement the widow and heirs permit the administrator to manage the entire estate, they will be estopped from challenging the jurisdiction they have chosen, especially where the statute of limitations has run as to some of the items.³⁵ The Orphans' Court will not set aside a sale of land made by an executor without authority where he bought it on a trust at sheriff's sale to protect the judgments of the testator against it. He held it only as trustee.³⁶ A widow having assented to the payment of her share in the personalty to the guardian of the minor children is also estopped from subsequently asking the court for an order on the guardian to pay it over to her.³⁷

The Orphans' Court has no power to authorize an attorney for a trustee to enter payment on the margin of a record of a mortgage by reference to proceedings in said court.³⁸ A husband who takes out letters on the estate of his deceased wife brings himself within the jurisdiction of the Orphans' Court and he cannot maintain a bill in the Common Pleas to declare himself the real owner of the property.³⁹ So is one who seizes property of a decedent and claims

²⁵ Evans' Est., 1 D. R. 453.

²⁶ Hamburg Bank's Ap., 19 W. N. C. 177.

²⁷ De Arman's Est., 32 Pitts. L. J. 182.

²⁸ Lafferty v. Corcoran, 180 Pa. 309.

²⁹ Brandt's Est., 11 Lanc. L. R. 321.

³⁰ Tracy's Est., 15 Mont'g Co. 30.

³¹ Walker's Ap., 116 Pa. 419.

³² Shisler's Est., 13 Phila. 333; Crook's Est., 11 D. R. 387.

³³ Shisler's Est., *supra*.

³⁴ Emerick's Est., 6 C. C. 641.

³⁵ Hoffman's Est., 185 Pa. 315; Hill's Est., 19 Lanc. L. R. 209.

³⁶ Barber's Ap., 125 Pa. 564.

³⁷ Evans' Est., 7 Supr. C. 146.

³⁸ Benjamin's Est., 12 Luz. L. R. 28.

³⁹ Hutchinson v. Dennis, 217 Pa. 290.

it as a gift *inter vivos*; but upon the facts he may be entitled to an issue to be tried in the Common Pleas.⁴⁰ But, when an executor receives money innocently and pays it out under an order from the Orphans' Court, which money belongs to another, proceedings against him to determine the value of it can only be had in the Common Pleas.⁴¹ The Orphans' Court has very large equitable powers in its administration and will be governed by equitable principles independently of express statute.⁴² But where there is a question of title to property which can alone be determined by a jury, it will not assume jurisdiction;⁴³ and the Common Pleas of the county in which the land lies has the power to declare a trust in it, where an executor invested funds of his estate in it, in his own name.⁴⁴

6. Power over strangers or persons acting as agents.

Where a person acts *mal adroit*, pretending that she was administratrix and by suit collects money due the estate, her attorney may be enjoined by the Orphans' Court from paying it over to her or to anyone else except by further order of the court.¹ So an attorney, who is also surety of the administrator, and receives the property of the decedent, is amenable to the jurisdiction of the court and personally liable for the property in his hands.² He is doubly liable, first as surety and second as an officer of the court, to which he has sworn fidelity.

But the Orphans' Court will not assume jurisdiction of a dispute between an attorney and his client, about the attorney's compensation and order the attorney to pay over the amount he holds and claims for his professional services.³ It has no power to compel a stranger to account as agent of the trustees, because he was married to the daughter of the testator;⁴ nor one who as agent of the trustees obtained possession of property. The trustees in such cases have their remedy at law.⁵ Where the heirs empower one of their number to make sale of real estate, giving him a power of attorney to do so, all being *sui juris*, the Orphans' Court has no jurisdiction of the account.⁶ But the Orphans' Court having jurisdiction of a trust estate can follow the funds into the hands of as many parties as they have passed through and having found them may order restitution.⁷

7. Power over debtors and parties to the proceedings.

One who is alleged to be a debtor to an estate is entitled to dispute the claim in an action at law and he cannot be drawn into the

⁴⁰ Mong's Est., 33 C. C. 102.

⁴¹ Goudy v. Wagner, 22 Mont'g 21.

⁴² Lynch's Est., 17 D. R. 374, Solly, J.

⁴³ Webb's Est., 15 D. R. 54.

⁴⁴ Goodwin v. Colwell, 213 Pa. 614.

¹ Piening's Est., 15 W. N. C. 384.

² Watts' Est., 158 Pa. 1. Mitchell and Thompson, dissenting.

³ Robb's Est., 6 C. C. 644.

⁴ Gaul's Est., 9 Phila. 333; Huber's Ap., 80 Pa. 348, affirming same.

⁵ Delbert's Ap. (No. 2), 83 Pa. 468.

⁶ Ross v. Coolbach, 6 Lanc. L. R. 290.

⁷ Kaiser's Est., 2 Lanc. L. R. 362.

Orphans' Court if he is unwilling.⁸ There is but one seeming exception to this rule, which is in the case of advancements or debts of heirs or legatees which stand as advancements. But even so, the Orphans' Court can go no further than the distributee's share; for if his debt is greater than his share, other proceedings are requisite to establish it.⁹ Nor will this court take cognizance of the administrator's individual claim against a distributee;¹⁰ nor is a claim against an administrator or executor individually within the jurisdiction,¹¹ unless it be his individual debt to the estate; nor is a claim against a guardian upon an assumption of a mortgage, the debt not being due to the ward.¹² As to a trust created in the lifetime of decedent, the Orphans' Court will not assume jurisdiction. "Trustees" in section 19 of the act of June 16, 1836, P. L. 784, means technical trustees appointed by will or substituted by the Orphans' Court.¹³ The remedy as against strangers is in the Common Pleas.¹⁴

The Orphans' Court may order a sale of decedent's estate to pay a balance due an administrator or executor, but it cannot bind the heir personally for such debt.¹⁵ Where a debt alleged to be due the testator is bequeathed to a legatee, the Orphans' Court cannot collect the debt from a stranger to the administration;¹⁶ nor will this court enforce payment of money due a father of minor children to the trustee of the children on the ground of his legal liability for their support.¹⁷ But where the fund is in the hands of an executor and thus under the control of the court, the income of a fund bequeathed to an intemperate person may be ordered paid for the support of himself and family.¹⁸

8. Territorial limits of jurisdiction.

The statutes frequently refer to "the Orphans' Court having jurisdiction of the accounts" of a fiduciary. The Orphans' Court of the county in which letters are first granted is the court which has such jurisdiction, and the county in which the decedent had his domicile at the time of his death is the county in which letters are authorized to be issued, although he died in another county.

The jurisdiction is not determined by the domicile of the administrator, for he may be a resident of another county.¹⁹ So where one dies in another state and his will is there probated and letters issued to the executor who subsequently removes to Pennsylvania and dies here, a citation will not issue in this state against the executor of

⁸ Sharswood, J., in Harrisburg National Bank's Ap., 84 Pa. 380.

⁹ Springer's Ap., 29 Pa. 208; Schulte's Est., 45 Pitts. L. J. 95. Over, J.

¹⁰ Carter's Ap., 10 Pa. 144; Bradshaw's Ap., 3 Grant, 109; Cotton's Est., 6 D. R. 205; Siegfried's Est., 1 Woodward, 77.

¹¹ Robinson's Est., 12 Phila. 170.

¹² Fuller's Ap., 98 Pa. 534.

¹³ Fretz' Ap., 4 W. & S. 433.

¹⁴ Osterhout's Est., 8 Lanc. L. R. 18.

¹⁵ Kachlein's Ap., 5 Pa. 95.

¹⁶ Bennett's Est., 16 Phila. 204.

¹⁷ Walton's Est., 174 Pa. 195.

¹⁸ Noble's Ap., 39 Pa. 425.

¹⁹ Holt's Est., 11 Phila. 13.

the deceased executor to file an account for the latter.²⁰ But the Orphans' Court has jurisdiction where the decedent died domiciled in this state and his administrator receives funds as ancillary administrator in another state, belonging to his decedent.²¹

Although decedent died in another state, on a question of distribution of the sale of decedent's lands lying in this state, the local Orphans' Court has jurisdiction to determine the amount of indebtedness which should be deducted from the shares of distributees under the will;²² but it cannot question the validity of a will probated in another state, that being a question exclusively for the court of primary local jurisdiction.²³

Where one died domiciled in New Jersey but willed all his estate in trust to a Pennsylvania corporation, and the executors accounted there and transferred the trust fund to the trustee and all the *cestuis que trustent* removed to Philadelphia, the Orphans' Court of Philadelphia had jurisdiction of a petition by the guardian of minor children to award them a share under the New Jersey law similar in import to section 15 of the act of April 8, 1833, P. L. 249.²⁴ In the case of a division of a county the new county has jurisdiction of the trust property and trustees within it by such division.²⁵

9. Jurisdiction of assets.

The Orphans' Court has exclusive jurisdiction of a proceeding by an executor against his co-executor to prevent his collection and wasting of the assets of the estate.¹ It may also require a pledgee of property unlawfully pledged by the executor for his own debt, well known to the pledgee, to restore the same to the estate.² Once admitted or proved that the property belonged to the estate, the Orphans' Court has plenary power to assist the legal representatives to reclaim it and restore it to the due course of administration.³ The same is true where the proceeds of the sale of real estate have been improperly paid to the widow.⁴

The Orphans' Court has general jurisdiction of the assets of a decedent's estate within its purview, and especially so under sections 2 and 3 of the act of April 13, 1854, P. L. 368, it may ratify the purchase of land by the executor at sheriff's sale under mortgage to the decedent and may also authorize him to sell it.⁵ It has no jurisdiction to compel a state bank to surrender stock of a decedent on which it acquired a lien for debt prior to his death;⁶ nor to order an administratrix to satisfy mortgages on the petition of one who

²⁰ Van Dyke's Ap., 4 W. N. C. 283, affirming 11 Phila. 15.

²¹ Page's Est., 75 Pa. 87.

²² Roberts' Est., 163 Pa. 408.

²³ Mackin's Est., 14 Phila. 328.

²⁴ Penrose, J., in Leaming's Est., 10 D. R. 389.

²⁵ Brown's Ap., 12 Pa. 333.

¹ Somers v. Hanson, 5 Phila. 87.

² Marshall's Est. (No. 2), 138 Pa. 285.

³ Tyson's Est., 191 Pa. 218; Tyson v. Rittenhouse, 186 Pa. 137.

⁴ Mulholland's Est., 154 Pa. 491.

⁵ Penrose, J., in Fell's Est., 14 Phila. 248.

⁶ Henry's Est., 33 Pitts. L. J. 241.

claims decedent had no interest in them. On settlement by the administratrix of her account, the court can control the subject.⁷ An agreement by a stockholder in a corporation that after his death the other stockholders shall have an option to buy his stock is exclusively for the Orphans' Court.^{7a}

10. Jurisdiction over real estate.

The Orphans' Court has no jurisdiction over real estate of a decedent except as conferred by statute; and whilst it has jurisdiction over legacies, it has not over devises.⁸ It may order an executor to convey a ground rent for which he is accountable under the will, to the person entitled to it.⁹ Where the will gives the widow the rents and profits during her life for the support of herself and children, under the directions of the executors, it does not create such a trust as will authorize the Orphans' Court to require an account and to decree in favor of the children.¹⁰

Where executors claim real estate under a power in a will, which is disputed by the executors of the widow, also under the will, the case is one where a bill of equity would not lie in the Common Pleas,¹¹ and therefore the Orphans' Court will assume jurisdiction of the controversy, by bill or petition, in the exercise of its equitable powers.¹² The jurisdiction of a trust estate in the hands of a testator when he died is in the Common Pleas.¹³ When the parties have agreed to the appointment of appraisers as directed by a will and the court has extended its jurisdiction thereto, they will not be heard to aver want of jurisdiction.¹⁴

The court will not set aside an appraisement directed by a will, in the absence of an allegation of fraud, gross error or collusion.¹⁵ Where it is directed by the will to be filed in the register's office, exceptions filed in the Orphans' Court will be stricken out.¹⁶ This court has no jurisdiction to compel payment of the income of devised land, for the maintenance of minor children. If the question had arisen on an account of the executors, it would have been otherwise.¹⁷ The Orphans' Court has no authority to order a severance of the fixtures from the realty, and its separate sale,¹⁸ nor to sell oil produced from decedent's land for the payment of debts,¹⁹ nor to authorize the operation of mines belonging to the estate, as against the protest of heirs and a majority of the creditors.²⁰ It was formerly

⁷ Albertson's Est., 20 Phila. 82; Eisenmann's Est., 12 D. R. 322.

^{7a} Fitzsimmons v. Lindsay, 205 Pa. 79.

⁸ Schreyer's Est., 7 Phila. 477, Allison, J. McCullough's Ap., 12 Pa. 197.

⁹ Ingersoll's Est., 11 Phila. 69.

¹⁰ Paisley's Ap., 70 Pa. 153.

¹¹ Tyson v. Rittenhouse, 186 Pa. 137.

¹² Tyson's Est., 191 Pa. 218.

¹³ Walker's Ap., 4 Penny. 452.

¹⁴ Drennan's Est., 32 Pitts. L. J. 462.

¹⁵ Bogers' Ap., 10 Pa. 440.

¹⁶ John's Est., 1 Lanc. L. R. 291.

¹⁷ McCullough's Ap., 12 Pa. 197.

¹⁸ Walters' Est., 10 Kulp, 221.

¹⁹ Johnson's Est., 47 Pitts. L. J. 365.

²⁰ Jones' Est., 23 C. C. 513.

held that the Orphans' Court would not inquire into waste,²¹ except on application for removal of the legal representative or requiring him to give bond, which is statutory. When money arising from sale of land under a will is paid into court under section 19 of the act of February 24, 1834, P. L. 70, the Orphans' Court has power to hear and determine the claim of an alleged creditor of the testator.²² When a fund is payable to the administrator, the Orphans' Court has power to distribute.²³

The Orphans' Court has no power, as a rule, to determine questions of title, the law having created another forum.²⁴ But where a testatrix in her will charges land with legacies, it may determine the validity of deed given by her for the land so charged.²⁵ So, also, where personal property is alleged to be in possession of respondent, which belongs to the estate.²⁶ Where real estate of a decedent is subject to a mortgage held by a trustee, the Orphans' Court may on petition of the trustee, who avers mistake in the satisfaction of the mortgage and desires to claim the deficiency, take proceedings to correct it, though the better practice would be to file a bill in Equity.²⁷ The Orphans' Court has no jurisdiction of a dispute as to royalties collected by the executor and remainderman, when they were willed to testator's wife for life, such royalties having been appropriated in the lifetime of the widow.²⁸ Where a devisee, who is also executor, collects rents, whilst the husband of the testatrix elected to take against the will and as tenant by the curtesy, the dispute is not for the Orphans' Court.²⁹

The Orphans' Court has no jurisdiction to restrain a person from collecting rents of real estate of a decedent. If such person is one of the joint owners of the land, the remedy, in the absence of an averment of insolvency, or that he is excluding the other owners, is account, or by charging him in proceedings in partition with what he has received in excess of his share.³⁰ A charge on land by deed is not within the jurisdiction of the Orphans' Court;³¹ nor can it authorize the residuary legatees to elect to take real estate as realty nor confirm or prevent their election. They can make their election by giving notice to the executor thereof and filing written evidence of it with the clerk. However, an order may be made on the executor to deliver the title papers to the legatees, though the land lies in another state.³²

The Orphans' Court has jurisdiction to determine a question of title, where an administrator of a deceased trustee takes credit

²¹ Crowell's Ap., 2 Watts, 295.

²² Tilghman's Est., 5 Wharton, 44.

²³ Kelly's Ap., 77 Pa. 232.

²⁴ Curran's Est., 9 C. C. 514; Straley's Est., 10 York, 204; Odd Fellows' Savings Bank's Ap., 123 Pa. 356.

²⁵ Tingle's Est., 15 Phila. 552. Penrose, J.

²⁶ Friedman's Est., 7 D. R. 517.

²⁷ Irwin's Est., 23 Lanc. L. R. 46. Smith, J.

²⁸ Duffy's Est., 209 Pa. 390.

²⁹ Farley's Est., 12 Luz. L. R. 27.

³⁰ McNeile's Est. (No. 2), 14 D. R. 300. Penrose, J.

³¹ Brenneman's Est., 27 C. C. 478.

³² Buck's Est., 10 D. R. 331.

in his account for property delivered to the successor in the trust, which is claimed by a stranger, who files exceptions to the account.³³

11. Power over decedent's interest in partnership.

As between partners, when their accounts are unsettled and one dies, the survivor or survivors have the right to settle the partnership and the Orphans' Court will not take jurisdiction of the matter.¹ But where an account has been settled between the partners and a balance is due the survivor, he may present his claim in the Orphans' Court for allowance out of the estate of the deceased partner.²

An agreement between partners that the survivor shall take the lands at a valuation is not enforceable in the Orphans' Court under the fifteenth section of the act of 1834,⁴ which does not apply to the settlement of partnership accounts and affairs.⁵ But where the surviving partner is also executor or administrator of the estate of the deceased partner their accounts come within the jurisdiction of this court⁶ and the settlement of the partnership account must precede the settlement of the estate.⁷ When the jurisdiction of the Orphans' Court is invoked, without objection, it is too late, after sixteen years, for the accountant to raise the question of jurisdiction.⁸ The Orphans' Court, on settlement of the administration account of a deceased partner, may inquire whether the survivor was indebted to the decedent;⁹ and the same applies where the decedent was indebted to the survivor for the proceeds of partnership real estate sold by him;¹⁰ also where the partnership was settled before the death of any of the partners and there was an agreement to share the loss on a claim.¹¹

The Orphans' Court has not jurisdiction to enforce specific performance of a contract made by administrators of a deceased partner to sell the interest of the decedent to the survivors at a price to be fixed by referees.^{11a} It may, where firm moneys were deposited with the decedent, direct the accountant to retain the dividend until the partnership accounts are settled in the proper forum.^{11b}

12. Powers when jurisdiction has attached.

Although jurisdiction attaches to the Orphans' Court, such as to decree specific performance, it has not the general and complete

³³ Kaiser's Est., 33 Pitts. L. J. 63.

¹ Ainey's Ap., 2 Penny. 192; Miller's Est., 136 Pa. 349; Bentley's Est., 16 Phila. 263; Weigley v. Coffman, 144 Pa. 489; Scott's Est., 42 Pitts. L. J. 475; Felton's Est., 7 D. R. 262; Hulse's Est., 12 Phila. 130.

² Miller v. Coffman, 16 W. N. C. 423; De Coursey's Est., 211 Pa. 92.

⁴ Wiley's Ap., 84 Pa. 270.

⁵ Walker's Ap., 4 Penny. 452; P. & L. Dig., vol. 14, col. 24283.

⁶ Unruh's Est., 13 Phila. 337; Sackett's Est., 30 Pitts. L. J. 372.

⁷ Williams' Est., 23 Pitts. L. J. 118.

⁸ Brown's Ap., 89 Pa. 139.

⁹ Alburger's Est., 8 D. R. 114.

¹⁰ Shafer's Ap., 106 Pa. 49.

¹¹ Kern's Est., 5 Kulp, 168.

^{11a} Ralston v. Ihmsen, 204 Pa. 588.

^{11b} Penrose, J., in Meyer's Est., 10 D. R. 445.

powers of a Court of Equity and must stop where the statutory authority ends.¹² But having jurisdiction, it may afford the necessary relief which the case requires, although not properly prayed for in the petition.¹³ A question of fact preliminary to an adjudication must be decided by the court or an issue directed to try it.¹⁴ Having directed a fund to be paid into court, its jurisdiction of it is complete and the effect of an attachment of the fund is for it to decide.¹⁵ Where an executor has pledged stock of the estate for his individual debt, the Orphans' Court has power, under the act of May 19, 1874, P. L. 206, not only to enjoin the further transfer of the stock, but to order the pledgee to surrender it to the estate.¹⁶

The Orphans' Court has power to inquire whether a legacy charged on land was paid or satisfied;¹⁷ or to decree the legacy to respondents, if entitled thereto, all the parties being in court.¹⁸ The Equity side of the Common Pleas will not be ousted on the question of the assignment of a legacy, by the fact that the Orphans' Court has cited the executrix to file an account, on petition of the legatee, and an answer averring that the legacy was assigned to her.¹⁹

The Orphans' Court may, before letting go of its hold, protect a guardian who has incurred personal liability in purchasing property for the use of his ward subject to mortgage.²⁰ If the Orphans' Court cannot take cognizance of the subject matter, jurisdiction cannot be conferred by consent.²¹ This does not apply to an executor's account, where all the parties agreed to permit him to collect rents and embrace them in his account.²²

The Orphans' Court cannot inquire into the validity of a judgment of the Common Pleas,²³ but it may ascertain what amount is due upon it.²⁴ Where a judgment is transferred to another county and the owner becomes purchaser of the land, the Orphans' Court of that county alone has power to order an issue to determine whether the judgment creditor is entitled to credit for it, or whether the consideration has failed since its entry;²⁵ the same is true where a question arises whether the judgment is fraudulent.²⁶ It has power to determine whether a parol trust had been created in favor of a *cestui que trust*, on the settlement of an account by a testamentary

¹² Ake's Ap., 74 Pa. 116; Frantz's Est., 6 Lanc. Bar, 1.

¹³ Cassady's Est., 13 Phila. 383.

¹⁴ Rhoads' Est., 3 Rawle, 420.

¹⁵ Atkinson v. Hines, 5 Phila. 16.

¹⁶ Odd Fellows' Savings Bank's Ap., 123 Pa. 356.

¹⁷ Wertz's Ap., 69 Pa. 173.

¹⁸ Postlethwaite's Ap., 68 Pa. 477.

¹⁹ McMurray v. Davis, 5 W. N. C. 305.

²⁰ Woodward's Ap., 38 Pa. 322; Fitzpatrick's Est., 9 D. R. 88; Ryan's Est., 9 D. R. 339.

²¹ Boyer's Est., 18 Phila. 218; Van Dyke's Ap., 60 Pa. 481; Willard's Ap., 65 Pa. 265; Lee's Est., 16 Supr. C. 627; 18 Supr. C. 513.

²² Marshall's Est., 49 Pitts. L. J. 247; Walker's Ap., 116 Pa. 419.

²³ Schmidt's Est., 185 Pa. 579.

²⁴ Gordon's Est., 9 Phila. 350; Bacon's Est., 2 Phila. 376; Miller's Est., 20 Lanc. L. R. 361.

²⁵ Gordon's Ap., 93 Pa. 361.

²⁶ Rowland's Est., 4 Clark, 190.

trustee.²⁷ While the Orphans' Court has no control over the judgment in the Common Pleas upon a transcript from it, it may modify its own decree as to the balance due from the accountant and such modified decree will operate as a limitation upon the amount to be recovered on it.²⁸

²⁷ Lowry's Ap., 114 Pa. 219.

²⁸ Ashman's Est. (No. 3), 218 Pa. 513.

CHAPTER III.

THE REGISTER OF WILLS.

1. Character of office.
2. Appointment of deputy — powers.
3. Jurisdiction of register.
4. Register's docket.
5. Power of register to grant letters.
6. Affidavit of death of decedent.
7. Form of affidavit.
8. Issuance of letters 21 years from the death of the person.
9. Register to fill vacant administration.
10. Letters granted by the court.
11. State tax on letters.
12. Administration not impeached by later discovery of a will.
13. Right and preference of administration.
14. Caveat against granting letters — form.
15. Renunciation of letters — form.
16. Revocation of letters.
17. Form of petition to revoke letters.
18. Administrators *durante minority*.
19. Letters void, when no bond is given.
20. Bond of administrator — condition.
21. Form of bond and affidavit of sureties.
22. Exceptions to bond — notice, etc.
23. Surety company may become sole surety.
24. Administrator *c.t.a.* to give bond.
25. Bonds to be held for uses.
26. Oath of administrator.
27. Duty to record inventories and appraisements.
28. Records in Mercer and Crawford counties.
29. Duty to certify copies of documents.
30. Register must give notice of bequests to public corporate body.
31. Commissions to examine witnesses.
32. Examination of accounts by the register.
33. Publication of notice of filing account.
34. Accounts shall not be confirmed without notice.
35. Register to account annually.
36. Fees of register.
37. Fees of register in Allegheny County.
38. Fees of register in Philadelphia.
39. Recovery of costs before register.
40. Annual account of fees.

1. Character of office.

The register of wills is an important functionary in the Orphans' Court, not only as the clerk thereof, being ministerial only, but the more important in his *quasi-judicial* capacity as probate officer in the probate of wills and the issuance of letters testamentary as well as of administration. In many of the states these last-named duties are performed by a probate judge, and the court is called a probate court. Before there can be any legal administration of the estate of an intestate the register of wills must be called into action as the law provides, and before any will can become a record it must be duly admitted to probate by him.

Hence it is of great importance that his relations to the subject

be considered as preliminary to the practice in the Orphans' Court, without going into his election, and qualification by giving bond as required by the statutes, but tracing his duties and powers as they are related to the subject of this volume.

2. Appointment of deputy — Powers.

Section 4 of the act of March 15, 1832, P. L. 135, provides:

"Every register shall appoint and keep a deputy to officiate in his absence, for whose conduct he and his sureties shall be accountable, and such deputy shall be capable in law to take the probate of wills and testaments and to grant letters of administration, and to do whatever else by law appertains to the office of register."

3. Jurisdiction of register.

Section 5 of the act of March 15, 1832, *supra*, provides:

"Every register qualified to act as aforesaid, shall have jurisdiction within the county for which he shall have been appointed, of the probate of wills and testaments, of the granting of letters testamentary, and of administration, of the passing and filing of the accounts of executors, administrators and guardians, and of any other matter whereof the jurisdiction may be at any time expressly annexed to his said office, and the act of any register in any matter whereof another register has the exclusive jurisdiction, shall be void and of no effect."

The register is both a ministerial¹ and a *quasi*-judicial officer, since his acts in admitting a will to probate and granting letters cannot be inquired into collaterally,² unless they are void for want of jurisdiction as above declared.³

The constitution and the acts of May 19, 1874, P. L. 206, and April 13, 1887, P. L. 22, constitute the register also clerk of the Orphans' Court, *ex officio*.

4. Register's docket.

The act of April 29, 1844, P. L. 527, requires the register of wills to keep a docket, and section 2 authorizes the judges of the Orphans' Court to inspect the papers on file and make orders and decrees in relation thereto.

5. Power of register to grant letters of administration.

Section 6 of the act of March 15, 1832, P. L. 135, provides:

"Letters testamentary and of administration shall be grantable only by the register of the county within which was the family or principal residence of the decedent at the time of his decease, and if the decedent had no such residence, in this commonwealth, then by the register of the county where the principal part of the goods and estate of such decedent shall be, and no letters testamentary or of administration, or otherwise, purporting to authorize any person

¹ Logan v. Watt, 5 S. & R. 212; Loy v. Kennedy, 1 W. & S. 396; Holiday v. Ward, 19 Pa. 485.

² Lovett's Exs. v. Mathews, 24 Pa. 330; Carpenter v. Cameron, 7 Watts, 51; Wilson v. Gaston, 92 Pa. 207.

³ Devlin v. Comth., 12 W. N. C. 299; Forster's Est., 2 Lanc. L. R. 206.

to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator, under letters granted within this state."

6. Affidavit of death of decedent.

The act of May 15, 1874, P. L. 194, provides:

"All persons applying for letters testamentary or letters of administration shall, before the issue of said letters, file with the register of wills an affidavit, setting forth, as nearly as can be ascertained, the day and hour of the decedent's death to which said letters respectively relate.

"Section 2. All registers of wills are hereby required to file said affidavits, and also to record said date of death with the other records of said decedent's estates respectively."

7. Form of affidavit.

Lancaster County, ss.

Before me personally appeared ———, who being duly sworn deposes and says that ——— late of ——— Township, said county, which was his domicile, died at ——— [naming the place], intestate [or testate] at ——— o'clock — M. of the ——— day of ———, A. D. 19—.

Sworn to and subscribed, etc.

—————

8. Issuance of letters twenty-one years from death of person.

Section 21 of the act of 1832, *supra*, provides:

"No letters of administration shall in any case be originally granted upon the estate of any decedent, after the expiration of twenty-one years from the day of his decease, except on the order of the register's court, upon due cause shown."

This means the Orphans' Court now.

Such issuance, without leave, is not absolutely void and those administering under such letters, and their bondsmen will be held.¹ But proper cause being shown to the Orphans' Court, an order will be made directing the register to issue letters.² A stranger has no standing to object.³

9. Register to fill vacant administration.

Section 20 of the act of 1832, *supra*, provides:

"In all cases where the administration of the estate of any decedent shall become vacant, by reason of any decree of the Orphans' Court, the register having jurisdiction, shall, on being certified thereof, under the seal of the said court, grant new letters, in such form as the case shall require, to the person or persons by law entitled thereto."

10. Letters granted by the court — Register not liable.

Section 10 of the act of April 3, 1851, P. L. 305, provides:

"Whenever letters testamentary or of administration shall have

¹ Foster v. Comth., 35 Pa. 148.

² Linder's Est., 15 W. N. C. 351.

³ Beeder's Est., 10 Pa. 261.

been heretofore or shall be hereafter granted by the register of wills of any of the counties of this commonwealth, by the direction and in the pursuance of an order of the Orphans' Court, and conformably thereto, the said register and his sureties shall not be liable on the register's official bond, for any loss or damage which may have accrued or which may hereafter accrue to any person in consequence of the compliance of said register with the said order of the Orphans' Court."

11. State tax on letters.

Section 36 of the act of March 15, 1832, P. L. 135, provides:

"On the probate of any will and the granting of letters testamentary thereon, also on the granting of any letters of administration, every register shall demand and receive, for the use of the commonwealth, in each case, the sum of fifty cents." ⁴

12. Administration not impeached by later discovery of a will.

Section 68 of the act of February 24, 1834, P. L. 70, provides:

"All such acts of administration as would be in due course of law, in case of intestacy, if done in good faith, and without notice of a will, shall not be impeached, though a will should afterwards be discovered and established."

13. Right and preference of administration.

Section 22 of the act of March 15, 1832, P. L. 135, provides:

"Whenever letters of administration are by law necessary, the register having jurisdiction shall grant in such form as the case shall require, to the widow, if any, of the decedent, or to such of his relations or kindred as by law may be entitled to the residue of his personal estate, or to a share or shares therein, after payment of his debts, or he may join with the widow, in the administration, such relation or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always of those so entitled such as are in the nearest degree of consanguinity with the decedent, and also preferring males to females,¹ and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent applying therefor, or to any fit person at his discretion: *Provided*, That if such decedent were a married woman, her husband shall be entitled to the administration in preference to all other persons; *and provided further*, That in all cases of an administration with a will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such case shall be granted by the register to such one or more of them as he shall judge will best administer the estate."

By act of March 15, 1832, P. L. 135, the husband is given a like preference in his wife's estate after her death. Amongst children it is held that the mother is preferred to a sister of the half-blood.²

⁴ Comth. v. Farnham's Admr., 5 Kulp, 425.

¹ This is a relic of the old Saxon law incorporated in the English feudal system of primogeniture, sometimes called the common law.

² Stoever v. Ludwig, 4 S. & R. 201.

It has been held that the right does not attach to the senior, except when the widow nominates one, but the choice is in the register's discretion.³ If the eldest son is a litigant against the estate, his claim to administer may be disregarded.⁴ None who have adverse interests are entitled to preference if objection be made and letters may be issued to a stranger.⁵ In the order of preference a brother of the half blood precedes sisters of the whole blood.⁶ But the next of kin are entitled over a stranger and, if they object, the Orphans' Court may direct the register to appoint the one nominated by them, after revoking the first appointment.⁷ The same rule applies to letters *de bonis non cum testamento annexo*.⁸ The primal right of the widow will be sustained, even though contestants object on the ground that the intestate was insane when he married her twelve days before his death.⁹ But a second wife, the first having obtained a divorce on the ground of adultery, who was married in Maryland, where the law does not interdict marriage by paramours, is not entitled to administer in Pennsylvania, where the law does so prohibit.¹⁰ Where there is a dispute between the brothers and sisters as to whether securities claimed by the former under their father's will, do or do not belong to the mother's estate on which letters are sought, a stranger may be appointed.¹¹ If the heirs do not take out letters, a creditor may do so on a proper showing. So letters may be granted upon an award of arbitrators on which the time for appeal has passed.¹²

14. Caveat against granting letters.

The form in which the granting of letters of administration or testamentary is objected to is called a *caveat*. In any form, the objection to granting letters, or granting them to a particular person, will be heard by the register, whose duty it is to notify the parties interested. Following is the form used in Lancaster County:

— —, A. D. 191—.

To — —, Esq., Register of Wills of the County of Lancaster:

Let nothing be done in the [probate of any testamentary writing alleged to be the last Will and Testament or] granting Letters of Administration in the Estate of — —, late of — — Township [or city], said county, — —, deceased, without notice to the undersigned, interested in the estate of said deceased.

— —,
— —.

Upon the hearing the register may take testimony as to the mental

³ Shower's Ap., 57 Pa. 356.

⁴ Bieber's Ap., 11 Pa. 157.

⁵ Marshall's Ap., 10 Pa. 454.

⁶ Single's Ap., 59 Pa. 55.

⁷ Neidig's Est., 183 Pa. 492.

⁸ Padelford's Est., 189 Pa. 634.

⁹ Nonnemacher v. Nonnemacher, 159 Pa. 634. (See an array of authorities in this case.)

¹⁰ Stull's Est., 183 Pa. 625.

¹¹ Schmidt's Est., 183 Pa. 129.

¹² McFadden's Est., 7 Supr. C. 368.

condition of the deceased,¹³ when that is in issue. (For practice on *caveat* against a will, see Wills, *infra*.)

15. Renunciation of letters.

Persons entitled to preference may renounce singly or jointly in favor of the next entitled, or all may renounce in favor of a stranger. But one having the preference may, when renouncing, also nominate one in the next class entitled and the register is bound thereby, except for legal incompetency or personal unfitness.¹⁴

The following is a suitable form of renunciation and nomination:

— —, A. D. 191—.

To — —, Esq., Register of Wills of the County of Lancaster:
 — —, — — hereby renounce — right to take out letters
 — on the estate of —, late of —, deceased, and ask that
 letters — be granted to —.

— —,
 — —.

16. Revocation of letters.

As the register is the judge in granting letters, if he finds that he has been deceived or misled and has granted them improvidently, he has the power to revoke them.¹⁵ The power to grant also implies the power to revoke, at the common law, when no rights have been irrevocably vested, so that wrong would be done by such revocation.

17. Form of petition to revoke letters of administration.

Where the register has improvidently granted letters of administration to one not entitled, he may, upon cause shown, issue a citation to the parties interested to appear and show cause why they should not be revoked. Following is a form of petition:

To — —, Esq., Register of Wills, etc., in and for the County of —.

The petition of William Hewit respectfully represents:

I. That he is the eldest son of Abram Hewit, late of said county, deceased, and that the names of the widow and the other children of said decedent are as follows, viz.: Mary Hewit, widow; Samuel, John, and Henry, children, all residing in the city of —, county aforesaid.

II. That letters of administration on said estate were granted by you to said Samuel Hewit without notice to me, and during my absence from this state.

III. That letters of administration ought not to have been granted to the said Samuel Hewit on the said estate, for the following reasons, to-wit (here state such reasons as existed before or at the time of the granting of letters).

Your petitioner therefore prays you to revoke the letters of administration heretofore granted as aforesaid, and that you will grant the same to your petitioner. And he will ever pray, etc.

WILLIAM HEWITT.

(Affidavit of truth.)

¹³ Nonnemacher v. Nonnemacher, 159 Pa. 634.

¹⁴ Swart's Est., 189 Pa. 71.

¹⁵ Boyd's Ap., 38 Pa. 246; McCaffney's Est., 38 Pa. 331.

The register will then issue a citation to the widow and all the heirs, which citation will consist of a copy of the principal parts of the petition, followed by the usual command to appear and show cause, etc.

18. Administrators durante minoritate.

Section 23 of the act of March 15, 1832, P. L. 135, provides:

"Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration as aforesaid to any other fit person or persons, subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty-one years."

19. Letters void, when no bond is given.

Section 27 of the act of 1832, *supra*, provides:

"If any register shall grant letters testamentary to any person, not being an inhabitant of this commonwealth, or shall grant any letters of administration to any person or persons, whatsoever, without having in either case taken a bond and sureties in the manner hereinbefore prescribed, such letters shall be void, and every person acting under them shall be deemed and may be sued and in all respects treated as an executor of his own wrong; and the register granting the same, and his sureties, shall be liable to pay all damages which shall accrue to any person by reason thereof."

20. Bonds of administrators — Form of condition.

Section 24 of the act of March 15, 1832, P. L. 135, provides:

"It shall be the duty of every register upon his granting any letters of administration of the goods and chattels of any person dying intestate, to take a bond or bonds from the person or persons receiving such letters, with two or more sufficient sureties, respect being had to the value of the estate, in the name of the commonwealth, with a condition in the following form, viz.:

"The condition of this obligation is, that if the above bounden A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have come or shall come to the hands, possession or knowledge of him, the said A. B., or into the hands and possession of any other person or persons, for him, and the same so made, do exhibit or cause to be exhibited into the register's office, in the county of —, within thirty days from the date hereof, and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law, and further do make, or cause to be made, a just and true account of his said administration, within one year from the date hereof, or when thereunto legally required, and all the rest and residue of the said goods, chattels and credits which shall be found remaining

upon the said administrator's account, the same being first examined and allowed by the Orphans' Court of the county having jurisdiction, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence, pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this commonwealth, relating to collateral inheritances, and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, if the said A. B., being thereunto required, do surrender the said letters of administration into the register's office aforesaid, then this obligation to be void, otherwise to remain in full force.'

"Provided, That in every case of special administration, the form of the foregoing condition shall be modified so as to suit the circumstances of such case."

21. Form of bond of administrator on grant of original letters.

Know all men by these presents, that we, James D. Reed, of the city of —, John Ross, of the borough of —, and James Lee, of the township of —, all of the county of —, State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the penal sum of — dollars, for the use of the parties interested, for the payment of which, well and truly to be made, we do bind ourselves jointly and severally, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the — day of —, A. D. 19—.

The condition of this obligation is, that if the above bounden James D. Reed, administrator of all and singular the goods, chattels, and credits of Rhys ap Rees, deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have come, or shall come, to the hands, possession, or knowledge of him, the said James D. Reed, or into the hands and possession of any other person or persons for him; and the same, so made, do exhibit, or cause to be exhibited, into the register's office, in the county of —, within thirty days from the date hereof; and the same goods, chattels, and credits, and all the other goods, chattels, and credits of the said deceased, at the time of his death, which at any time after shall come to the hands and possession of the said James D. Reed, or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further do make, or cause to be made, a just and true account of his said administration, within one year from the date hereof, or when thereunto legally required; and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Orphans' Court of the county having jurisdiction, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence pursuant to law, shall limit and appoint; and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, if the said James D. Reed, being thereunto required,

do surrender the said letters of administration into the register's office aforesaid, then this obligation to be void, otherwise to remain in full force.

James D. Reed, [Seal.]
 John Ross, [Seal.]
 James Lee. [Seal.]

Signed and sealed in presence of

_____,
 _____.

Affidavit of sureties.

John Ross and James Lee, the sureties in the foregoing bond, being duly sworn, say, each for himself, that he is seized and possessed of real estate in his own name and right, situate in the county of _____, which he verily believes is worth the amount of such bond over and above all incumbrances, and the amount exempt by law from levy and sale on execution.

John Ross,
 James Lee.

[If the bail is objected to by one interested, they may be cited to come in and justify.]

22. Exceptions to bond — Notice and further requirements.

Section 28 of the act of March 15, 1832, P. L. 135, provides:

"All bonds taken by any register in pursuance of this act from any executor or administrator may be excepted to before such register by any person interested, both in respect of the sufficiency of the sureties therein, and of the sum in which they may be bound. And whenever any such exception shall be so made to any such bond, the register shall give notice thereof to the executor or administrator, and require him to appear before him in a reasonable time, not exceeding ten days, and show cause against the allowance of such exception, and if upon the hearing of the objections of all persons interested, and of such executor or administrator, or of such of them as shall appear, such register shall see cause, he shall order such executor or administrator to find additional sureties, or to give security in a larger amount, as the case may require, and if such executor or administrator shall refuse to comply with such order, or if he shall neglect so to do during the space of thirty days after the making thereof, the register shall revoke the letters granted to him, and grant other letters, in such form as the case shall require, to the person by law next entitled thereto, they giving to such register the security by him ordered as aforesaid: *Provided*, That no such exception shall be so made, or proceedings thereunto be had before the register, after one year elapsed from the time of the filing of a full and perfect inventory by such executor or administrator of the whole of the estate in question."

Such exceptions must be taken before the year is expired.¹⁶

The practice on exceptions is so fully set forth above, that nothing further need be said here.

¹⁶ Simmon's Est., 3 Phila. 172.

23. Surety company may become sole surety in bond.

The act of June 25, 1885, P. L. 181, provides:

"That whenever any person individually, or in any public or private trust, who is now, or hereafter may be required, or permitted by law to make or execute and give a bond, or undertaking with security, conditioned for the faithful performance of any duty, or for the doing or not doing of any thing in said bond or undertaking specified, any head of a department, judge of the Supreme Court, or prothonotary thereof, judge of the Court of Common Pleas, or prothonotary thereof, judge of the Orphans' Court, register of wills, sheriff, magistrate or any other officer, who is now or shall be hereafter required to approve the sufficiency of any such bond or undertaking, may, in the discretion of such officer, accept such bond or undertaking, and approve the same, whenever the conditions of such bond or undertaking are guaranteed by a company, duly authorized by the insurance department of this state to do business in this state, and authorized to guarantee the fidelity of persons holding positions of public or private trust; and such company may become sole surety in any case, where, by law, one or more sureties may be required for the faithful performance of any trust or duty: *Provided, however,* That where such bond or undertaking shall involve the safe-keeping or faithful application of the assets of any fiduciary, such head of department, judge or other officer shall make such order or decree, as shall assure the retention of such assets within this commonwealth, in such manner as such head of department, judge or officer may direct, until disposition thereof be made according to law."

24. Administrator c. t. a. to give bond.

Section 8 of the act of April 22, 1856, P. L. 532, provides:

"It shall be the duty of the register of wills, in granting letters of administration with the will annexed, to take adequate security for the faithful accounting for the proceeds of any sales of real estate the administrator may make under such will; and the sureties taken shall be liable therefor, as well as for any personal effects to come into the hands of the administrator, who shall settle his accounts thereof before the register and Orphans' Court: *Provided,* That the parties interested may agree upon the amount of security to be taken."

Although the form of the bond is that of the common administration bond, it will be binding.¹ This section does not repeal section 12 of the act of February 24, 1834, P. L. 70.² The power of sale given by the testator to his executors is rightly exercised by the administrator *d. b. n. c. t. a.*³

25. Bonds to be held for uses.

Section 44 of the act of March 15, 1832, P. L. 135, provides:

"All bonds given or hereafter to be given by executors, administrators or guardians, shall be held in trust for the use of the commonwealth and such person or persons as may be interested therein;

¹ Hartzell v. Comth., 42 Pa. 453; Comth. v. Miller, 195 Pa. 230.

² Bell's Ap., 66 Pa. 498.

³ Jackman v. Delafield, 6 W. N. C. 9 (Supreme Court).

and suits may be brought thereon from time to time, by all persons interested therein, in the same manner, and with like effect, as is now allowed in the case of sheriff's bonds," by section 4 of the act of March 28, 1803.

(See Johnson's Practice, Vol. II. Assumpsit on official bonds.)

A suit on such bond is similar to one on a sheriff's bond,⁴ each party having his own claim to make out.⁵

26. Oath of administrator, etc.

Section 14 of the act of March 15, 1832, P. L. 135, provides:

"Before any register shall issue letters of administration, letters testamentary, or of administration with a will annexed, he shall administer an oath or affirmation to the person or persons receiving the same, in the following form, viz.:

"'You do, etc., that as executor of the last will and testament (or as administrator of the estate of A. B., deceased, as the case may be), you will well and truly administer the goods and chattels, rights and credits of said deceased, according to law, and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.'"

27. Duty to record inventories and appraisements.

Section 1 of the act of June 24, 1885, P. L. 155, provides: ⁶

"Hereafter, it shall be the duty of the register of wills of the several counties of this commonwealth to record all inventories and appraisements of the estate of any decedent, filed in the office of the register of wills, by the executor or administrator of any such decedent's estate, in a book to be provided for that purpose; and the same shall be indexed, by such register of wills, in an index book, provided for that purpose; and true and attested copies or exemplifications of all such inventories and appraisements, so enrolled, certified under the hand and seal of such register of wills, shall be allowed in all courts, when produced, and are hereby declared and enacted to be as good evidence and as valid and effectual in law, as the original inventory and appraisal themselves, and the said register of wills shall be allowed, for performing such duties, the same fees, as are now allowed by law to such officers for performing similar services."

28. Records in Mercer and Crawford Counties.

The act of April 29, 1844, P. L. 527, provides:

"It shall be the duty of the register for the probate of wills and granting of letters of administration, in the counties of Mercer and Crawford, to purchase a book or books, at the expense of the respective cities or counties, and make, or cause to be made therein, at his own expense, entries setting forth in all cases hereafter arising, the names

⁴ Miltenberger v. Comth., 14 Pa. 71.

⁵ Kiehl v. Comth., 133 Pa. 83; Wetherill v. Comth., 17 W. N. C. 104; Comth. v. Meyerhaven, 17 Phila. 108.

⁶ French v. Comth., 78 Pa. 339; Taylor v. Comth., 103 Pa. 96. Similar duties were imposed on the Register of Luzerne County by act of February 10, 1859, P. L. 31, and Monroe and Carbon Counties by the act of March 12, 1867, P. L. 408.

of decedents, the time of granting letters of administration and letters testamentary, and to whom granted, the amount of the bond filed by any administrator, with the names of his sureties, the time of filing the inventory and appraisement, and the date of settlement of the accounts of executors and administrators, with the amount of debts and credits, showing the balance, and to whom due; the same to be entered in a fair and legible hand, and to be so arranged as to afford easy and ready reference to said matters."

The second section of the act, *supra*, authorizes judges of the Orphans' Court in other counties and cities to make an order and decree to make the same entries in books to be purchased for them by the counties or cities, and the cost of making the entries, also.

29. Duty to certify copies of documents.

Section 32 of the act of March 15, 1832, P. L. 135, provides:

"It shall be the duty of every register to make and certify, under the seal of his office, true copies of all bonds, inventories, accounts, actings and proceedings whatsoever, remaining in his office, being thereunto required by any person having an interest therein, and to deliver the same within a reasonable time to such person applying therefor, on receiving the fee allowed to him by law for such copy or copies, and if any register shall refuse, after the tender of his lawful fees, to make or deliver such copy or copies as aforesaid, he shall be deemed guilty of a misdemeanor in office."

30. Register must give notice of bequests to public corporate body.

Section 5 of the act of April 6, 1791, 3 Sm. L. 20, provides:

"When any last will and testament is brought to be recorded in any of the register's offices of this state, which shall contain any bequest or legacy to a public corporate body, the register is hereby enjoined and required, that, within six months, he shall make known, by letter addressed to the corporate body in whose favor such bequest or legacy is made, the nature and amount of the same, together with the names of the executors of such last will and testament."

31. Commissions to examine witnesses.

Section 9 of the act of March 15, 1832, P. L. 135, provides:

"On the application of any person interested, every register shall have power to issue commissions to take the depositions of witnesses in other counties or states, or foreign countries, in all cases within his jurisdiction, upon interrogatories filed in his office."

(See rules of court on this subject. See also Depositions and Commissions, Vol. I, Johnson.)

32. Examination of accounts by register.

Section 29 of the act of March 15, 1832, P. L. 135, provides:

"Every register, before he shall allow the accounts of any executor or administrator, shall carefully examine the same, and require the production of the necessary vouchers, or other satisfactory evidence of the several items contained in it."

This section does not embrace guardians' accounts.¹ The practice now well-established by careful lawyers is to produce and file a voucher for every item in the account.²

33. Publication of notice of filing, etc.

Section 30 of the act of March 15, 1832, P. L. 135, provides:

"Every register, having allowed and filed any account in his office, shall prepare and present a certified copy thereof to the Orphans' Court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing and allowance, of all of which he shall give notice to all persons concerned in the following manner, viz.: by an advertisement enumerating all the accounts to be presented at any one time to the said court, in at least two newspapers (if there be two), published in the respective county; or, if there be but one newspaper published in such county, then in that one; or, if there be none, then in one printed nearest to the said county, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented, setting forth in substance that the accountants (naming them and the character in which they respectively act) have settled their accounts in the office of the said register, and that the same will be presented to the Orphans' Court for confirmation at a certain time and place (mentioning the same), and also by setting up conspicuously in his office, and in at least six other of the most public places in the county, at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisements; and the actual expense of such advertisement, according to the usual rates of advertising in such newspapers, and of the setting up of such notices, shall be divided among all the accounts presented at the same court, and the proper proportion thereof only shall be charged in any of the said accounts, and allowed to the register as the cost of such advertisement and notices."

Where a rule of court, as in Luzerne County, requires all legal notices to be published in the legal publication, in addition to such newspapers as are required by law, this charge for such publication is properly added.³ The newspapers intended are secular and not religious journals,⁴ or trade publications.

34. Accounts shall not be confirmed without notice.

Section 15 of the act of March 29, 1832, P. L. 190, provides:

"No account of an executor, administrator or guardian shall be confirmed and allowed by the Orphans' Court, except in the cases herein specially provided for, unless it shall appear on the presentation of such account that notice of such presentation has been conformably to the directions of an act entitled 'An act relating to register and registers' courts,' " *supra*.

The act of April 15, 1867, P. L. 86, prohibited publishing such

¹ Hughes' Minors' Ap., 53 Pa. 500.

² Romig's Ap., 84 Pa. 235; Bowman v. Herr, 1 P. & W. 282.

³ McGreevy v. Kulp, 126 Pa. 97.

⁴ Act April 15, 1867, P. L. 86.

notices in religious or denominational church papers. See the act of April 15, 1869, P. L. 1095, as to Delaware County; and the act of February 14, 1871, P. L. 52, as to Chester County.

35. Register to account annually.

Section 34 of the act of March 15, 1832, *supra*, provides:

“Every register shall annually, in the month of September, account for, under oath or affirmation, to the auditor general, and pay into the treasury of the commonwealth, all moneys which may have been received by him, for the use of the commonwealth, during the year immediately preceding the first day of the said month, deducting therefrom such sum only as shall be allowed to him by law for receiving and paying the same.”

36. Fees of register of wills.

In counties having separate Orphans' Courts the act of March 24, 1877, P. L. 37, authorized such courts to “establish a bill of costs to be chargeable to parties and to estates, for the probate of wills and testaments, and granting of letters testamentary and of administration and for all the services of the register of wills of such county in the transaction of the business of his office.” Where not so done, the law of April 2, 1868, P. L. 10, is in force.

Section 7, of the act of 1868, fixes the fees as follows:

“For probate of will and granting letters testamentary thereon, one dollar and twenty-five cents.

For recording same, for every eight words, one cent.

For letters of administration, one dollar.

For bond of administrators, one dollar and seventy-five cents.

For filing of renunciation of widow, executor, guardian or administrator, fifty cents.

For annexing a copy of will, for every eight words, one cent.

For issuing citation or attachment with seal, sixty cents.

For entering *caveat*, twenty-five cents.

For issuing commission to take testimony of witnesses, seventy-five cents.

For issuing precept for an issue, fifty cents.

For issuing subpoena, forty cents.

For administering oath or affirmation, ten cents.

For filing lists of articles appraised, and lists of articles sold, each twenty-five cents.

For examining, passing and filing accounts of guardians, executors or administrators, three dollars.

For advertising executor's, administrator's or guardian's account, two dollars and fifty cents.

For every copy of said accounts, if demanded, not exceeding seventy-five items, one dollar and twenty-five cents.

For every additional item, one cent.

For entering exceptions to administrator's or executor's bonds, and hearing the same, seventy-five cents.

For holding register's court, per day, two dollars and fifty cents.

For every search when no other service is performed, fifteen cents.

For certificate and seal, forty-five cents.

For copy of any bond filed, fifty cents.

For commission on taxes received for the use of the commonwealth in proceedings in office, on every dollar, three cents.

Provided, That in all cases where the value of the estate of the decedent shall not exceed two hundred and fifty dollars, the register shall receive, in lieu of all the fees for official services hereinbefore specified, to be performed after the granting letters, the sum of two dollars and fifty cents.

Register to demand and to receive, for the use of the commonwealth, on every probate of a will, and letters testamentary thereon, fifty cents.

On every letter of administration granted, fifty cents.

Same fee for services not herein specially provided for, the same as for similar services."

Under this last clause, the register has some latitude, in his charges. But where the fee is fixed, it has been held incompetent to change it by rule of court.¹ No fee is allowed him for preparing the certified copy of each account.²

This act excluded Allegheny, Lancaster, Montgomery, Philadelphia, Beaver and Washington Counties, which were left under section 37 of the act of March 15, 1832, P. L. 145. Allegheny, Lancaster and Philadelphia, having separate Orphans' Courts, come under the act of 1877, *supra*.

37. Fees of register of wills in Allegheny County.

The act of March 24, 1877, P. L. 37, authorized the Orphans' Court to fix the fees. In Allegheny County they are fixed as follows for the register of wills (D. R. C. p. 169):

For probate of will.....	\$ 1.00
Letters testamentary.....	1.00
Recording will, per page of brief or cap paper.....	.50
Affidavit of death.....	.50
Copy of will, per page of brief or cap paper.....	.50
Filing inventory.....	.50
Bond of administrator.....	1.00
Letters of administration.....	1.00
Use of commonwealth on each letters testamentary and of administration .....	.50
Filing, examining, passing and recording accounts of executors, administrator, guardian, or other trustee, not exceeding two pages of brief or cap paper, each.....	3.75
Each additional page.....	.50
Filing renunciation.....	.50
Sales list.....	.50
Petition and citation.....	1.00
Entering <i>caveat</i>.....	.50
Issuing commission to take testimony of witness.....	2.00
Precept for issue.....	1.00
Subpœna .....	.25

¹ Register of Wills of Lancaster County, 15 C. C. 479.

² Hogendobler v. Edgerly, 11 Lanc. Bar, 170.

Entering exceptions to administrator's bond and hearing the same	2.00
Certificate and seal.....	.50
Copy of will, account, bond, inventory, etc., per page of brief or cap paper.....	.50
Commission on tax writs, for every dollar.....	.03
Commission on collateral inheritance tax, for every dollar.....	.05
Filing and entering election.....	.50
Filing and entering release, per page.....	.50

38. Fees of the register of wills in Philadelphia.

Under the act of March 24, 1877, P. L. 37, the Orphans' Court of Philadelphia adopted the following fee bill for the register of wills:

Administering oath or affirmation.....	\$.25
Citation or attachment.....	1.00
Commission to take testimony of witnesses.....	5.00
Certified copy of the will, inventory and appraisement or account per page of cap or brief paper.....	.50
Certified copy of bond.....	1.00
Certificate and seal.....	1.00
Certifying record to Orphans' Court and on appeal.....	5.00
Entering <i>caveat</i>.....	.50
Entering exceptions to administrator's or executor's bonds, and hearing same.....	1.00
Filing renunciation of widow, executor, guardian or administrator .....	.50
Filing, advertising and recording accounts of executors, administrators, trustees and guardians, in estates not exceeding \$250 in value.....	6.50
Between \$250 and \$1,000.....	8.50
Between \$1,000 and \$5,000.....	13.50
Between \$5,000 and \$10,000.....	18.50
Between \$10,000 and \$100,000.....	23.50
And over \$100,000.....	28.50
The above fees include the advertisement of audit notices.	
Filing inventory and appraisement.....	.50
Recording inventory, per page or fraction of a page in addition to the fee for filing.....	.50
Letters of administration in estates not exceeding \$250.....	3.00
Between \$250 and \$1,000.....	5.00
Between \$1,000 and \$5,000.....	8.50
Between \$5,000 and \$10,000.....	13.50
Between \$10,000 and \$100,000.....	18.50
And over \$100,000.....	23.50
Including filing and entering bonds and tax due the commonwealth .....	.50
Precept for an issue.....	5.00
Probate of will and granting letters testamentary, in estate not exceeding \$250 in value.....	3.50
Between \$250 and \$1,000.....	5.50
Between \$1,000 and \$5,000.....	10.50

Between \$5,000 and \$10,000.....	15.50
Between \$10,000 and \$100,000.....	20.50
And over \$100,000.....	25.50
Including tax due the commonwealth.....	.50
Recording exemplified copies of letters of administration from other states, etc., where letters of administration are not required to be issued.....	3.50
Recording exemplified copies of wills from other states, etc., where letters testamentary, or of administration <i>c. t. a.</i> are not required to be issued.....	3.50
Recording exemplified copies of wills from other states, etc., where letters testamentary, or of administration <i>c. t. a.</i> are not required to be issued, exceeding ten pages.....	5.00
Recording wills of decedents of this county, and probating the same when no letters are taken out in this county, per page	.50
Filing exemplified copies of letters of administration, etc., from other states, etc., where it is unnecessary to record the same	1.50
Filing exemplified copies of wills from other states, etc., where it is unnecessary to record the same.....	1.50
Filing and entering bond where additional security is required	2.00
Search and certificate.....	.50
Short certificate.....	.50
Subpoena .....	.25

39. Recovery of costs before register.

Section 38 of the act of March 15, 1832, provides:

"Whenever any proceedings before a register or register's court shall be wholly ended, and the fees and costs accrued thereon shall remain during the space of thirty days thereafter, due and unpaid, such register may file a bill thereof, under his hand and the seal of his office, in the Court of Common Pleas of the county, and upon the docketing thereof, an execution may be issued, in the name of the commonwealth, to levy the amount of the said bill, in like manner as executions may issue to levy costs accrued in the courts of common law, and subject, in like manner, to control and taxation by the said court."²

40. Annual account of fees.

Section 35 of the act of 1832, *supra*, provides:

"Every register shall annually in the month of October, render an account, under oath or affirmation, to the auditor general, of all fees which shall have been received by him, or by any person employed by him for official acts and services performed in his office, and whenever the amount thereof, as allowed by the auditor general, shall exceed the sum of fifteen hundred dollars, he shall pay one-half of the excess into the treasury of the commonwealth."

The duties of the register in respect to wills are given under "Wills."

² Comth. v. Farnham's Admr., *supra*.

CHAPTER IV.

ADMINISTRATION — WIDOW'S EXEMPTION — APPRAISEMENT.

1. Notice of appointment.
2. Form of notice.
3. Inventory required within thirty days.
4. Additional inventory.
5. Debts to be included in the inventory.
6. Executor must include debt due testator.
7. Arrears of rent belong to the personal estate.
8. Rents due life tenant go to the executor.
9. Estates *pur autre vie* go to the executor.
10. Appraisement — oath of appraisers.
11. Method of appraisement.
12. Appraisement of widow's exemption.
13. Form of widow's demand.
14. Form of appointment of appraisers.
15. Form of oath of appraisers.
16. Form of appraisement.
17. Appraisement under act of 1909.
18. Rule in Allegheny county.
19. Proceedings on appraisement.
20. Certain minor children entitled without demand.
21. Guardian or administrator to make selection.
22. Appraisement without letters.
23. Form of petition under act of 1883.
24. Form of order of court.
25. Form of oath of appraisers.
26. Form of appraisement.
27. Widow's exemption extended to estate of husband dying outside of the state.
28. Election to retain choses in action.
29. Growing crops, when appraised.
30. Exemption where real estate cannot be readily divided.
31. Title to vest in widow or children.
32. Fees of appraisers.
33. Exceptions to appraisement.
34. Sale of personalty.
35. Filing of vendue list.

I. Notice of appointment, by administrator, etc.

Section 1 of the act of February 24, 1834, P. L. 70, provides:

"The executors and administrators of every decedent shall, immediately after the granting of letters testamentary or of administration to them, cause notice thereof to be given in one newspaper, published at or near the place where such decedent resided, once a week during at least six successive weeks, together with their names and places of residence, and in every such notice they shall request all persons having claims or demands against the estate of the said decedent to make known the same to them without delay."

Where there is a legal publication in which all legal notices are by rule of court required to be published, such notice must also appear therein.¹

By order of court of April 7, 1910, the *Pittsburg Legal Journal* was designated as a legal newspaper of Allegheny County in which

¹ Kulp v. Luzerne County, 20 Supr. C. 7; McGreevy v. Kulp, 126 Pa. 97.

legal notices are required to be published by the act of May 3, 1909, P. L. 424. This act requires all ordinary legal notices in counties having over 500,000 population, to be published in the legal journal "unless dispensed with by special order of court."

In Philadelphia, by rule of court, the *Legal Intelligencer* is made a legal newspaper, and in other counties having such publications, similar rules obtain.

Section 1 of rule 13, Philadelphia, provides:

"The *Legal Intelligencer* will be the weekly newspaper for the publication of notices under the act of April 5, 1855, including public sales of real estate, such advertisement to consist of a concise and intelligible abstract in accordance with said act, and as in the case of sheriff's sales: *Provided*, The charge for such publication shall not be greater than the usual rates charged by such newspaper."

2. Form of notice.

The form of notice should follow the act of Assembly as closely as possible, which may be said of any form.

Following is a concise form:

In the estate of Thomas Wolf, deceased.

Notice is hereby given that letters [testamentary or] of administration have been duly granted by the register of wills of _____ County, State of Pennsylvania, upon the estate of Thomas Wolf, late of _____, said county, deceased, to Weiser Hahn, of _____, county of _____, in said state, and all persons who are indebted to said estate are requested to make payment without delay and all persons who have lawful claims against the same are required to make the same known without delay to the undersigned.

Date, _____.

Weiser Hahn,
Administrator
[or executor].

P. O. Rebersburg, Centre County, Pa.

3. Inventory required within thirty days.

Section 15 of the act of March 15, 1832, P. L. 135, provides:

"It shall be the duty of the said executors and administrators to make a true and perfect inventory of all the goods, chattels and credits of the deceased, as far as they may know or can ascertain them, and exhibit the same into the register's office, within thirty days from the time of administration granted, and also a just account and settlement thereof in one year, or when thereunto legally required: *Provided*, That in the case of the will of a decedent, not resident at the time of his decease within this commonwealth, proved in another state, or in a foreign country, whereof letters testamentary or of administration, with the will annexed, may be granted in this state, the inventory and account therein mentioned, shall be of the goods, chattels and credits of the deceased within this commonwealth." ²

² Rastaetter's Est., 15 Supr. C. 549; Jones' Ap., 99 Pa. 124; Simpson's

The form of the inventory is within the power of the Orphans' Court, to correct, revise and allow a second or more inventories to be filed.³ Where deceased left neither wife nor children, the administrator must include the wearing apparel in the inventory.⁴ Real estate has no place in it. The effect of the inventory is to charge the administrator, *prima facie*, with what it contains and the burden of proof is put upon him to discharge himself for any item or items.⁵

If the account is not filed within one year, as above required, it will not require much scrutiny of a petition to lead the court to spur the administrator to file it.⁶

4. Additional inventory.

Section 3 of the act of February 24, 1834, P. L. 70, provides:

"Whenever personal property or assets of any kind, not contained in the inventory made and returned, as aforesaid, shall afterwards come to the possession or knowledge of the executor or administrator, he shall take an inventory thereof, and return the same into the office of the proper register, within four months from the time of the discovery thereof."

5 Debts to be included in inventory.

Section 5 of the act of 1834, *supra*, provides:

"All bonds, notes and other evidences of debt, also all other claims and demands for money, or any other personal property owned or held by the decedent at the time of his decease, shall, as far as the same may be known, to his executors or administrators, be included in the inventory to be made and returned as aforesaid."

6. Executor not relieved of debt due testator.

Section 6 of the act of 1834, *supra*, provides:

"The appointment of any person to be an executor shall in no case be deemed a release or extinguishment of any debt or demand which the testator may have had against him, but such debt shall be included in the inventory and be subject to distribution like other personal estate."

If such executor does not include the debt he owes the testator in his inventory, he may be charged with it by the auditor.⁷ It is his duty to include it in the inventory.⁸ The co-executor who received none of the assets can sue his colleague and recover a debt due the testator.⁹ The appointment of a judgment debtor as execu-

Ap., 109 Pa. 383; Robins' Est., 180 Pa. 630; Gallen's Est., 26 W. N. C. 308.

³ Comth. v. Bryan, 8 S. & R. 128; Bradford, *in re*, 1 Browne, 87; King's Est., 11 Phila. 26; Reiff's Ap., 2 Pa. 257.

⁴ Steen's Est., 1 C. C. 473.

⁵ Fleming's Est., 25 C. C. 269.

⁶ Dickson's Est., 1 W. N. C. 534; Schlemmer's Est., 28 C. C. 247.

⁷ Gilson's Est., 18 W. N. C. 570.

⁸ Griffith v. Chew, 8 S. & R. 17; Metz' Ap., 11 S. & R. 204; Simon v. Albright, 12 S. & R. 429; Eichelberger v. Morris, 6 Watts, 42; Leisenbiger v. Gourley, 56 Pa. 166 —; Bowman's Ap., 62 Pa. 166.

⁹ Pringle v. Pringle, 130 Pa. 565.

tor does not release the lien of the judgment in favor of a junior lien creditor of the executor.¹⁰

7. Arrears of rent belong to the personal estate.

Section 8 of the act of 1834, *supra*, provides:

"The arrearages of any rent charge, or other rent, or reservation in nature of a rent, due at the death of any tenant, in fee simple, fee tail or for term of life or lives of such rent, shall go to and be vested in the executors or administrators of such tenant, and be included in the inventory and appraised as personal estate."

As the real estate passes to the heir at the death, the administrator cannot manage real estate and collect rents accruing after the death of decedent.¹¹ But he may collect rents which are due at the death of the decedent.

8. Rents due life tenant go to the executor.

Section 7 of the act of 1834, *supra*, provides:

"The rents of any real estate accruing to any tenant for life of such estate, who had demised the same, for a term or time, not fully expired at his decease, shall go to and be vested in the executors or administrators of such tenants; and the due proportion of such accruing rent, to be computed according to the time elapsed at the decease of such tenant, shall be included in the inventory of personal assets."

The rent due the life tenant when he dies goes to his personal representative and the balance to the remainderman.¹² The grantees of a deed also take the emblements where the tenant is a cropper.¹³ Interest on municipal bonds and bonds of private corporations is apportionable in Pennsylvania,¹⁴ if not in England.

9. Estates pur autre vie to go to executors.

Section 9 of the act of February 24, 1834, P. L. 70, provides:

"All estates in lands or tenements, of which the decedent was seized at the time of his decease, for the life or lives of another person or persons, shall, unless such estate have been limited to the decedent and his heirs, go to the executors or administrators of such decedent, and be included in the inventory, and be subject to distribution in like manner as leases for terms of years."

A right only to receive income and profits is not an estate *pur autre vie*, that would come under this act which provides that such life estates shall go to the executor during the life of the *cestui que vie*.¹⁵

10. Appraisement — Oath of appraisers.

Section 26 of the act of March 15, 1832, P. L. 135, provides:

"Every executor or administrator shall cause a just appraisement to be made of the goods, chattels and credits of the decedent, by

¹⁰ Anderson v. Anderson, 183 Pa. 480.

¹¹ McManus' Est., 3 D. R. 183.

¹² Borie v. Crissman, 82 Pa. 125; Agnew's Est., 17 Supr. C. 201.

¹³ Waugh's Exs. v. Waugh, 84 Pa. 350.

¹⁴ Wilson's Ap., 108 Pa. 344.

¹⁵ Knowles' Est., 12 D. R. 631.

two appraisers, of which an inventory is to be made, agreeably to the preceding sections of this act, and the said appraisers shall be sworn or affirmed well and truly, and without prejudice or partiality, to value and appraise said goods, chattels and credits, and in all respects to perform their duty as appraisers, to the best of their skill and judgment."

11. Method of appraisement.

Section 2 of the act of February 24, 1834, P. L. 70, provides:

"It shall be the duty of executors and administrators, having given convenient notice to the appraisers of the decedent's estate of a time and place for making the inventory and appraisement thereof, to produce or make known to them, in the presence of such of the persons interested in the estate as may attend, the whole of the personal estate of the decedent, which may have come to their possession or knowledge; and the inventory and appraisement thereof being finished and certified by the appraisers, to return the same into the office of the proper register."

Although not required by law, it has been a custom to notify such of the heirs as are convenient, to be present and witness the appraisement, and if the widow does not elect to take her exemption out of the goods appraised, any of the heirs may be permitted to take such goods as they choose at the appraisement, giving their receipt therefor, in case the estate is ample, or paying cash for the same, if likely to be required for payment of debts and expenses. The appraisers of the estate shall also be the three called in under the act of April 14, 1851, P. L. 612, to appraise and set aside the widow's exemption, as by act of April 8, 1859, P. L. 425, *infra*, required.

12. Appraisement of widow's exemption.

The act of April 14, 1851, P. L. 612, provides:

"Hereafter the widow or the children of any decedent dying within this commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of three hundred dollars and the same shall not be sold, but suffered to remain for the use of the widow and family, and it shall be the duty of the executor or administrator of such decedent to have the said property appraised in the same manner as is provided in the act passed April 9, 1849, entitled 'An act to exempt property to the value of three hundred dollars from levy and sale on execution and distress for rent': *Provided*, That this section shall not affect or impair any liens for the purchase money of such real estate; and the said appraisement, upon being signed and certified by the appraisers and approved by the Orphans' Court, shall be filed among the records thereof."

The right above given is to the "widow or children," and in case there is no widow, the children may take it, if members of the family,¹⁶ and although over twenty-one years of age, since the act does not say minor children as some of the courts read it.¹⁷

¹⁶ Hines' Ap., 94 Pa. 381; Henkel's Est., 13 Supr. C. 337; Halbe's Est., 27 W. N. C. 440.

¹⁷ Barr's Est., 1 Mona. 764.

But on the death of the mother, the father being living, the children cannot set up the claim upon their mother's estate, the father being liable in law for their support.¹⁸ The widow may take under the will where there is one, and still have this statutory exemption.¹⁹ This provision made for the widow and family is one of public policy and does not depend upon necessity.²⁰ But she must take as widow, for if she re-marries before election and appraisal, she loses her right.²¹ Whatever may have been the purpose of the legislature to vest absolutely so much in the hands of the widow for her immediate support and that of the family, the courts have taken a different view and have held that it is a right which vests only upon election²² and that it is rather a privilege to take than a right.²³ And so they have held it to be a personal privilege which the widow may waive²⁴ whatsoever becomes of the children. It has been held that she may waive it by an ante-nuptial agreement.²⁵ She has been held to have lost the privilege by not demanding an appraisal within a reasonable time.²⁶ A delay of three years in making the demand has been held a waiver;²⁷ so also five years.²⁸ What is reasonable time depends on the circumstances of the case. A widow who is also executrix and does not claim by appraisal but as owner, when defeated in her claim before the auditor is estopped from going back and claiming the exemption.²⁹ Where an aged and infirm widow signed a waiver and in eighteen days after letters issued claimed her exemption, the waiver was disregarded.³⁰ The widow may claim her exemption out of the estate of her husband, who committed bigamy and abandoned her abroad, when she was at all times willing to re-join him.³¹ A widow who claims the exemption without delay, demanding an appraisal, which is denied her, may make her claim before the auditor, on the fund arising from the sale of the real estate.³² The claim may be made before the auditor where other parties would not be affected.³³

¹⁸ King's Ap., 84 Pa. 345.

¹⁹ Compher v. Compher, 25 Pa. 34; Peeble's Est., 157 Pa. 605.

²⁰ Palethorp's Est., 14 C. C. 51.

²¹ Burk v. Gleason, 46 Pa. 297; Comth. v. Powell, 51 Pa. 438; Shumate v. McGarity, 83 Pa. 38; Kern's Ap., 120 Pa. 523.

²² Kern's Est., 120 Pa. 523.

²³ Machemer's Est., 140 Pa. 549.

²⁴ Davis' Ap., 34 Pa. 256; Weaver's Ap., 18 Pa. 309; Neff's Ap., 21 Pa. 247.

²⁵ Tiernan v. Binns, 8 W. N. C. 233; Hunt's Ap., 100 Pa. 590; Ludwig's Ap., 101 Pa. 535.

²⁶ Davis' Ap., 34 Pa. 256.

²⁷ Kern's Est., 120 Pa. 523.

²⁸ Bryan's Est., 4 Phila. 228; Pratt's Est., 23 W. N. C. 543; Machemer's Est., 140 Pa. 549.

²⁹ Countryman's Est., 151 Pa. 577, distinguishing Speakman's Ap. as "an extremely hard case."

³⁰ Potter's Est., 6 Supr. C. 627.

³¹ Grieve's Est., 165 Pa. 126.

³² Gibson's Est., 5 Supr. C. 57, distinguishing Huffman's Ap., 81 Pa. 329. (See also Thomas' Est., 152 Pa. 63.)

³³ Hunt's Est., 11 W. N. C. 123; Rizer's Est., 11 W. N. C. 563; Kirk-

This privilege, when claimed, becomes a right which is paramount to the claims of creditors,³⁴ even to that of a judgment for money loaned to pay for the house in which the husband died³⁵ and as against an execution levied before the death of the husband on a judgment in which the exemption was waived by him.³⁶ But her right is not preferred as against a mortgage,³⁷ nor a precedent mechanic's lien following a mortgage;³⁸ though as to a mechanic's lien alone, her claim was held to be preferred.³⁹ She has been held to have yielded her preference to the funeral expenses by agreeing to pay them.⁴⁰

The decedent's debts which are not secured by mortgage or are for purchase money of the land, must come in after the widow's claim,⁴¹ but the right of the mortgagee is paramount.⁴²

Where the court makes an order striking off the widow's withdrawal of her claim, it is interlocutory, and no immediate appeal lies therefrom.⁴³ Where the widow is a lunatic, her committee must present the claim.⁴⁴

A woman divorced *a mensa et thoro* cannot claim the exemption, as the family relation is severed;⁴⁵ nor can a woman who deserts her husband have the exemption;⁴⁶ nor one who always lived in a foreign country.⁴⁷ But where the husband deserted his wife and lived in another state the widow's claim dates from the time she first heard of his death.⁴⁸ It was held that where no administrator or executor has been appointed the Orphans' Court cannot entertain a petition by the widow for exemption out of a fund in the hands of the sheriff.⁴⁹ This was before the act of June 4, 1883, P. L. 74, providing for the allowance of the exemption, without administration where the estate is not more than \$300 in value.

patrick's Est., 5 Phila. 98; Cocker's Est., 1 D. R. 81; Buddy's Est., 25 W. N. C. 359; McCann's Est., 27 W. N. C. 439; Formad's Est., 3 D. R. 13; Kelley's Est., 3 D. R. 15.

³⁴ Davis' Est., 1 Phila. 360.

³⁵ Nottes' Ap., 45 Pa. 361.

³⁶ Hildebrand's Ap., 39 Pa. 133; Peeble's Est., 157 Pa. 605; Beetem v. Getz, 5 Supr. C. 71; McMullin's Est., 11 W. N. C. 546 and 562. (See Thompson's Ap., 36 Pa. 418.)

³⁷ Conrad v. Susquehanna B. & L. Assn., 18 W. N. C. 133.

³⁸ Miller's Ap., 122 Pa. 95.

³⁹ Hildebrand's Ap., 39 Pa. 133.

⁴⁰ Formad's Est., 3 D. R. 13.

⁴¹ Baldy's Ap., 40 Pa. 328.

⁴² Gangwere's Ap., 36 Pa. 466; Nerpel's Ap., 91 Pa. 336; Wells v. Van Dyke, 109 Pa. 330; Kauffman's Ap., 112 Pa. 645; Peeble's Est., 157 Pa. 605.

⁴³ White Deer Twp's Ap., 38 Leg. Int. 285; Catterson's Ap., 100 Pa. 9.

⁴⁴ Garrett's Est., 14 W. N. C. 310.

⁴⁵ Hettrick v. Hettrick, 55 Pa. 290.

⁴⁶ Tozer v. Tozer, 2 Am. L. R. 510; Nye's Ap., 24 W. N. C. 121.

⁴⁷ Spier's Ap., 26 Pa. 233; Hill's Admr. v. Hill, 42 Pa. 198; Odiorne's Ap., 54 Pa. 175; Platt's Ap., 80 Pa. 501; Coate's Ap., 6 W. N. C. 367; Nye's Ap., 126 Pa. 341.

⁴⁸ Terry's Ap., 55 Pa. 345; Speidel's Ap., 107 Pa. 18.

⁴⁹ Cox' Est., 11 W. N. C. 137.

13. Form of widow's demand.

Following is a form of the widow's demand for an appraisement:
 I, ———, widow of ———, late of the ——— of ——— in the County of Lancaster, deceased, hereby elect to retain out of the [personal or real] estate of said deceased, property to the value of Three Hundred Dollars; and I request [legal representative] of the estate of said deceased, to have the same appraised and set apart for me according to law.

Witness my hand, this ——— day of ———, A. D. 19—.

Witnesses present:

———,
 ———.

———.

14. Form of appointment of appraisers.

I, ———, administrator [or executor] of the Estate of ———, late of the ——— of ———, in the County of Lancaster, deceased, in pursuance of the above election and request, hereby appoint and summon ———, ———, ———, disinterested and competent persons to appraise and set apart for ———, Widow of said deceased, the Three Hundred Dollars' worth of ——— property which said widow has elected to retain under the provisions of the Acts of Assembly in such cases made and provided.

Witness ——— hand this ——— day of ———, A. D. 19—.

———,
 ———.

15. Form of oath of appraisers.

———, ———, ———, being severally sworn or affirmed according to law, do say that they will perform their duty as appraisers, under the above appointment, with impartiality and according to the best of their judgment and ability.

——— A. D. 19—

———.

——— and subscribed }

———,
 ———.
 ———,

16. Form of appraisement.

We, the undersigned, appointed to appraise and set apart three hundred dollars' worth of ——— estate of John Hoffman, late of ——— in said county, deceased, for the use of Frances Hoffman, the widow of the said deceased, have appraised and set apart the following, viz.: [Here describe the articles or the property in detail, with the value of each.]

Taken and appraised by us this ——— day of ———, A. D. 19—.

Witness our hands and seals.

———, [Seal.]
 ———, [Seal.]
 ———. [Seal.]

17. Appraisement under act of 1909.

The same forms, with change of amount, will answer under the act of April 1, 1909, P. L. 87, which gives the widow of one who died without issue, \$5,000, absolutely in real or personal estate, or both, "in addition to the widow's exemption as allowed by law."

This act was declared constitutional, but not an exemption law, in *Gilbert's Est.*, 227 Pa. 648, but a question has been raised whether it applies to a widow of one who died prior to its passage, the principle of law being well settled that all rights are vested at the death of the decedent.

18. Widows' appraisement, rule in Allegheny County.

Section 1 of rule 2 provides:

"All appraisements made under the provisions of the act of April 14, 1851 (section 5, P. L. 613), and its several supplements, and presented to this court for approval, shall be accompanied by a petition setting forth the facts and circumstances out of which the claim arises; whereupon a *prima facie* case appearing to have been made out, such appraisement shall be approved *nisi* and filed, which approval, subject to the notice hereinafter provided, shall become absolute in one month, unless exceptions be filed thereto in the meantime. Notice of filing an appraisement shall be published once a week for two consecutive weeks in the *Pittsburgh Legal Journal*, whereof the last publication shall be at least ten days before final confirmation of such appraisement, and such appraisement shall become absolute on the filing with the clerk of a certificate of such notice, verified by affidavit, unless exceptions shall in the meanwhile have been filed; a minute of the filing of such certificate shall be made by the clerk." ^{49a} [Compare rules.]

19. Proceedings on the appraisement.

It was held that where the administrator refused the widow's demand for an appraisement she could not bring an action of trespass.⁵⁰ Where she had the possession, although no letters issued, she could sue a mere *tort feasor*.⁵¹ When refused out of the personalty she can claim out of the realty.⁵² If she elects to take out of a particular property and dies, her legal representatives are bound by her election.⁵³

The creditor is interested and may intervene to prevent an unfair or inadequate appraisement,⁵⁴ and he, or any one else interested in the estate, may file exceptions to the return of the appraisers. But it is not enough to avoid the appraisement that it was made by the widow's relatives,⁵⁵ though this may be a ground of objection to the confirmation in connection with inadequacy of valuation. An appraisement when approved and confirmed absolutely becomes a record and has the effect of a judgment at common law.⁵⁶ It becomes a judgment *in rem* and is binding against all persons.⁵⁷

^{49a} See *Zaccaginni's Est.*, 52 Pitts. L. J. (O. S.) 177.

⁵⁰ *Neely v. McCormick*, 25 Pa. 255.

⁵¹ *Roberts v. Messinger*, 134 Pa. 309.

⁵² *Thomas' Est.*, 152 Pa. 63.

⁵³ *Finney's Ap.*, 113 Pa. 11.

⁵⁴ *Graves' Est.*, 134 Pa. 377.

⁵⁵ *Vandevort's Ap.*, 43 Pa. 462.

⁵⁶ *Seller's Est.*, 82 Pa. 153. It cannot be collaterally attacked except for fraud. *Runyan's Ap.*, 27 Pa. 121; *Allentown's Ap.*, 109 Pa. 77; *Kaufman's Ap.*, 112 Pa. 649.

⁵⁷ *Runyan's Ap.*, 27 Pa. 121.

If the petition is advertised the cost must be paid by the widow and not the estate.⁵⁸ If the personalty is not sufficient to cover \$300, the balance may be chosen out of the real estate; and the filing of the appraisement makes it a lien, even in the hands of purchasers.⁵⁹

20. Certain minor children entitled without demand.

Section 1 of the act of June 4, 1883, P. L. 74, provides:

"Hereafter in the case of any decedent leaving to survive him any child or children under the age of fourteen years, and no widow, his administrator or executor, without request made to him by any one, shall have appraised and set aside, for the use and benefit of all the minor children of said decedent, to the full value now allowed by law to the widow or children of decedents upon demand made."

21. Guardian or administrator to make selection.

Section 2 of the act of 1883, *supra*, provides:

"The guardian of said child or children, and if there be none, the administrator or executor, with the appraiser, shall make selection of the property set aside, and in the same, the said guardian or the said administrator or executor, with the appraiser, shall be governed by the necessities of such child or children under the circumstances of each case."

22. Appraisement without letters, where estate does not exceed \$300.

Section 3 of the act of 1883, *supra*, provides:

"When any decedent shall leave to survive him a widow or children, and an estate not exceeding in value three hundred dollars, it may be lawful for such widow or children, if to said children the right belongs, by any next friend or guardian, to petition the Orphans' Court of the proper county for the appointment of two appraisers, who may appraise and set aside any property of said decedent, selected by such widow or guardian, or next friend of such children, in the same manner, and with the same effect as if letters testamentary or of administration had issued, and the appraiser been selected in the usual way."

The petition of the widow should be promptly made, for, if by delay, the rights of creditors have attached, it may be refused.¹ This act has no reservation for any class of creditors and the exemption is absolute and cuts out the modern undertaker, which is not an unmixed evil.²

The children who are entitled are those who are in the family relation, and have not left home and become practically emancipated and self-supporting.³

⁵⁸ Homiller's Est., 17 W. N. C. 239.

⁵⁹ Detweiler's Ap., 44 Pa. 243; Lyman v. Byam, 38 Pa. 475.

¹ Roberts' Est., 20 W. N. C. 380.

² Weir's Est., 28 W. N. C. 268. Such was doubtless the intention of the act of 1834, excepting mortgages and judgments for purchase money for the land.

³ Nevin's Ap., 47 Pa. 230; Steel's Est., 9 W. N. C. 274; Halbe's Est., 27 W. N. C. 440.

23. Form of petition for appraisement of personal estate less than \$300 under act of 1883.

No. ——. In the Orphans' Court of Chester County, Pa.

In the Estate of Horatio S. Campbell, late of the borough of Phoenixville, in the county aforesaid, deceased.

To the Honorable, the judges of said court:

The petition of Susan D. Campbell, of the borough of Phoenixville, in the county and state aforesaid, respectfully represents:

That she is the widow of the said Horatio S. Campbell, deceased, who died on or about the tenth day of October, A. D. 1906, intestate, domiciled in the said borough of Phoenixville and County of Chester, leaving your petitioner his widow and heirs at law as follows: Minor children, named respectively: Alfred Ira Campbell, born January 28, 1892; Matilda Campbell, born February 26, 1894, and Florence Mabel Campbell, born November 14, 1902.

That said decedent left an estate not exceeding in value three hundred dollars and no letters of administration have been taken out thereon by anyone. That said estate consisted wholly of a legacy of one hundred dollars bequeathed to the said Horatio S. Campbell by Joseph Campbell, late of the township of Lower Providence, Montgomery County, Pennsylvania, in and by the last will and testament of said Joseph Campbell, deceased, bearing date July 17, 1900, duly probated October 31, 1901, and of record in the office of the register of wills in and for the County of Montgomery in Will Book No. 28, at page 265, etc. In said will the following bequest is made: "I give and bequeath unto Horatio Campbell, one hundred dollars." That the executrix of said Joseph Campbell is now ready and desirous to pay over said bequest.

Your petitioner therefore prays your honorable court to appoint two suitable persons as appraisers to appraise and set aside said property of said decedent to your petitioner as the widow of Horatio S. Campbell aforesaid, in accordance with the act of Assembly of June 4, 1883.

And she will ever pray, etc.

Signed — — —.

County of Montgomery, ss.

[Affidavit to truth of petition.]

John Hyatt Naylor,

Att'y for petitioner.

24. Form of order of court under act of 1883.

And now August 1, 1904, upon presentation of the within petition and due consideration thereof by the court, it is ordered and decreed that — — — and — — —, are appointed appraisers to appraise and set aside to the said widow the property selected by her and to make return according to law.

By the court,

George Kunkel, P. J.

J. H. Musser, Attorney for Petitioner.

25. Form of oath of appraisers.

In the Matter of the Estate { In the Orphans' Court of Dauphin
of — — —, Deceased, Etc. { County.

State of Pennsylvania, County of Dauphin, ss.

Personally appeared before me, the subscriber, an alderman in and for said county and state, — — — and — — —, who being duly sworn according to law, do depose and say that they will well and truly, and without prejudice or partiality, value and appraise and set apart the property of — — —, deceased, pursuant to their appointment, and they will in all respects perform their duty as appraisers to the best of their skill and judgment.

— — —
— — —

Sworn to, etc.

26. Form of appraisement.

Inventory and appraisement of all the goods and chattels, rights and credits, and property which were of — — —, late of the city of Harrisburg, Dauphin County, deceased, elected to be retained by — — —, widow of said decedent, pursuant to the provisions of the act of Assembly of June 4, 1883.

Taken this — — — day of — — —, A. D. 19—.

[First mention the personal property, if any, and the value of each item. If none, but an interest in realty, set out the same by location and description, and the value thereof thus:]

The appraisers viewed the above described premises and they value the same at.....\$296 85

We, the undersigned appraisers of the estate of — — —, late of the city of Harrisburg, county of Dauphin, deceased, respectfully certify and return:

That, after having been duly sworn, we made the appraisement above, of the real estate of said decedent, at two hundred and ninety-six dollars and eighty-five cents, he having left no personal property at the time of his death, which has come to the knowledge of the appraisers, thus making the total appraisement of the entire estate of said decedent said sum of \$—.

— — —, } Appraisers.
— — —,

Filed August 22, 1904.

Approved *nisi*. Per Cur.

There being no exceptions filed under and within the time fixed by the rules of court, the clerk marks it confirmed absolutely.

27. Widow's exemption extended to estate of husband dying outside the state.

The act of May 6, 1909, P. L. 459, provides:

"That the widow or children of any decedent dying outside of this commonwealth, but whose estate is settled in this commonwealth, may retain either real or personal estate or property belonging to said estate to the value of three hundred dollars, and as if he had died in this commonwealth; and the same shall not be sold, but shall remain for the use of the widow and family; and it shall be the duty of the executor or administrator of such decedent to have said property appraised in the same manner as is provided in the act passed April 9, 1849, * * * or, if said estate consists

only of money, by claiming and having set apart to said widow or children three hundred dollars thereof."

28. Election to retain choses in action.

Section 1 of the act of April 8, 1859, P. L. 425, provides:

"The widow or children of any decedent, entitled to retain three hundred dollars out of such decedent's estate by the laws of this commonwealth, and every person entitled to the exemption provided for in the act * * * approved April 9, 1849, may elect to retain the same or any part thereof, out of any bank notes, money, stocks, judgments or other indebtedness, to such person; and that in all cases hereafter, where property shall be set apart for the widow and children of any decedent, the same shall be appraised and set apart to said widow and children by the appraisers of the other personal estate of said decedent."

Although the children are those of a divorced wife, when they constitute a part of the father's household at his death, they are entitled to the \$300.⁴ The fact that children receive rents does not prevent their claiming what the law has provided for them.⁵ The allowance of \$300 is out of the husband's and not the wife's estate; and so minor children cannot claim out of their mother's estate.⁶

If the amount be taken in money or credits, no appraisement seems to be necessary, the administrator taking the receipt of the widow.⁷ Counting answers the purposes of the appraisement; but the widow cannot take it in the shape of a debt due the estate on a contract, and thus exclude the executors from their right.⁸

29. Growing crops, when to be appraised.

Where decedent died in possession of a farm with growing crops which are personalty,⁹ such crops should be appraised. But where the land is rented on shares or otherwise, the share as well as the rent passes to the reversioner.¹⁰ Grass also belongs to the reversioner.¹¹

30. Exemption where real estate cannot be readily divided.

Section 1 of the act of November 27, 1865, P. L. 1866, page 1227, provides:

"Whenever any widow or children of any decedent shall claim the benefit of the act to which this is a supplement, out of the real estate left by said decedent, and the real estate appraised shall con-

⁴ Nelson v. Thomson, 2 D. R. 844.

⁵ McElroy's Est., 8 W. N. C. 184.

⁶ Wanger's Ap., 105 Pa. 346. There is room here for an equalizing act and also a provision that the exemption shall be set aside in all cases without formal demand, where there are minor children, under sixteen.

⁷ Larrison's Ap., 36 Pa. 138.

⁸ Rigby's Est., 8 Supr. C. 108.

⁹ Hershey v. Metzger, 90 Pa. 217; Backenstoss v. Stahler, Admr., 33 Pa. 251; Fetrow's Ex. v. Fetrow, 50 Pa. 253.

¹⁰ Bank of Penna. v. Wise, 3 Watts, 394; Cobel v. Cobel, 8 Pa. 342; Burns v. Cooper, 31 Pa. 426.

¹¹ Reiff v. Reiff, 64 Pa. 134.

sist of a single messuage, or tenement, lot of ground, or other real estate which cannot be divided without prejudice, or spoiling the whole, and the appraisers may have appraised, or shall appraise and value the same at any sum not exceeding six hundred dollars, it shall and may be lawful for the Orphans' Court to whom such application shall be made, to confirm such appraisement and to set apart for the use of the widow or children, such messuage, or tenement, lot of ground or other real estate; conditioned, however, that the person or persons, in whose behalf the claim is made, shall pay the amount of the valuation or appraisement, in excess of the three hundred dollars, within one year from the date of confirmation of such valuation: *Provided*, That if the widow and children, interested in said real estate, refuse to take the same at such appraisement, the court, on application of any person interested, shall grant an order to sell the same, in the manner provided by law, for the sale of real estate of decedents, after proceedings in partition."

31. Title to vest in widow or children.

Section 2 of the act of 1865, *supra*, provides:

"The real estate, if taken by the widow or children as aforesaid, shall vest in her or them, and their heirs or assigns, absolutely upon her or them paying the surplus over and above the sum of three hundred dollars, to the parties legally entitled thereto: *Provided*, That if the real estate should not be so taken at the appraisement, but should be sold as provided for in this act, then the sum of three hundred dollars of the purchase money shall be paid to the widow, or children, entitled thereto, and the balance, after payment of costs and expenses, distributed to the heirs or other persons legally entitled thereto."

32. Fees of appraisers.

Section 10 of the act of February 24, 1834, P. L. 70, provides:

"The appraisers of the estate of a decedent shall be respectively entitled to receive from the executors or administrators, a sum not exceeding one dollar, for their services in appraising the estate as aforesaid; and if not completed in one day, one dollar for every day diligently employed therein."

33. Exceptions to appraisement.

If for any reason the appraisement is unfair or unconscionable, exceptions may be filed thereto in the office of the register, before the appraisement is confirmed absolutely. Such exceptions may relate to either undervaluation or excessive valuation, or incompetence of the appraisers, or failure to be sworn. Whilst filed with the register they must be heard by the Orphans' Court, either in the form of depositions or by oral testimony.

34. Sale of personalty — Notice.

"Whenever required to sell the personal property, the administrator will give public notice by hand bill, or otherwise, fixing the time and place of sale according to the exigencies of the case. If any of the goods are perishable, they should be sold quickly. The time of

notice is not fixed by statute, as the matter is safe in the discretion of the administrator, the intention being to realize the best price for those interested, with whom he should consult. So also are terms of sale, as to whether cash or time, or both, should be required, always remembering the limit of one year wherein he must file his account, according to law, and the requirement of his bond. Whatever the terms of sale, they should be stated from a written notice before the sale, either by the administrator or the crier. If time be given, notes should be taken with approved security, so that the money may be promptly made before the accounting."¹²

35. Filing of vendue list.

Section 11 of the act of February 24, 1834, *supra*, provides:

"Whenever any executor or administrator shall sell at public auction or vendue any of the personal estate of the decedent, he shall, within thirty days thereafter, file in the office of the register having jurisdiction, a just and true account of the articles so sold, and the prices and purchasers thereof."

If the executrix fails to file such list and account for money coming into her hands, the costs of exceptions may be placed upon her, but she will not be deprived of her exemption.¹³

¹² Bierly on Administrators and Guardians, p. 11.

¹³ Speakman's Ap., 71 Pa. 25.

CHAPTER V.

ADMINISTRATORS AND OTHER FIDUCIARIES — DISCHARGE AND REMOVAL.

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| 1. Administration in general. | 15. Form of replication. |
| 2. Kinds and forms of administration. | 16. Form of order for security. |
| 3. Resignation of administrator, etc. | 17. Form of order of removal. |
| 4. Discharge of administrator. | 18. Form of petition to remove for sickness or imbecility. |
| 5. Manner of procuring discharge. | 19. Form of order of removal. |
| 6. Effect of discharge. | 20. Form of petition of administrator for discharge. |
| 7. Proceedings for additional security. | 21. Form of decree of discharge. |
| 8. Removal for failure to give security. | 22. Practice on petition. |
| 9. Enforcement of order. | 23. Form of petition for discharge of trustee. |
| 10. Removal for cause shown. | 24. Form of rule to show cause. |
| 11. Procedure to remove. | 25. Form of decree of discharge. |
| 12. Petition by sureties. | 26. Rule of court in Philadelphia, as to discharge. |
| 13. Form of petition for security or removal. | 27. Form of bond for delivery of estate to surety. |
| 14. Form of answer. | |

I. Administration in general.

"In the administration of a decedent's estate the chief office of executors and administrators is the just distribution of the decedent's property. To this end all their labor and skill tend. Their work is done when the dead man's estate is so divided as that each of his creditors, heirs and legatees shall get his due share of it under the rules and forms of law. The collection of notes, bonds and other evidences of indebtedness; the conversion of personal and real property into money; and the commencement and defense of actions; are all for the purpose of facilitating the final distribution. If there be no debts to pay, nor contracts to perform, and all the legal representatives of the decedent be willing to distribute the estate amongst themselves, there need be no executor nor administrator, for the title to the estate is acquired by virtue of the last will of the decedent, or by the rules of law where no will is made, and not by virtue of letters of administration. Where the estate is solvent, and none of the claims against it are contested, and all the legal representatives of the decedent are surely known, it is the duty of the personal representatives, as we have before shown, to make distribution of the funds as soon as practical and before an account is tendered of their trust, so that there be as little delay and expense as possible. But if the estate be insolvent, or is likely to be, or if any of the claims against it are to be contested, or if the existence of heirs and legatees be uncertain, then the personal

representatives should account for the assets in hand and await an order of distribution by the Orphans' Court.

If an executor or administrator refuse to account and make distribution of funds in hand where the estate is solvent, the Orphans' Court, on application of any party interested, will assume the duty of compelling an account and making distribution, so that in a general sense distribution may be said to be voluntary or compulsory. The voluntary is done by the executors and administrators before an account and the involuntary or compulsory is performed by the court after an account."¹

The general term "Administration," under our statutes, covers the functions of both administrators and executors, in the settlement of estates, with certain distinctions, however, where an executor is governed by the will and its interpretation and where he is also constituted a testamentary trustee. These peculiarities and distinctions will be duly traced and explained in their appropriate places. An administrator, as such, is wholly governed by the statutes, whilst an executor may by the will be given large discretionary powers by virtue of his appointment.

2. Kinds and forms of administration.

In England, whence our system is partly derived, the law separated the various fiduciaries more distinctly than do our statutes. Here, there has been a development into a system of classification so as to make the later statutes apply to a larger class of fiduciaries, administrators, executors, guardians, trustees and committees, and it must be confessed that this has led to confusion rather than a clear and definite understanding of the particular duties and liabilities of each.

From the English law have come down to us letters of administration proper; letters, with the will annexed; *pendente lite*; *de bonis non*, and *durante minore ætate*. There is no record of a case of appointment for the collection of the goods of the decedent, which might still be proper in cases requiring promptness, as where a will is alleged to exist but is lost, or withheld. In England, letters of administration obtained by collusion are void and shall not repeal a former administration;² *cæteris paribus*, administration is always granted to the party having the greater interest,³ and the court prefers a sole to a joint administrator.⁴ If an administrator, who is appointed *durante minore ætate*, wastes the goods, he shall be punished as executor of his own wrong, says Curson.⁵

The administrator of an executor cannot sue out execution on a judgment obtained by the executor for his testator's right;⁶ nor can the executor of the administrator meddle with such a judgment, since that belongs to another estate.⁷ It is provided by statute that an administrator *de bonis non* shall be appointed to continue the

¹ Rhone's O. C., vol. 3, p. 91.

² Wentworth on Executors, p. 466.

³ Tucker v. Westgarth, 2 Addams' Ec. R. 352; 2 Eng. Ec. R. 339.

⁴ 1 Hagg. Ec. R. 341; 3 Eng. Ec. R. 148.

⁵ Wentworth on Ex., p. 467.

⁶ Brudnel's Case, 5 Coke, 9; Fraser's Ed., vol. 3, p. 16.

⁷ Brudnel's Case, 5 Coke, 9; Fraser's Ed., vol. 3, p. 16.

administration.⁸ Administrators *pendente lite* are only such until the suit terminates, when they are to turn over all the property to the party declared by the court to be entitled.⁹

An administrator *durante minore ætate* cannot sell any of the goods of the deceased, if it be not for necessity for payment of his debts or *bona peritura*; for he hath his office of administration *pro bono et commodo* of the infant.¹⁰ The administrator, *ibid* executor, may recover arrears of rent and distrain for the same.¹¹ An administrator who wastes the goods and is removed is still liable to an action of assumpsit to the creditor, for his claim, because of such waste.¹²

Where an executor dies, his representatives may be called upon for an inventory and account, without first taking out letters *de bonis non*.¹³

3. Resignation of administrator, etc.

Our statutes generally combine administrators and executors, in defining their rights and duties, and sometimes guardians and trustees, or committees are added. It is well to look sharply into the statutes for the differences in application. It is provided by section 21 of the act of March 29, 1832, P. L. 170, that

"An executor or administrator may, with leave of the Orphans' Court having jurisdiction, make a settlement of his accounts, so far as he shall have administered the estate committed to him, and the same being confirmed by the court, he may be discharged from the duties of his appointment, and surrender the remainder of the property in his hands to such person as the court may direct."

4. Discharge of administrator.

Section 1 of the act of February 2, 1853, provides:

"Whenever one or more of several joint administrators shall die or be discharged by the proper Orphans' Court, under existing laws, the said court, upon the application of any party interested, shall have power to discharge from further liabilities said discharged or deceased administrator, his, her or their surety or sureties, as the case may be, and require new or additional sureties of the remaining administrator or administrators, with a like result in case of failure to comply, as now provided by law when new or additional surety is, for any cause, required by said court: *Provided*, That such discharge shall not affect liabilities existing at the time of the discharge of such party or parties."

Section 7 of the act of April 18, 1853, provides that all persons authorized by the Orphans' Court to raise money by a sale of real estate, after filing an account and its approval, may be discharged from the trust.

⁸ 17 Chas. 2; c. 8.

⁹ Dame Susanna Graves, 1 Haggard's Ec. R. 313.

¹⁰ Curson, Wentworth on Ex. 469.

¹¹ Finch's Case, 6 Coke, 67; Fraser's Ed., vol. 3, p. 332.

¹² Packman's Case, Part 6, Coke 18, b; Fraser's Ed., vol. 3, p. 293.

¹³ Ritchie v. Rees, 1 Addam's Ec. R. 144; Gale v. Luttrell, 2 Addam's Ec. R. 234.

5. Manner of procuring discharge.

Says Rhone: "Where a party is desirous of being discharged from the further execution of the trust, before it is completed, he files in the register's office an account in the usual form, which is passed, duly advertised and certified as other accounts, and when it arrives in the Orphans' Court he presents his petition setting forth the facts of the case, praying leave to be discharged on surrendering the residue of the estate under his care to such person or persons as the court may direct. Whereupon a citation or rule to show cause is issued to the parties interested, and upon its return the court proceeds to hear the facts, and if no good cause be shown to the contrary, the decree is entered that he pay over and surrender the estate to his successor, and when the successor is duly qualified and his receipt is produced, the final decree of discharge is entered.

"The like proceeding is had where a discharge is desired after final account and settlement of the estate, save that there is no delivery over to a successor. The most expeditious and economical practice after a final account and settlement is to secure the consent of all parties interested, when the decree follows at once."

Section 1 of rule 9, Allegheny County (D. R. C., p. 152), provides:

"Executors, administrators, guardians, or other trustees, shall not be discharged on their own application, unless ten days' personal notice be given to the parties interested, if such notice be reasonably practicable; and if not, notice shall be given by publication for three weeks in at least one newspaper of the county."

6. Effect of discharge.

A discharge of the principal discharges the sureties in his bond from all future liabilities, but they remain liable for all his past misconduct and default.¹⁴ Such discharged executor or administrator no longer remains liable for the future *devastavit* of his co-trustee.¹⁵ A decree of discharge may be made, although there may be outstanding debts due the estate,¹⁶ and although there be legacies unpaid or suits at law still pending. The "leave of the Orphans' Court" will be granted whenever it shall appear just and equitable that the petitioner should be relieved of his trust, and the decree of discharge will not be set aside unless some party interested can show some specific fraud which has occasioned a loss.¹⁷ The Orphans' Court alone can discharge an administrator or executor who has taken out letters and undertaken his office, and then only upon notice to the parties interested in the estate.¹⁸ But before letters are lifted, he may renounce.¹⁹ Where the fiduciary has been discharged, of course, the office is vacant, and one who seeks to pursue the estate in court, must raise an administrator *de bonis non* for that purpose.

¹⁴ Hocker v. Wood, 33 Pa. 466.

¹⁵ Comth. v. Smith, 4 Phila. 270; McNeal v. Holbrook, 25 Pa. 189.

¹⁶ Walker's Est., 3 Rawle, 243.

¹⁷ Marr's Ap., 78 Pa. 66; Wimmer's Ap., 1 Wharton, 96.

¹⁸ Buckley's Pet., 1 Browne, 289; Bowman's Ap., 62 Pa. 166.

¹⁹ Miller v. Meetch, 8 Pa. 417.

7. Proceedings to require executors, etc., to give additional security.

Section 22 of the act of March 29, 1832, P. L. 170, provides:

"Whenever it shall be made to appear to the Orphans' Court having jurisdiction of the accounts of any executor, administrator or guardian, or to any judge thereof, when such court shall not be in any session, on the oath or affirmation of any person interested, that such executor, administrator, or guardian is wasting or mismanaging the estate or property under his charge, or is like to prove insolvent, or has neglected or refused to exhibit true and perfect inventories, or render full and just accounts of such estate or property, come to his hands or knowledge, then and in every such case, it shall be lawful for such court, or for such judge thereof, to issue a citation to such executor, administrator or guardian requiring him to appear, on a day certain, before an Orphans' Court to be convened for such purpose, if the said court shall not then be in session, and the case shall require despatch, and upon the return of such citation, the said court may require such security of such executor, or such other and further security of such administrator or guardian as they may think reasonable, conditioned for the performance of their respective trusts, which security shall be taken in the name of the Commonwealth of Pennsylvania, and filed in the said Orphans' Court, and shall be deemed and considered in trust for the benefit of all persons interested in such estate: *Provided*, That if, in the cases above mentioned, it shall be made to appear to the said court or any judge thereof, on oath or affirmation as aforesaid, that such executor, administrator or guardian is about to remove from this commonwealth, or that the property under his charge may be wasted or materially injured before he can be reached by the ordinary process of the court, it shall be lawful for such court, or such judge thereof, to issue a writ of attachment, under which the same proceedings may take place as in other cases of attachment on mesne process in the Orphans' Court; and on the return of such attachment, the court may proceed as on the return to the citation above mentioned."

These proceedings are premature if begun before letters are granted.²⁰ The law makes a distinction between an executor, who is not required to give security in the first instance, unless the will so directs, and an administrator or guardian who must give bond at his appointment. An executor can only be cited to give security upon a petition showing that he is wasting and mismanaging the estate, and this must be specific. If he uses the money of the estate to pay his own debts, he may be required to give bond²¹ or be dismissed.²²

Section 1 of rule 18, Allegheny County, provides:

"No attorney, sheriff, or other county, city or state officer shall be admitted as surety in any proceeding, unless by leave of court for special cause shown.

"Section 2. All bonds required in any proceeding shall be signed,

²⁰ Harberger's Ap., 98 Pa. 29.

²¹ McKennan's Ap., 27 Pa. 237.

²² Green's Est., 7 Phila. 502.

in addition to the principal, by at least two sureties, and in case of individual surety shall be accompanied by affidavits attached to or made part of said bonds, appropriately filled out as follows:

"Setting forth the name, amount of bond, residence, occupation, reference to the record volume and page of title to real estate which is in the surety's name, its value above encumbrances, and that the surety is worth the amount of the bond over and above his just debts and liabilities."

8. Removal for failure to give required security.

Section 23 of the act of 1832, *supra*, provides:

"If such executor, administrator or guardian shall neglect or refuse to give such security, or such further security so ordered, then the said court shall vacate such letters testamentary or of administration, or remove such guardian, and award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper; and in the case of a guardian, the court shall proceed to the admission or appointment of a new guardian, according to the circumstances of the case; and the said court shall, moreover, order the first executor, administrator or guardian to deliver over and pay to his successor all and every the goods, chattels and estates in his hands, of the decedent or minor, as the case may be."

It was early held that the Orphans' Court has no power to vacate letters without the consent of the executor administrator, unless for refusal to give security or additional security, as ordered; or where he has been legally declared a lunatic or habitual drunkard.¹ Where an executor is removed and he appeals from the order, he must give security.² If bond is given, as required, the power of the court over it ends.³ The legatees acquire a vested interest in it, as much as though it had been given to them instead of the commonwealth.⁴

9. Enforcement of order.

Section 24 of the act of 1832, *supra*, provides:

"If such superseded executor, administrator or guardian shall neglect or refuse to comply with the order of the court in the premises, the court may proceed against him by attachment, with or without sequestration, or may issue process for the delivery of the trust property and effects, as is hereinafter provided, or the successor may proceed at law against him and his sureties, if any there be, or against any other person who may be possessed of any goods or chattels belonging to the estate of the decedent or minor, as the case may be, or be indebted to him, or the remedies by execution and suit at law may be pursued at the same time, if the case so require, until the end be fully attained."

A removed executor cannot be compelled forthwith to hand over all the property of the estate.⁵

¹ Cohen's Ap., 2 Watts, 175.

² Comth. v. Judges, 10 Pa. 37; act of 1897. (See vol. 1, Johnson.)

³ McKee v. McKee, 14 Pa. 231.

⁴ Comth. v. Rogers, 53 Pa. 470.

⁵ Bradley's Est., 9 Phila. 327.

The order to hand over is enforceable by attachment founded on affidavit and proof that he is in contempt of the order, and a citation to show cause why he should not be attached.⁶

10. Removal for cause shown.

The act of May 1, 1861, P. L. 680, was passed to enlarge the powers of the Orphans' Court in the removal of those in a trust capacity, without a previous citation to give security or additional security,⁷ and is as follows:

"Whenever it shall be made to appear to the proper court having jurisdiction of the accounts of any executor, administrator, guardian, committee of a lunatic or of an habitual drunkard, or other trustee, on the oath or affirmation of any person interested, that such executor, administrator, guardian, committee or trustee is wasting or mismanaging the property or estate under his charge, or that for any reason, the interests of the estate or property are likely to be jeopardized by the continuance of any such executor, administrator, guardian, committee or trustee, or when such executor, administrator, guardian, committee or trustee is, or is likely to prove insolvent, or has neglected to exhibit true and perfect inventories, or render full and just accounts of such estate or property, come to his hands or knowledge, according to law, then, and in every such case, it shall and may be lawful for such court, or for the said president judge, to issue a citation to such executor, administrator, guardian, committee or trustee, requiring him to appear on a day certain, to answer the charge so preferred as aforesaid, and shall make all such necessary rules and orders, as the said court, or the said president judge thereof, may deem right, for bringing the matter complained of to a hearing; and if, on the hearing, the said court, or the said president judge and one associate judge, in vacation, shall be satisfied of the truth of the matters charged, the said court, or the said judges in vacation, if the case shall require despatch, may, in their discretion, instead of requiring the security provided for in the twenty-second section of the act of * * * March 29, 1832, vacate the letters of administration or testamentary, or commission, and remove such administrator, executor, guardian, committee or trustee, and award new letters or commission, to be granted by the register or by the court, in such form as the case may require, or appoint some suitable person to discharge such trust, upon such security as the court may require; and shall, moreover, order and compel such executor, administrator, guardian, committee or trustee, to deliver over and pay to his successor all and every the goods, chattels and property, money, estate or effects in his hands as aforesaid."

11. Procedure to remove fiduciaries.

It has been noted that whilst the register has the power of appointment, when the fiduciary has accepted and assumed his duties, he is

⁶ *Tomes' Ap.*, 50 Pa. 285.

⁷ *Kellberg's Ap.*, 86 Pa. 129; *Parson's Est.*, 82 Pa. 465; *Van Dusen's Ap.*, 102 Pa. 224; *Greentree's Est.*, 12 Phila. 10; *Silberman's Est.*, 14 W. N. C. 259; 16 Phila. 317.

wholly under the control of the Orphans' Court. The jurisdiction of the register has ended. The act of 1832, *supra*, applied only to administrators, executors and guardians, in proceedings to require new or additional security. But the act of 1861, last quoted, added "committee of a lunatic or of an habitual drunkard, or other trustee," and enlarged the causes of removal. So, to proceed for additional security first and in default thereof, removal, the proceedings are under the first quoted act, and to proceed for removal in the first instance, under the latter act.

Section 26 of the act of 1832 provided for the removal of any executor, administrator or guardian who shall be found and "declared a lunatic or an habitual drunkard," and the issuance of new letters by the register on the order of the court; whilst section 27 provided:

"When any executor, administrator or guardian, shall have removed from this state, or shall have ceased to have any known place of residence therein, during the period of one year or more, the Orphans' Court having jurisdiction of the accounts of such executor, administrator or guardian, may, on the application of any person interested, and after a citation shall have been returned served, or published, as is hereinafter provided, make a decree vacating such letters testamentary or of administration, and remove such guardian, and award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper; and, in the case of a guardian, the court shall proceed to the admission or appointment of another guardian accordingly: *Provided*, That no decree as aforesaid shall suspend the power, or prejudice the acts of any person who may be joined with such executor, administrator or guardian, in the trust."

The act of May 1, 1861 (section 2) provided for removal of any of the fiduciaries when "by reason of sickness or other visitation" he is rendered incompetent to discharge his trust, and the court is satisfied that "such incompetency is likely to continue to the injury of the estates" under his control. The earlier acts having embraced only administrators, executors and guardians, section 1 of the act of April 7, 1859, P. L. 406, added trustees "in all cases of trusts derived under or created by any last will and testament."

The procedure under these acts is by petition, etc., as will be shown by the forms following.

12. Petition by sureties.

Section 28 of the act of March 29, 1832, *supra* (which is enlarged by section 19 of the act of June 16, 1836, P. L. 784), gives the sureties a right to petition for the removal of their principal, as follows:

"Application may be made to the Orphans' Court, or any judge thereof, in the cases mentioned in the twenty-second section of this act, by any surety in the bond of such executor, administrator or guardian, and upon such surety making oath or affirmation as required in that section, the like proceedings may be had for the purpose of compelling such executor, administrator or guardian to give security. And thereupon the court may order such executor, administrator or guardian to give such counter-securities as they shall

judge necessary to indemnify him against loss by reason of his suretyship. And if such executor, administrator or guardian shall refuse or fail to give such security, within such reasonable time as the court shall order, it shall be lawful for the court to direct such executor, administrator or guardian to pay or deliver over forthwith to such surety, or to some other person for him, all goods, chattels, effects and securities whatsoever for which such security may be accountable: *Provided*, That such surety shall first give to the satisfaction of the court sufficient security faithfully to preserve and account therefor, and deliver and dispose of the same according to the order of the said court."

Since the later acts the removal of a legal representative is discretionary with the court.⁸ Poverty alone is not insolvency and does not affect the question of integrity.⁹ Waste and mismanagement may result from ignorance amounting to stupidity.¹⁰ Where the fiduciary applies the funds to his own use, it amounts to neglect and misconduct, sufficient for removal;¹¹ so, also, where a trustee vexatiously obstructs his co-trustees in the performance of their duties,¹² or where he puts out the funds without adequate security;¹³ or obstructs the widow and heirs in the pursuit of their legal rights against others.¹⁴

13. Form of petition for security or removal.

The same form may be used for any of the fiduciaries embraced in the acts of Assembly, *supra*.

To the Hon. — — —, Judge of the Orphans' Court of Luzerne County:

The petition of Gladys Honk, of — — —, said county, respectfully represents that she is the widow of Willis Honk, late of said county, deceased; that said Willis Honk died on the — — — day of — — —, A. D. 19—, leaving to survive him your petitioner and the following children, viz.: Jasper Honk, Helen Honk, and Eunice Honk; that the will of said decedent was duly probated on the — — — day of — — —, A. D. 19—, and letters testamentary issued to Henry Gable, named as executor in said will; that in and by said will your petitioner was devised a lot of ground in the city of Wilkes-Barre in lieu of dower, which she promptly refused, by election duly made and filed in the office of the register of wills in said county; that aside from said lot, there came into the hands of the executor the sum of three thousand dollars, which he has invested in his business, the same being in a failing condition, and the said executor is mismanaging and wasting the same and becoming hopelessly involved therewith; that he has no real estate, nor any other property aside from his said business, in which he is liable to fail.

Wherefore your petitioner prays your honorable court to issue

⁸ Kellberg's Ap., 86 Pa. 129.

⁹ Levan's Ap., 112 Pa. 294.

¹⁰ Nicholson's Ap., 20 Pa. 50.

¹¹ McKennan's Ap., 27 Pa. 237; Crawford's Est., 22 Pitts. L. J. 157.

¹² Chew's Est., 2 Parsons, 153.

¹³ Johnson's Ap., 9 Pa. 416.

¹⁴ Kellberg's Ap., 86 Pa. 129.

a citation to the said Henry Gable, executor, commanding him to appear and show cause, if any he have, why he should not give security conditioned for the performance of his trust and in default thereof why he should not be removed from said trust.

And she will ever pray, etc.

Gladys Honk.

Affidavit to truth.

Now, — day of —, A. D. 19—, citation awarded as prayed for; returnable on the — day of —, A. D. 19—, at — o'clock — M.
By the Court.

14. Form of answer.

The answer of Henry Gable to the petition of Gladys Honk respectfully shows that true it is he was duly granted letters testamentary in the estate of Willis Honk, deceased, but that the statements in the petition of said Gladys Honk with respect to the waste and mismanagement of said estate by your respondent are not true, the petitioner being evidently misinformed. On the contrary, the facts are as follows:

[State the same as to the condition and investment of the fund in detail.]

And he therefore respectfully submits that said petition be dismissed at the costs of the petitioner.

Henry Gable.

[Sworn to in usual form.]

15. Form of replication.

If the petitioner wishes to take issue, she may file a replication traversing the statements as to the condition of the fund and its safety or such new matter as is suggested by the answer and demand a hearing in court or take a rule for depositions. The cause will then go regularly upon the argument list.

16. Form of order for security.

If the court deem it just that security be given, it will so order in form as follows:

Now — day of —, 19—, after due consideration by the court [aided by the report of an auditor, where one has been appointed], the court is satisfied that the interests of the said estate are likely to be jeopardized by the continuance of the said executor in his office or trust, without giving security for the faithful execution of his trust, etc., it is ordered, adjudged, and decreed, that the said Henry Gable, executor, shall, within ten days from the service of this order upon him, file in this court a bond in the name of the Commonwealth of Pennsylvania, for the use of the parties interested, in the sum of — dollars, with security to be approved by the court, or by a judge thereof in vacation, conditioned for the faithful performance of his trust as executor, etc. And that in default thereof his said office of executorship be declared vacant, and his letters testamentary be revoked.

By the Court.

17. Form of order of removal.

In case security is not given as required, upon petition to the court showing the fact, the removal may be decreed in the form following:

Now, — day of —, 19—, this case having been heard on petition, answer, replication [and report of an auditor], and the court being satisfied of the truth of the matters charged in the petition, and that the interests of the said estate are likely to be jeopardized by the continuance of Henry Gable as executor, it is ordered, adjudged, and decreed, that the said Henry Gable be removed from his office or trust as executor of Willis Honk, deceased. And it is further ordered, that the said Henry Gable do, on demand, deliver over and pay to his successor all and every the goods, chattels and property, money, estates, and effects in his hands belonging to the said estate. And that he pay the costs of this proceeding.

By the Court.

18. Form of petition for removal of administrator for sickness or imbecility.

To the Honorable, etc.

The petition of Anna Holt respectfully represents that she is a creditor of the estate of Howell Dha, deceased.

That Bert Spare is sole administrator of said estate, and has filed his final account, and upon final adjudication of the same a balance was found due her of one hundred dollars.

That certain claims against the estate remain unpaid, of which deponent holds one, and that decedent left certain real estate upon which said debts are liens.

That deponent is informed and believes, that the said Bert Spare has become incapacitated by reason of sickness for the discharge of his duties as said administrator, and that said incompetency is likely to continue.

Deponent therefore prays the court to issue a citation to the said administrator to appear and show cause why a decree shall not be entered vacating the letters of administration heretofore granted to him, by reason of his inability to proceed with his duties as administrator, as provided by the act of May 1, 1861.

Anna Holt.

(Affidavit of truth.)

19. Form of order of removal.

Estate of Howell Dha, } In the Orphans' Court of Luzerne County.
Deceased.

In re petition for removal of administrator in the estate of Howell Dha, deceased.

Now, — day of —, A. D. 19—, it appearing to the court that the citation heretofore granted was duly served upon Bert Spare, sole administrator of said estate, and the court being satisfied from the report of an auditor that the said Bert Spare has become incompetent to discharge the duties of his trust, by reason of sickness, and that such incompetency is likely to continue, to the injury of the estate under his control, it is ordered, adjudged, and decreed, that the letters of administration heretofore granted to the said Bert

Spare, by the register of Luzerne County, be vacated, and that he shall moreover deliver and pay to his successor all the goods, chattels and property, money, estate or effects, in his hands as aforesaid. The costs of this proceeding to be paid out of the estate.

By the Court.

20. Form of petition of administrator for discharge after distribution.

To the Honorable, etc.

The petition of John Adams, administrator of the estate of John Jay, late of the Borough of Pittston, in the County of Luzerne, and State of Pennsylvania, deceased, respectfully represents:

1. That he has filed in this court his first and final account of the estate of the said deceased, which said account has been duly confirmed absolutely.

2. That upon the audit of the said account it was directed by this court that there should be deducted from the amount for distribution and retained by your petitioner as administrator, the sum of six thousand dollars, for the purpose of meeting two judgments, recovered against the decedent in the Court of Common Pleas in this county, to-wit, to Nos. 100 and 150, November Term, 1880, upon which judgments writs of error had been taken to the Supreme Court, where the same were then depending; all of which will fully appear by reference to the records of this court, and that your petitioner knows of no other indebtedness of the estate, and believes there can be none.

3. That the whole fund for distribution, excepting the said sum of six thousand dollars, was paid to the persons entitled thereto under the said distribution audit, as also appears upon the records of this court.

4. That since the final confirmation of your petitioner's account, and the said distribution thereunder, the said two judgments have been decided adversely to the interests of the said decedent's estate, and your petitioner compelled to pay the amount, to-wit, the sum of two thousand dollars (\$2,000) upon the judgment No. 150, November Term, 1880, which said amount has been receipted of record and the said judgment satisfied. Upon the other judgment, to-wit, No. 100, November Term, 1880, the amount was realized out of the property of the principal debtor, and the judgment satisfied without recourse to the decedent's estate, as appears by the record in the proceedings to No. 100, November Term, 1880.

5. The balance in the hands of your petitioner, to-wit, the sum of four thousand dollars, has been paid to the widow of the said decedent in her own right, as widow and as guardian of the minor children of the decedent, in the proportion ascertained and decreed by this court on audit as aforesaid, since which time your petitioner has had no moneys or other property of the said estate in his hands, and knows of no outstanding unsettled matter.

Wherefore your petitioner prays that he may be discharged from his duties as administrator as aforesaid.

And he will ever pray, etc.

John Adams.

(Affidavit of truth.)

I, Ann Jay, widow of the decedent in the foregoing petition named, and guardian of his minor children, have read the said petition, and believe the facts therein stated to be true, and agree that the court may discharge him, the said petitioner, from the duties of his appointment as administrator.

Ann Jay.

Where the widow and heirs do not join in the petition, a rule to show cause is entered, which is served on them personally, or by advertisement.

21. Form of decree of discharge.

Estate of John Jay, } In the Orphans' Court of the County of
Deceased. } Luzerne.

In re discharge of John Adams, administrator of the estate of said decedent.

Now, to-wit, — day of —, A. D. 19—, on motion of counsel for the administrator, and upon filing petition by the said administrator, duly verified by affidavit; and it appearing to the court that the prayer of the said petition has been agreed to in writing by the widow and guardian of the minor children of the decedent, they being the only persons interested in the said estate, which said agreement is made part of the said petition, it is thereupon ordered, adjudged, and decreed, that the prayer of the said petition be granted, and that the said administrator be and is hereby discharged from the duties of his office and that he and his sureties be and are hereby discharged from any future liability on their bond given on the grant of letters to said administrator.

By the Court.

22. Practice on petition.

Rhone, J., said:

"Executors in the first instance never give security, hence the proceeding under these acts of assembly, if sustained, will always result in an order of removal or for security. In an application requiring an administrator to give additional security, it must be shown that the security already entered is insufficient. The insolvency of the administrator, while his sureties remain sufficient, is no reason for increasing the amount of security.¹⁵ If new or additional security be given, this does not discharge the original sureties from liability,¹⁶ and counter-security given at the instance of sureties is but collateral to the original.¹⁷ Such sureties cannot be released by substituting others. The bond is to be taken in the name of the commonwealth "in trust for all persons interested," and after the court has exercised its discretion in demanding and approving the bond, its power is at an end.¹⁸ By reference to the twenty-second section of the act of 1832, it will be seen that where the necessities of the case require it, the court may at once issue a "writ of attachment" to secure the property pending the trial of the case. It will

¹⁵ Rhone's O. C., vol. 3, p. 147; Sharkey's Est., 2 Phila. 276.

¹⁶ Comth. v. Risdon, 8 Phila. 23.

¹⁷ Comth. v. Rogers, 53 Pa. 470.

¹⁸ Newcomer's Ap., 43 Pa. 43.

be perceived also that this cautionary proceeding may be had in all cases of delinquency, but not where the charge is mere incapacity. A more familiar process is provided by act of 1874,¹⁹ whereby the court is authorized to issue a writ of injunction to restrain the officer from acting pending the hearing. The order of removal is followed by an order that "new letters be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper. And the said court shall moreover order the first executor or administrator to deliver and pay to his successor all and every the goods, chattels and estates in his hands of the decedent." The order for delivery is enforced by the Orphans' Court by writ of attachment, with or without sequestration, or the successor may proceed at law against the delinquent and his sureties or other persons in possession of the property until the end be fully attained.²⁰ The order will require an immediate delivery of the property of the estate unadministered, but payment of the funds of the estate in money will not be enforced until after an account is filed.²¹

23. Form of petition for discharge of trustee appointed to sell real estate.

To the Honorable, etc.

The petition of John Law, of the Township of Franklin, in the County of Luzerne, and State of Pennsylvania, respectfully represents:

1. That he was appointed by the Orphans' Court of Luzerne County trustee, to make sale of that portion of the real estate of Richard Roe, late of the Township of Franklin, said county, and State of Pennsylvania, deceased, which was not accepted at the valuation by the heirs or representatives of heirs in the proceedings instituted in said court to make partition.

2. That he made sale of said real estate under the terms and orders prescribed by said court, and afterwards filed his final account as such trustee, which was confirmed absolutely, on the — day of —, A. D. 19—.

3. That said court made a decree of distribution of the amount in his hands, which amounts have since been paid by petitioner to the parties respectively entitled thereto.

He therefore prays the court to discharge him from the duties of his appointment as trustee aforesaid.

John Law.

(Affidavit of truth.)

24. Form of rule to show cause.

Now, to-wit, — day of —, 19—, court grant rule to show cause why trustee to make sale of real estate of Richard Roe, deceased, under proceedings in partition, shall not be discharged as prayed for.

Returnable on the — day of —, 19—, at 10 o'clock A. M.

By the Court.

¹⁹ Act May 19, 1874, *supra*.

²⁰ Tome's Ap., 50 Pa. 285.

²¹ Bradley's Est., 9 Phila. 327.

25. Form of decree of discharge.

Now, to-wit, — day of —, 19—, the court being satisfied of the truth of the matters in the petition set forth, and that the rule heretofore granted has been served according to law and the order of the court, and no objection being made or cause shown why said discharge should not be granted, said rule is hereby made absolute; and it is further ordered, adjudged, and decreed that the said John Law be and is hereby discharged from all future duties and obligations incident and pertaining to said office of trustee as aforesaid, and that his sureties are also discharged from any future liability on his bond as said trustee.

By the Court.

26. Rule of court for discharge of fiduciaries.

Section 1 of rule 6, Philadelphia, provides:

"All applications for the discharge of executors, administrators, guardians and trustees shall state that the partial or final account, as the case may be, of such executor, administrator, guardian or trustee, has been adjudicated and confirmed absolutely; that the entire estate has been paid and transferred to the parties entitled thereto, or to the successor in the trust, if any; and that no other moneys or property in the estate has been received by them since the filing and adjudication of the account. Accompanying all such applications shall be the agreement in writing of all parties interested in the estate, or the successor in the trust, verified by affidavit, consenting that such application for discharge be granted by the court. And in the case of administrators, guardians and trustees such agreement shall also be signed by the surety or sureties."

27. Form of condition in bond, by surety for delivery of estate to him.

Where the surety of an administrator petitions the court to have an estate delivered to him by the administrator for whom he is surety, he will be required to give bond conditioned as follows:

[Obligation same as in administrator's bond.]

Whereas, such proceedings were had in the Orphans' Court of Chester County in relation to the estate of George Roberts, late of West Chester, deceased, that Zerilda Roberts, administratrix of said deceased, was by said court directed to pay and deliver to Charles Hause all goods, chattels, effects and securities in her hands belonging to said estate, upon the said Charles Hause entering into bond in the sum of three thousand dollars to the commonwealth with condition thereafter written.

Now, the condition of this obligation is such that if the same Charles Hause shall faithfully perform and account for the aforesaid goods, chattels, effects and securities and deliver and dispose of the same according to the order of the said court and the directions of law, then this obligation shall be void, or else to be and remain in full force and virtue.

Sealed and delivered in the presence of

Willis Blair,
Pearl Wilson.

Charles Hause, [Seal.]
Karl Reed, [Seal.]
John K. Hays. [Seal.]

CHAPTER VI.

POWERS OF AND PROCEDURE IN THE ORPHANS' COURT.

1. Procedure by petition and citation.
2. Interest of the petitioner.
3. Other requisites of the petition.
4. Forms of petitions.
5. The order of court.
6. Power to fix return days and make rules.
7. Terms and return days in Allegheny county.
8. Terms and order of business in Philadelphia.
9. Saturday motion list, Philadelphia.
10. Saturday, previous memorandum of application.
11. Time limit on entering motion, Philadelphia.
12. Audit list, Philadelphia.
13. Argument *in banc*, Philadelphia.
14. Placing causes on argument list, Philadelphia.
15. Paper books of the argument, Philadelphia.
16. Paper books on exceptions to adjudications, Philadelphia.
17. Order of argument, Philadelphia.
18. Striking from list, Philadelphia.
19. Exceptions, placed on list of course.
20. Process to be attested by the president judge.
21. Forms, immaterial variations.
22. Amendments.
23. The citation.
24. Notice of citations, etc.
25. Granting citations and rules in vacation.
26. Service of citation.
27. Notice to heirs, legatees and distributees.
28. Notice where minors are interested.
29. Separate 'Orphans' Courts to prescribe form of notice.
30. Decree *pro confesso* when no appearance is entered.
31. Pleadings — demurrer.
32. Form of demurrer to petition.
33. Form of plea to a petition.
34. Form of disclaimer to a petition.
35. Form of order on filing disclaimer.
36. Answer to petition.
37. Form of answer.
38. Replication.
39. Form of general replication.
40. Scandalous and impertinent matter.
41. Right of petitioner to withdraw.
42. Reference to auditor, examiner or master.
43. Hearing by auditor.
44. Hearing by master or examiner.
45. Admission of evidence by auditor.
46. Admission of evidence by examiner.
47. Evidence and commissions, etc.
48. Depositions, rule in Allegheny.
49. Depositions of ancient, infirm and going witnesses.
50. Commissions outside the state, Allegheny.
51. Depositions on motions and rules, Allegheny.
52. Auditor's report — notice to parties.
53. Form and substance of report.
54. Filing of report.
55. Return of testimony.
56. Re-committal of report.
57. Effect of confirmation.
58. Conclusiveness of findings of fact.
59. Enforcement of orders and decrees.
60. Rule for attachment as for contempt.

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| 61. Process directed to other counties. | 72. Form of certificate of the clerk. |
| 62. Transfer of orders and decrees to other counties. | 73. Form of certificate of the judge. |
| 63. Rules and orders upon officers and attorneys. | 74. Clerk's certificate, attesting the judge. |
| 64. Perpetuation of testimony of lost records. | 75. Form of registrar's certificate to letters. |
| 65. Sending issues to the Common Pleas. | 76. Form of judge's certificate. |
| 66. Requests for issues, Allegheny county. | 77. Writs of execution in the Orphans' Court. |
| 67. Issue on distribution. | 78. Manner of issuing executions. |
| 68. Decrees in the Orphans' Court. | 79. Form and character of writ. |
| 69. Decrees, satisfaction of, Philadelphia. | 80. Special writs of execution when allowed. |
| 70. Decree, enforcement of, Philadelphia. | 81. Costs in separate Orphans' Courts. |
| 71. Exemplifications of the record. | 82. Costs, generally. |
| | 83. Stenographer's fees. |
| | 84. Counsel and witness fees. |
| | 85. Liability for costs. |

1. Procedure by petition and citation.

Section 57 of the act of March 29, 1832, P. L. 190, provides:

"The manner of proceeding in the Orphans' Court, to obtain the appearance of a person amenable to its jurisdiction, and to compel obedience to its orders and decrees, shall be as follows:

I. On the petition to the court, of any person interested, whether such interest be immediate or remote, setting forth facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief desired and supported by oath or affirmation, the Orphans' Court, or any judge thereof in vacation, may award a citation returnable at a day certain not less than ten days after the issuing thereof."

The petition must be supported by an oath or affirmation.¹ Section 57 of the act of 1832, *supra*, which will be considered by paragraphs here, lays down a code of procedure, and it must be followed.

The petition, which is the commencement of the proceeding must be presented by one who shows his interest in the matter;² and he must set forth therein specifically the facts which give the court jurisdiction and support his prayer for specific relief.³ The petition of an agent acting under a power of attorney has been rejected as not complying with the act;⁴ and one claiming to be mentally unhinged but of age, cannot petition by next friend; he must have a committee appointed to represent him.⁵ The court

¹ Darrach's Est., 2 Clark, 454, section 1, rule 12, Phila. Section 4 of the rules of Phila. adopt the rules of equity practice of the Supreme Court, but petitions and other pleadings need not be printed except in cases of injunctions and petitions for review. (See King's Est., 15 Phila. 617; Drum's Est. (No. 2), 16 Phila. 203.)

² Halsey v. Tate, 52 Pa. 311; Olwine's Ap., 4 W. & S. 492; Fry's Est., 7 Lanc. L. R. 107.

³ Davis' Est., 12 Phila. 128; Okeson's Ap., 2 Grant, 303; Eberle's Est., 21 Lanc. L. R. 407.

⁴ Madden's Est., 6 Luz. L. R. 201.

⁵ Kline's Est., 9 D. R. 386.

having assumed jurisdiction and made an order upon an unverified petition will not revoke it, on that account.⁶ One who is executor, guardian and testamentary trustee cannot upon a single petition be discharged from every trust.⁷ An averment as to the meaning of words in a will is immaterial and may be disregarded by the judge.⁸ A petition is not necessary where an auditor's report has raised questions as to the relative rights of creditors, and the court is confronted immediately with the duty of marshaling the assets.⁹ It was held that a bill in equity would lie to perpetuate testimony in the Orphans' Court.¹⁰ The date of commencement of the proceeding is the time of filing the petition, and when this becomes important and it is shown by the motion list, the court on petition will order such date entered on the docket *nunc pro tunc*.¹¹ A petition for an order to compel an executor to seize property as a part of the estate is unnecessary. The proper course is to notify him and he will then disregard it at his peril.¹²

2. Interest of the petitioner.

The interest to give a petitioner standing in court, whilst the act says "immediate or remote," must be an actual present interest, though "remote" in time of enjoyment, and has been construed not to mean a mere possible interest so contingent and uncertain that it may never happen.¹³ The objection to the interest of the petitioner should be made at once, and not postponed until after the answer.¹⁴ It may be objected to by demurrer or answer. Not only should the petition show the interest of the petitioner, but it should name all the persons interested as far as known, and their residences if known, so that proper notice may be given to all, and their interests be bound by the decree.¹⁵

3. Other requisites of the petition.

The petition should be single; i. e., not embrace two or more incongruous complaints.¹⁶ It must ask, not for general, but for specific relief.¹⁷ Where it relates to land which is held by *terre-tenants* they must be made parties.¹⁸ Not only must it appear that the court has jurisdiction of the subject, but also that it

⁶ Grier's Ap., 25 Pa. 352.

⁷ Morrow's Est., 16 Phila. 387.

⁸ Dugan's Est., 17 Phila. 454.

⁹ Kunkle's Est., 21 Supr. C. 200.

¹⁰ Watson's Est., 10 Kulp, 527; Watson v. Monroe, 12 D. R. 570. But these cases are anomalous.

¹¹ McNeile's Est. (No. 3), 14 D. R. 318.

¹² Ecke's Est., 8 D. R. 252.

¹³ Keene's Ap., 60 Pa. 502; Halsey v. Tate, 52 Pa. 311; Olwine's Ap., 4 W. & S. 492.

¹⁴ Rankin's Ap., 14 W. N. C. 358.

¹⁵ Barclay v. Lewis, 67 Pa. 316; Richards v. Rote, 68 Pa. 248.

¹⁶ Willard's Ap., 65 Pa. 265; Dundas' Ap., 73 Pa. 474; Graham's Est., 14 W. N. C. 31.

¹⁷ Simpson's Ap., 9 Pa. 416.

¹⁸ Jenkins v. Jenkins, 7 Pa. 246.

has power to afford the relief sought.¹⁹ It must set out the nature and ground of the claim.²⁰ If it is defective in form, only, it is amendable.²¹

Section 1 of rule 15, Allegheny County (D. R., C. 157), provides:

"All applications shall be by petition verified by affidavit, setting forth the facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief prayed for."

And section 4 is as follows:

"The mode of proceeding in controverted matters shall be by petition, answer, replication, etc., verified by affidavit."

Section 7 of rule 15, Allegheny County, provides:

"No petition shall be filed of record and no citation, rule or certificate be issued thereon by the clerk, except for cause especially shown, until the costs be paid, and after the expiration of thirty days from its presentation such petition shall, in case of default of payment of costs, be returned to petitioner's counsel, with the order of court cancelled."

4. Forms of petitions.

"The following points should be considered in drawing petitions, and as many of them inserted as are applicable to the case. The facts should be grouped and numbered as follows:

I. The name of the decedent, the date of his death, the place of his residence at the time of his death, whether testate or intestate, and the name and residence of his personal representative, if any.

II. The interest of the petitioner, whether creditor, heir, legatee, devisee, or otherwise, and if of kin the degree.

III. The names and residences of all the legal representatives of the decedent, and if any of them are married women, the names of their husbands; if any of them are minors or lunatics the fact must appear, as also the names and residences of the guardians, or committees, and also the names and residences of any other person interested, and in what manner the interest has been acquired.

IV. A correct extract of so much of any contract, will or other writing as relates to the relief desired (with a full copy of the instrument appended to the petition), and whether the widow, if any, has accepted or refused to take under the will.

V. Where any process is desired, affecting land, an intelligible brief description of all the real estate of the decedent, with the improvements, and where situated, and a full description of the particular lands to be affected. If an inquest in partition is prayed for, state that no partition can be made or jury selected by agreement of all parties interested, and if the petitioner is a tenant in common with others, not related to the decedent, state the amount of interest. In all cases state by what title the petitioner, and others to be affected, hold the lands, whether by descent from one or more ancestors or otherwise.

VI. All other facts necessary to give the court jurisdiction, shall

¹⁹ Cohen's Ap., 2 Watts, 175.

²⁰ Morton, *ex parte*, 3 Wharton, 170.

²¹ Chess' Ap., 4 Pa. 52.

be fully and clearly stated, and the specific cause of complaint, referring to the act of Assembly giving jurisdiction, if any.

VII. The relief desired must be fully set forth."²²

The petition should moreover be entitled, as will appear in the forms hereinafter given in specific cases, similarly to this:

In the Matter of the Estate of ———, Deceased. } In the Orphans' Court of ——— County.

To the Honorable ———, President Judge of said court:

The petition of ———, a son of ———, late of ———, in the county of ———, deceased, respectfully represents:

1. That, etc.

5. The order of court.

Section 5 of rule 12, Philadelphia, provides:

"In all *ex parte* proceedings the decree or order asked for shall be prepared by counsel and submitted with the petition;" which is a good rule in general practice. Formerly, the petition being read was handed up to the judge who endorsed it *breve*: now, to-wit: ———, ———, ———, petition allowed and citation awarded returnable ———, ———, ———; or, petition refused, and handed it to the clerk to be docketed, and if process was awarded, to issue thereon forthwith.

Now, the counsel prepares his order following the affidavit, in the form he wishes it; and if the judge finds it not in proper form, or deems it just to modify it, he either does this at once or directs the counsel to draw it accordingly.

6. Power to fix return days and make rules.

Section 58 of the act of 1832, *supra*, provides:

"The several Orphans' Courts shall have power to fix the return days of all process issuing out of the respective courts, whenever such return days are not otherwise provided for by law, and from time to time to make rules for the regulation of the practice of such courts, not inconsistent with this act."

Section 9 of the act of May 19, 1874, P. L. 206, provides:

"The said courts shall have power to make all rules necessary for the exercise of the power hereby or which may hereafter be conferred."

Sections 20, 21 and 22 of the act of June 16, 1836, P. L. 784 (q. v. Vol. I, Johnson P. 141), refer equally to the Orphans' Court and the Common Pleas.

7. Terms and return days in Allegheny County.

Under rule 20, Allegheny County, regular terms begin the first Monday of each month except July and August; and the first Monday of every term is return day, when not otherwise specified by law or by order of court. If the court is not in session on a return day the cause will be continued of course, to the day of the following session.

Each jurisdiction has its own return days. (See rules of court.)

²² Rhone's O. C. Pr., vol. 2, p. 376.

8. Terms in Philadelphia.

Section 1 of rule 10, Philadelphia, provides:

"There shall be four terms in each year, beginning respectively on the first Mondays of January, April, July and October."

9. Saturday — Motion list, Philadelphia.

Section 2 of rule 10, Philadelphia, provides:

"Except during vacation, the court will sit at ten o'clock A. M. on Saturday of each week to dispose of the current motion list and to receive applications for admission to the bar."

10. Saturday — Previous memorandum of application.

Section 3, rule 10, Philadelphia:

"The court will not hear any application on Saturday unless the clerk shall have been previously furnished with a memorandum of such application, containing the nature of the application and the name of the counsel presenting the same. Such applications will be called by the court in the order in which they shall have been received by the clerk, and no other business will be attended to until all such applications shall have had an opportunity of being heard."

11. Time limit on entering motion.

Section 4, rule 10, Philadelphia:

"No motion will be entered on the current motion list after half past nine o'clock A. M. of the day on which the list is to be called."

12. Audit list.

Section 5, rule 10, Philadelphia:

"The audit list will be heard during two weeks of each month, except August and September."

13. Argument in banc.

"Section 6. The argument list will be heard by the court *in banc* during the week beginning with the third Monday of each month, except July, August and September."

14. Placing causes on argument list.

"Section 7. No case will be placed on the argument list within five days of calling that list, without a special order of the court."

15. Paper books of the argument.

"Section 8. In cases placed on the argument list, counsel are to prepare paper books for the judges, to be made up as follows:

1. A brief statement in narrative form of the facts upon which the case is founded.

2. Copies of petition and answer and replication, if there be one, exceptions to auditors', examiners', or masters' reports, and such extracts from other papers, as counsel may deem essential to the case, a brief statement of points relied on, together with a reference to the authorities sustaining each point.

16. Paper books on exceptions to adjudication.

"Section 9. In cases of exceptions to adjudication, the paper books must contain: (1) The statement of facts as set forth by the auditing judge, his ruling thereon, and the essential parts of his reasoning in support of such ruling; (2) The exceptions; (3) The facts as alleged by the exceptant; (4) A brief of the authorities relied upon in support of the exceptions."

17. Order of argument.

"Section 10. Cases upon the argument list will be heard as they are reached, unless the absence of counsel is occasioned by an actual engagement in another court, or unless, by agreement of both sides, they be permitted to go to a subsequent call."

18. Striking from list, after third call.

"Section 11. The argument list will be called at least three times. When a cause is reached on the last call, if either counsel be present and require it, in the absence of the other, the same shall be heard, *ex parte*, and disposed of finally. All causes not answered to on the last call, shall be stricken from the list, and not placed thereon by the clerk without the written order of counsel."

19. Exceptions, placed on list, of course.

"Section 12. Exceptions to adjudications, auditors', masters' or examiners' reports shall be placed by the clerk, as of course, on the argument list next succeeding the expiration of the time allowed for filing such exceptions."

20. Process to be attested by the president judge.

Section 5 of the act of May 24, 1878, P. L. 131, provides:

"All process, subpoenas, certificates, copies of records and other documents, which shall be issued out of any of said courts, shall be attested in the name of the president judge thereof alone."

21. Forms, immaterial variations.

Section 43 of the act of March 15, 1832, P. L. 135, provides:

"No immaterial variation from the forms given and prescribed in and by this act, shall vitiate or render void any proceedings in which said forms shall be used."

Whilst the law provides that justice and equity shall not fail for want of nicety of form, yet we should not forget the words of Chief Justice Gibson:

"Forms may yet be profitably consulted as the unerring indices of the law, and they who forget them will soon forget the law itself." ²³

22. Amendments in the Orphans' Court.

Amendments will be allowed after the term in the Orphans' Court.¹ A petition may be amended on proof of the facts to agree

²³ Boas v. Updegrove, 5 Pa. 519.

¹ Beck's Est., 12 Phila. 74.

with them, in order to give jurisdiction.² Amendment of an adjudication has been allowed in a special case even after ten years.³ Amendments as to parties will be allowed to subserve the ends of justice;⁴ and even in the appellate court, the case will be treated as if the amendment had been made.⁵ After answer under oath, if amendment be made, the record should show notice, or that the right to make further answer has been waived.⁶ A trustee appointed by the Common Pleas cannot get into the Orphans' Court by amendment, entitling him administrator *d. l. n.*⁷

23. The citation.

A citation is a writ directed to the respondent, commanding him to appear on a given day and to do a certain thing therein specified or to show cause why he should not.²⁴ It is as much a matter of right as a subpoena in chancery and it is error to refuse it, unless the record shows that the matter has already been determined and is not reviewable.²⁵ It cannot be allowed by the clerk, but must issue only on order of the court,²⁶ and be attested in the name of the president judge thereof.²⁷

24. Notice of citations, etc.

Section 5 of rule 15, Allegheny County, provides:

"Notices of the granting of citations and rules to show cause shall be given to parties interested, ten days before the return day thereof; if no answer be filed, and the petitioner appear entitled thereto, a decree *pro confesso* will be made on motion. If an answer and replication or a demurrer be filed, the cause shall be put down for hearing. Except where otherwise specially provided by law, all allegations contained in any petition, not denied by the answer shall be taken as admitted facts."

25. Granting citations and rules in vacation.

Section 1 of the act of May 7, 1889, P. L. 102 (Vol. I. Johnson, p. 144), gives power to all the law judges, which includes the Orphans' Court, to grant citations and rules to show cause, in vacation, returnable at a term of the court.

26. Service of citation.

Section 57 of the act of 1832, *supra*, further provides:

"II. Such citation may be served by the party obtaining the same, or by any authorized agent, or if required by the party, it

² Wilson's Ap., 3 Walker, 216; Stewart's Est., 7 C. C. 603; Young's Est., 3 D. R. 282; Eyre's Ap., 106 Pa. 184.

³ Dalton's Est., 14 D. R. 763.

⁴ Downer v. Downer, 9 Pa. 302; Pote's Ap., 106 Pa. 574.

⁵ Knecht's Ap., 71 Pa. 333.

⁶ Greble's Est., 9 D. R. 441; 16 Supr. C. 42.

⁷ Olwine's Ap., 4 W. & S. 492.

²⁴ Rhone's O. C., vol. 1, p. 574.

²⁵ Smith v. Black, 9 Pa. 308; Okeson's Ap., 2 Grant, 303.

²⁶ Ward's Est., 1 W. N. C. 418.

²⁷ Section 5, act May 24, 1878, P. L. 131, *supra*.

shall be served by the sheriff or coroner, as the case may require, of the proper county.

III. The manner of service shall be by giving a copy thereof to the defendant personally, or by leaving such copy with some member of his family, at his last place of abode.

IV. If the defendant be not found and have no known dwelling place within the county, such citation may be served in like manner upon the person or persons who may be the surety or sureties of such party in any bond or recognizance given by him, for the performance of any trust or duty in respect to which such citation may issue.

V. The return to a citation, if made by the party on whose petition it issued, or his agent as aforesaid, shall be on oath or affirmation, and in all cases of service, the return shall state how such citation was served.

VI. If the party to be cited cannot be found, and have no known dwelling place within this commonwealth, and there is no surety on whom service of the citation can be made as aforesaid, and the facts shall be so stated in the return, on oath or affirmation by the party complaining, or by some one competent to make affidavit in that behalf, the Orphans' Court may award another citation, returnable in like manner with the first.

VII. At the time of awarding such second citation, the court may make an order for publication of the same in two or more newspapers, to be designated by the court, in such place or places and for such length of time as the court, having regard to the supposed place of residence of the defendant, and other circumstances, shall direct."

A return of service at the residence of the respondent by leaving a copy of it and of the petition (as required in Philadelphia) with a member of the family is regular on its face.¹

Under the Philadelphia practice, which is a law unto itself, a citation does not need to be served ten days before the return day thereof, but no decree can be entered *pro confesso*, until ten days have elapsed after service.²

A citation is notice to a respondent, of the petitioner's demand, and he will act in disregard of it, at his peril.³

27. Notice to heirs, legatees and distributees.

Section 52 of the act of March 29, 1832, P. L. 190, provides:

"In all cases in which heirs, legatees, or distributees are interested, and in consequence of such interest notice shall be required to be given to them or any of them, of any proceedings in the Orphans' Court, such notice shall in all cases be given in the manner following, except in the case of the accounts of executors or administrators, and other cases specially provided for, viz.:

To all persons resident within the county in which the court has jurisdiction, notice shall be given personally or by writing left at their place of abode; to all persons resident without the

¹ Lafferty's Est., 14 D. R. 6. (See section 2, rule 12, Phila. O. C. rules.)

² Palmer's Est., 2 C. C. 566. (See section 3, rule 12, Phila. O. C.)

³ Suplee's Est., 17 Phila. 512.

county, personal notice as aforesaid shall be given, if in the opinion of the court such notice be reasonably practicable; if otherwise, by publication, in such one or more newspapers as, in the opinion of the court, will be most likely to meet the eye of those entitled to notice."

It has been ruled that all parties interested in a proceeding are entitled to notice of every motion or petition not grantable of course.⁴ But if they have actual knowledge of the proceeding and acquiesce therein notice will be presumed to have been given them.⁵ And where they appear before the auditor and their claims are passed upon, they cannot complain of want of notice.⁶ Parties only which are necessary to the proceedings, must be notified.⁷ Thus a surcharge of an accountant is an adjudication requiring notice to him and an opportunity to be heard.⁸

28. Notice where minors are interested.

Section 53 of the act of March 29, 1832, P. L. 190, provides:

"In all cases in which proceedings may be had in the Orphans' Court, affecting the interest of any minor, notice of such proceedings shall be given to the guardian of such minor, if such guardian be resident within the county, or within forty miles of the seat of justice of the county, in the same manner as is herein provided for in the case of resident persons of full age; but if such minor have no guardian, it shall be the duty of the party making application to the Orphans' Court to cause notice of such application to be given to the minor, if above the age of fourteen years, or, if under that age, to the next of kin of full age; *Provided*, Such minor, or next of kin be resident within the county, or within forty miles of the seat of justice thereof; and if, at the next session of the Orphans' Court, application shall not have been made on the part of such minor, praying for the appointment of a guardian, it shall be the duty of the court to appoint a suitable person as guardian, on whom notice shall be served in all cases in which notice shall be requisite."

An infant respondent can only appear by guardian. An appearance by next friend is only in case of an infant plaintiff or complainant.⁹

29. Separate Orphans' Court to prescribe form of notice.

The act of March 18, 1875, P. L. 29, provides:

"The judges of the separate Orphans' Courts of this commonwealth, respectively, shall have power and are hereby authorized to establish, in their discretion, such rules and regulations, as they may deem proper for the publication of advertisements of

⁴ Mintzer's Ap., 17 W. N. C. 336. (See Bierly on Petitions and Rules for distinctions.) Lancaster's Ap., 111 Pa. 524; Krug v. Keller, 8 Supr. C. 78; Owen's Ap., 78 Pa. 511.

⁵ Rittenhouse's Est., 1 Parsons, 313.

⁶ Kunkle's Est., 21 Supr. C. 200.

⁷ King's Est., 14 D. R. 332; Dalton's Est., 14 D. R. 763; 35 Supr. C. 210.

⁸ Stitzel's Est., 221 Pa. 227.

⁹ Swain v. Fidelity Ins. Co., 54 Pa. 455.

notices of the auditing of accounts of executors, administrators, guardians, or trustees, of notices of sales of real estate under proceedings in said court, of notices to parties in proceedings in partition, and all other cases within their jurisdiction: *Provided*, That said court shall have supervision of and regulate the cost of such publication in all cases, as well by special order in particular cases as by general rules; that said courts shall establish a bill of costs to be chargeable to parties and to estates before them for settlement, for the services of the clerks of said courts, respectively, in the transaction of business of said courts."

30. Decree pro confesso, when no appearance is entered.

Section 57 of the act of 1832, *supra*, continues:

VIII. At the time appointed for the appearance of the defendant, should he not appear, according to the requisition of the citation, and if due proof be made of the service thereof, or when service cannot be made, of the publication thereof, as heretofore prescribed, the court may, with or without another citation, as justice may require, proceed to make such order or decree in respect to the subject matter as may be just and necessary."

The court may proceed *ex parte* and judge how far the complaint is sustained by the evidence.¹⁰

Section 57 of the act, *supra*, continues:

"IX. It shall be lawful for the court, on such proof, to order that the petition of the complainant be taken as confessed, and to direct a reference to an auditor or auditors to take proof of the facts and circumstances set forth in the petition, and to report thereon, and also to report an account against such defendant, if necessary.

X. On the report of the auditor or auditors, the court shall make such order or decree thereon as may be just and necessary."

In the Orphans' Court there is no judgment by default.¹¹ A decree without proof, will be set aside.¹² A petition which shows on its face that the relief sought cannot be granted will be dismissed on examination by the judge, even if no one appears to answer.¹³ Under rules of court where it has been determined to make the Orphans' Court a court of Equity, decrees have been entered *pro confesso* in default of appearance or answer, as under the Equity rules of the Supreme Court.¹⁴ If all the parties appear and confess the facts set forth in the petition a decree may be made without citation or other proceeding.¹⁵ But a case stated is unknown in Orphans' Court practice.¹⁶ It is best that all the parties in interest appear and have their day in court.¹⁷ They

¹⁰ Shilling's Ap., 1 Pa. 90; Moore's Est., 3 W. N. C. 80.

¹¹ Rhone, P. J., in Case's Est., 1 Kulp, 307.

¹² Oviatt's Est., 3 D. R. 620.

¹³ Dugan v. Law, 1 Supr. C. 338; McLaren's Est., 4 Luz. L. R. 113.

¹⁴ Erb's Est., 14 D. R. 286; Watson's Est., 10 Kulp, 527, section 4, rule 12, Phila. Orphans' Court. (See your rules of court.) Palmer Minors' Est., 18 Phila. 126.

¹⁵ West Hickory, Etc., Assn. v. Reed, 80 Pa. 38; Keene's Ap., 60 Pa. 504.

¹⁶ Sharpe's Est., 1 W. N. C. 405.

¹⁷ Wilen's Est., 8 Phila. 210; Holt's Est., 11 Phila. 13.

may, however, appear by counsel, or by an agreement in writing signed by them.¹⁸

31. Pleadings — Demurrer.

The proceedings in this court, whilst assimilating in form and substance to equity practice, are not bound by the rigidity of the rules of Equity,¹⁹ nor should they be, as shall appear in the volume on Equity Practice, which will show the distinction between Equitable Procedure and Equity Practice. The respondent may demur to the petition;²⁰ but if he answer also, the demurrer is over-ruled by the answer.²¹ Where he takes these two swords and the court gives leave to withdraw the one named "answer," the appellate court will equitably assume that the demurrer was filed with leave of court after he withdrew his longer weapon.²²

A demurrer does not admit evasive or uncertain averments, nor such as appear to be untrue by reference to a document described in the answer.²³

32. Form of demurrer to petition.

In the estate of } In the Orphans' Court of Montgomery
Peter Pepper, deceased. } County.

To the Hon. — —, President Judge of said court:

Your respondent Edith Bartley appears and submitting herself to the court, alleges that she ought not to answer the said petition, because it appears from its face that the matters therein alleged and contained are not within the jurisdiction of this court (or because it appears from the reading of the petition that he is not entitled to the relief prayed for). (Here state wherein the petition is defective.)

She therefore prays that the petition may be dismissed at the cost of the petitioner.

Form of Affidavit.

Edith Bartley.

Montgomery County, ss.

Edith Bartley, being duly sworn, says that the foregoing statement is not made for the purpose of delay, but because she is informed and verily believes that it is not just or lawful for her to make answer to the said petition as presented.

Edith Bartley.

Sworn to, etc.

[Order same as above.]

33. Form of plea to a petition.

Estate of } In the Court of Common Pleas of
Richard Rowan, deceased. } Elk County.

¹⁸ Hutchinson's Est., 9 Phila. 322; Keene's Ap., 60 Pa. 504.

¹⁹ Steffy's Ap., 76 Pa. 94.

²⁰ Montgomery's Est., 3 Brewster, 306.

²¹ Cram's Est., 25 W. N. C. 250; McNeile's Est. (No. 6), 15 D. R. 341 (217 Pa. 179).

²² Finley's Est., 196 Pa. 140. *Quære.* Would this result if the Orphans' Court were a court of Equity?

²³ Manners v. Phila. Library Co., 93 Pa. 165.

To the Honorable — —, President Judge of the said court:

Your respondent appears, and submitting himself to the court, alleges that he ought not to answer the said petition, because the said Hans Hansen is not such a party in interest as is entitled to meddle in this matter, as he is not a creditor (heir or legatee, etc.) of said decedent as he alleges (or because it appears by the petition, that more than — years have elapsed since the cause of action arose), (or because all of the identical matters alleged and set forth in said petition have been heretofore finally adjudicated by the court of —), (or pending suit), (stating particulars in all cases).

He therefore prays that the proceeding be dismissed at the costs of the said petitioner.

John Rowan.

Elk County, ss.

John Rowan, the above petitioner, being duly sworn, says the foregoing statements are correct and true, as he verily believes, and that his plea as made is not for the purpose of delay.

John Rowan.

Sworn and subscribed, this —, }
day of —, 19—. }
— —.

34. Form of disclaimer to petition.

Pike County, ss.

Estate of }
Wilson Opp, deceased. } In the Orphans' Court of Pike County.

In the Matter of the Petition of Mary Rogers, for the purpose of [here state concisely the purpose of the petition].

Your respondent Esther Jones appears and alleges that she never had any right, title or interest in the matter set forth in the said petition [or had not at the date of filing]. And she therefore prays that the petition may be dismissed with costs; and she will ever pray, etc.

Esther Jones.

Affidavit to truth.

35. Form of order on filing disclaimer.

Now this — day of —, A. D. 19—, the court orders the disclaimer of Esther Jones to be filed, and by consent of [or notice to] counsel, the matter is set down for hearing and investigation, on the — day of —, A. D. 19— [or on the next argument list].

By the Court.

36. Answer to petition.

"It is text-book law that one who undertakes to answer a bill or petition at all, must answer fully. The answer must confess and avoid, deny or traverse, all the material parts of the bill or petition. The respondent must answer not only as to his knowledge and information, but also as to his belief. And while it is not essential that the precise words, 'knowledge, information and

belief,' should be used, some equivalent expression is required."²⁴ Whilst an answer should be full as to all the material facts, it need not detail the evidence.²⁵ If the answer be deemed insufficiently explicit the petitioner may file exceptions thereto²⁶ or demur. If the matter comes before the court on petition and answer, without filing a replication and taking testimony, the averments of the answer will be taken as true.²⁷ This is limited in some jurisdictions to such averments as are responsive to the petition,²⁸ but in others all the averments are taken as true.²⁹ The petitioner will be put to proof of his petition;³⁰ and this is the rule in Philadelphia, although a replication be filed;³¹ for, here the Equity rules of the Supreme Court have been adopted, and when a replication is filed it must be general under rule 46, a special replication raising new matter being forbidden by rule 47 of the Supreme Court.³² An answer which does not specifically deny the averments of the petition, but sets up facts from which a different conclusion might be drawn and concludes with practically a demurrer, nullifies itself.³³ If the answer be demurred to, it is wrong to make new averments therein, which can only be imported by amending the petition.³⁴ Exceptions to a petition for the allowance of a widow's exemption will be treated as a demurrer, and the averments therein as admitted, if no testimony is taken.³⁵ Where a replication to an answer setting up an ante-nuptial contract against the widow's exemption, admits the contract, but assails the form it raises no issue as to the integrity or validity of the contract.³⁶ If the petitioner files exceptions and demurs to the answer, his exceptions will be considered irregular and the case heard as on demurrer alone.³⁷ If the exceptions do not amount to a demurrer or replication, leave may be granted to file a replication and take testimony.³⁸

²⁴ Rhone's O. C. Pr., vol. 1, p. 576, citing Penrose, J. Davis' Est., 9 W. N. C. 381.

²⁵ Doherty's Est., 14 D. R. 79.

²⁶ Tasker's Est., 13 D. R. 402.

²⁷ Russell's Est., 34 Pa. 258; Souder's Est. (No. 2), 169 Pa. 249; Mercur's Est., 151 Pa. 149; Mead's Est., 4 D. R. 750; Wood's Est., 7 D. R. 655; Schooley's Est., 7 Kulp, 226; P. & L. Dig., vol. 14, col. 24486; Scanlan's Est., 24 Montg. 38.

²⁸ Emig's Est., 18 York, 157.

²⁹ Oberly's Est., 5 Northam. 337; Good's Est., 35 Supr. C. 440.

³⁰ Mosely's Est., 12 Phila. 50; Long's Est., 168 Pa. 341; Mulley's Est., 4 Lack. Jur. 293.

³¹ Wilt's Est., 13 D. R. 483.

³² Troelch's Est., 17 D. R. 518; Morrow's Est., 16 Phila. 387.

³³ Robinson's Est., 16 D. R. 31; 35 Supr. C. 192.

³⁴ McNeile's Est. (No. 1), 14 D. R. 299.

³⁵ Sigrist's Est., 13 D. R. 735.

³⁶ Livingood's Est., 15 D. R. 239.

³⁷ McGrann's Est., 14 D. B. 261.

³⁸ Reichner's Est., 14 D. R. 789.

37. Form of answer to petition.

In the Estate of
 Mary Layton,
 Deceased.

} In the Orphans' Court of Luzerne County.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne.

The respondent, James Clark, executor of the estate of Mary Layton, deceased, for answer to the petition of Sarah Layton, asking for his discharge as such executor, respectfully sheweth:

1. That the first specification in said petition is true, saving that said estate was not worth about twelve thousand dollars, nor more than about half that amount.

2. To the second specification in said petition, respondent says that the will of decedent is not correctly set out, but that it is as follows, to-wit: "Third, I give and bequeath to said Ellen Sherwood, in trust, all notes, moneys, and obligations, the use or interest of which are to be used for the support and maintenance of my two daughters, Sarah and Jennie Layton, till they shall marry, or so long as they may wish to make their home with said Ellen Sherwood."

3. That the third specification in said petition is true.

4. That the fourth specification is not true, saving the clause in relation to the note of twenty-four hundred dollars.

5. That the fifth specification is not true.

6. To the sixth specification respondent answers, that he has endeavored to rent the property, or that part of it not needed by the said Ellen Sherwood and Sarah and Jennie Layton, but the said Sarah has warned tenants when procured, that she would make it "too hot" for them to stay there. That at one time a tenant did occupy the premises, and said Sarah boasted that she had made it too hot for them to stay, and that in consequence of such conduct on her part your respondent has been unable to rent it. Respondent says that Ellen Sherwood has been absent for some months, living with her brother, in Wyoming County, said Ellen being unable, by reason of age and infirmity of mind, to take care of herself, said Sarah and Jennie refusing to give her any assistance in the housework, except to take care of their own room.

7. To the seventh and last specification in said petition, respondent says, there is no reason whatever that he should be discharged from the executorship of this estate.

He therefore prays the court to dismiss the petition at the costs of the petitioner.

James Clark.

(Affidavit of truth.)

38. Replication.

In general the operation of a replication is to put the respondent to proof of the allegations in the answer not responsive to the petition, but set up by way of confession and avoidance.³⁹ Where the replication puts in issue the averments of the answer, it throws upon respondent the burden of proving them.⁴⁰ The replication may be allowed filed *nunc pro tunc* at any time before the filing of the

³⁹ Penrose, J., in Sterr's Est., 13 Phila. 212.

⁴⁰ Naglee's Est., 51 Pa. 154.

report of the examiner.⁴¹ A replication in Equity is the plaintiff's answer or reply to defendant's plea or answer. If it be a general denial of the truth thereof, matter alleged in the answer must be proved. If the replication denies only parts of the answer and does not deny or demand proof of material facts, an agreement that the court may dispose of the case in that state, will warrant it in accepting the facts which are not denied, as being admitted.⁴²

When the petitioner files his replication, he should move for the appointment of an "examiner" ["auditor," saith the act, *supra*] and rule the respondent to close his testimony within a definite time.⁴³ If he sets down the cause for argument on petition, answer and replication, without giving the respondent an opportunity to take testimony, the effect will be the same as if there was no replication, and the answer will be taken as true.⁴⁴ The rule which Equity applies, then, is that the answer must be overcome by the testimony of two witnesses, or one witness and corroborating circumstances equivalent to a witness.⁴⁵ The court, however, will equitably permit a petitioner, thus snapped up in his own trap, to ask for an examiner and proceed according to Equity.⁴⁶ Where a replication is filed averring new matter, whereas the petitioner should have asked leave to amend his petition, instead, and the respondent acquiesces in this irregularity, he cannot take advantage of it, after final decree. "He has slept on his arms."⁴⁷

39. Form of general replication.

In the Estate of Mary Edwards, Deceased.	}	In the Orphans' Court of Wyoming County.
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To the Hon. ———, President Judge of said Court.

Your petitioner still alleging that the statements made in his petition are true, and denying the truth of the conflicting statements made in the defendant's answer, takes issue on the facts, and prays that the court will make such orders as will allow him to take testimony to prove the allegations in his petition contained, and to disprove those which conflict therewith, and are contained in the defendant's answer.

James Jones.

40. Scandalous and impertinent matter.

Where the Orphans' Court has *dictated* itself by rule or otherwise into a Court of Equity, the question sometimes arises as to what matter in the pleadings is scandalous or impertinent, or both, and should be expunged at the culprit's cost. The court may do this on inspection or refer it to an "examiner," the Equity rules

⁴¹ Fleming's Ap., 67 Pa. 18.

⁴² Worthington's Est., 6 Supr. C. 484.

⁴³ Sterr's Est., 13 Phila. 212. (Under Equity rules adopted in Phila.)

⁴⁴ Sterr's Est., *supra*; Cremer's Est., 13 Phila. 253; Berryman's Est., 17 Phila. 463.

⁴⁵ Krogman's Est., 14 C. C. 567; Priestly's Ap., 127 Pa. 420. This is the penalty the petitioner pays for invoking Equity rules in the Orphans' Court.

⁴⁶ Sterr's Est., 13 Phila. 212; Thomas' Est., 11 D. R. 256.

⁴⁷ Miller's Est., 174 Pa. 362.

of the Supreme Court having abolished the dignified personage known as "master."⁴⁸ The one who takes exceptions, in form, thus, should bear in mind the monition: "He that taketh the sword shall perish by the sword"; if he himself has laid the ground work for it.⁴⁹ Matter may be stricken out as impertinent and irrelevant.⁵⁰

41. Right of petitioner to withdraw.

The petitioner may be allowed to discontinue his proceedings when no injury will result to a party in interest,¹ upon payment of costs, which shall not include the counsel fees of respondent.² But if allowed to dismiss inadvertently, after answer filed and refusal to dismiss same, the discontinuance will be stricken off.³

42. Reference to auditor, examiner or master.

When the pleadings have developed an issue of fact which the court has no time to hear and determine, the court upon agreement of parties or counsel,⁴ will appoint an auditor, examiner or master. The authority to appoint a master is imported from the general authority of section 21 of the act of June 16, 1836, P. L. 784, to establish rules of practice, and from the assumption of the dignity of a Court of Chancery.⁵ An "examiner" is less than an auditor, for his duties are to take testimony, either upon interrogatories and cross-interrogatories, or without, whereas an auditor sits as *vice* judge and not only takes the testimony but reports the facts and conclusions of law applicable.

Said Rhone, P. J.:⁶

"The term 'auditor' is the one most usually adopted by the Orphans' Court, instead of the 'examiner' and 'master' of the Equity courts; under this title, the duties and powers of an auditor appointed to investigate the facts, and make report thereon, are co-extensive with those of an examiner and master combined."

The purpose for which an auditor is appointed should be distinctly stated in the order appointing him, the usual purpose being to state an account, to report facts and to report facts with his findings thereon.⁷ The conjunction of Equity with Orphans' Court practice has been responsible for some ludicrous malpractice in the confusion of "auditors" with "examiners and masters."⁸

⁴⁸ Nixon's Est., 16 Phila. 210, 237. The Orphans' Court may appoint a master under section 21, act of June 16, 1836, P. L. 784.

⁴⁹ Marshall's Est., 16 Phila. 271.

⁵⁰ Fleming's Est. (No. 2), 14 D. R. 346.

¹ Hanbest's Est., 3 W. N. C. 28.

² Harrah's Est., 7 D. R. 698.

³ Doherty's Est., 15 D. R. 37.

⁴ Act April 1, 1909, P. L. 95.

⁵ Dale's Est., 8 D. R. 683. The appointment of auditors, examiners and masters in the Orphans' Court of Phila. is regulated by rule 5, which also prescribes notice, report, exceptions and compensation, *q. v.*

⁶ Mott's Est., 2 Kulp, 283. Both terms and duties will be fully given in vol. 4 on Equity Practice and Equitable Procedure.

⁷ Mengas' Ap., 19 Pa. 221; Witman's Ap., 28 Pa. 376.

⁸ Rockhill's Est., 17 Phila. 516, per Hanna, P. J. (See Howell's Est., 38 Leg. Int. 478; Collis' Est., 2 W. N. C. 130.)

The act of April 13, 1840, P. L. 319, authorizes the appointment of one or more auditors in the Orphans' Court.

43. Hearing of parties and witnesses by auditor.

The rules of court provide the time and manner of giving notice of appointment and meetings.

Section 56 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court or any auditors appointed by them, shall have power to examine, on oath or affirmation, any of the parties to any proceedings instituted in such court, respecting any matter in dispute in such proceedings, and the said court shall have power to compel the production of any books, papers or other documents, necessary to a just decision of the question before them, or before auditors."

The act of April 11, 1848, P. L. 506 (section 4), confers upon an auditor power to compel the attendance of witnesses by attachment, if they fail to obey the subpoena duly served upon them, and on proof of such service made.⁹ Section 4 is as follows:

"Any auditor or auditors appointed by any court of record within this commonwealth, in the due performance of any of the duties committed to them by said courts, shall have power to issue subpoenas to witnesses to appear before them; and if any person who shall have been duly subpoenaed to attend as aforesaid, shall neglect or refuse to attend, the auditor, or a majority of them, when more than one, shall have power to issue an attachment against such person according to the practice of the courts, directed to the sheriff, or any constable of the proper county, for execution."

It is no excuse for an executrix to refuse to obey a subpoena, that the auditor refused her request for an issue.¹⁰ An auditor may punish a witness for contempt, who refuses to answer a relevant question before him.¹¹ An executor brought in on a citation to file an account, which is referred to auditors is bound to answer all questions relative to his administration, propounded to him by them.¹² Where the competency of the witness is objected to, it is not the practice to instruct him not to answer and refer the matter to the court. The practice is to object to his competency, stating the reasons and requesting the auditor to write them down. The testimony is then taken under exceptions, and if the auditor's report is based upon such testimony exceptions must be filed to his report, as required by the rules of court.¹³ The auditor should give ample opportunity to parties to be heard and not close the testimony before they have had it.¹⁴

44. Hearing by master or examiner.

In those jurisdictions where the Orphans' Court is treated as an Equity court, when only testimony is to be taken to be laid be-

Edris' Est., 25 C. C. 377.

¹⁰ Connell's Est., 1 W. N. C. 64.

¹¹ Edris' Est., 25 C. C. 377.

¹² Bowen's Ac., 2 Clark, 147.

¹³ Snyder's Est., 29 C. C. 10; Dougherty's Est., 14 Phila. 288.

¹⁴ Sutton's Est., 15 York, 176.

fore court, an examiner and not a master is appointed; and he should not be appointed until a replication is filed.¹⁵ A witness before an examiner is bound to attend until his examination and cross-examination are closed and he has signed his deposition.¹⁶ An examiner has no power to commit a witness for contumacy in refusing to answer. He must report the matter to the court for instructions.¹⁷

45. Admission of evidence by auditor.

The auditor having taken down the evidence objected to as incompetent, may disregard it, if he concludes that it is incompetent.¹⁸ Auditors are not supposed to proceed according to the strictest rules of evidence.¹⁹ Said Rhone, P. J.:²⁰

"The auditor expressly authorized by acts of assembly * * * is but an auxiliary of the court, and his power to decide upon the admissibility or relevancy of testimony must be very limited, else the suitor might have his case strangled in the dark. The duties of an auditor in the taking of testimony are as much separated from his duty to report thereon as those of an examiner are from the duties of a master in Equity. So far as taking testimony is concerned, his duties are more like those of a commissioner to take depositions, but are not nearly so limited, being specially appointed to investigate all the facts of the case, to develop the true points and bring before the court only the real matters at issue. In his report, which follows the taking of the testimony, he is to decide upon the admissibility, relevancy and weight of the testimony and the competency of the witnesses." There is nothing more or better to be said.

46. Admission of evidence by examiner.

An examiner is a mere clerk to take down the testimony for the court. It is his duty to take all that is offered, and when he returns it to court, it will be passed upon.²¹ But where a party vexatiously piles up plainly irrelevant and incompetent testimony, the court may interfere²² and put the costs upon the offender.²³

47. Evidence and commissions, etc.

In the Orphans' Court the rules of evidence are the same as in other courts, and if a witness is incompetent, section 56 of the act of March 29, 1832, P. L. 190, does not render him competent; it merely authorizes that he may be examined by the opposite party.¹ But where called by his antagonist, his evidence will be taken as

¹⁵ Stuard's Est., 17 D. R. 535.

¹⁶ Hook's Est., 13 Phila. 390.

¹⁷ Brophy's Est., 3 W. N. C. 306; Bradley's Est., 15 Phila. 586.

¹⁸ Sweeten's Est., 3 Del. Co. 127; Myer's Est., 13 Supr. C. 476.

¹⁹ McFarland's Est., 4 Pa. 149.

²⁰ Mott's Est., 2 Kulp, 283.

²¹ Collins' Est., 2 W. N. C. 430; Hunt's Est., 8 W. N. C. 45; Colwell's Est., 18 Phila. 38.

²² Taylor's Est., 16 Phila. 205.

²³ Howell's Est., 14 Phila. 329.

¹ Mylin's Est., 7 Watts, 64.

true unless clearly disproved.² A guardian cited to account may be examined with reference thereto.³ Where an examiner can be appointed, depositions will not be heard.⁴ After the death of the executor, a rule to take depositions cannot issue until an administrator *de bonis non* is raised.⁵ When a commission is taken out by a party, the opposite party cannot by order of court compel the taking of his testimony by the same commissioner. This can only be done by agreement of the parties.⁶ A rule to file a more specific bill of particulars, so that the respondent may file cross-interrogatories, will be discharged, when the bill filed is specific enough.⁷ It is improper to enter an office rule to strike off interrogatories, which, if improper, scandalous or impertinent may be excepted to.⁸ An order will not be granted on an interlocutory report of the auditor, an answer by accountant, but no replication, to compel an accountant to produce a book, on cross-examination, which he claims is a private book and not pertinent to the account.⁹ Interrogatories under the Equity rules should be answered in the first person. But on an issue *devisavit vel non*, the Common Pleas rules will be followed in Philadelphia.¹⁰

48. Depositions within the state.

Section 1 of rule 11, Allegheny County, provides:

"Rules to take the depositions of witnesses within the state may be entered of course by the clerk, and the depositions may be taken before any person legally authorized to administer oaths or affirmations, on ten days' notice."

49. Depositions of ancient, infirm and going witnesses.

Section 2 of rule 11, Allegheny County, provides:

"Rules may be entered of course by the clerk to take the depositions of ancient, infirm or going witnesses within five miles of the courthouse on twenty-four hours' notice; and on four days' in other parts of Allegheny County: *Provided*, The party file an affidavit of facts necessary to entitle him to such rule."

(See Vol. I, Depositions and Commissions.)

50. Commissions outside the state.

Section 3 of rule 11, Allegheny County, provides:

"Rules for a commission to take testimony out of the state may be entered of course by the clerk, and the commission may be issued, after fifteen days' notice, containing the commissioner's name and a copy of the interrogatories filed. All commissions to take testimony shall be returned within sixty days from the issuance thereof; except where otherwise specially ordered."

² Lights' Ap., 24 Pa. 180.

³ Bowman v. Herr, 1 P. & W. 282.

⁴ Buckingham's Est., 3 W. N. C. 564.

⁵ Montgomery's Est., 3 Brewster, 306.

⁶ McCullough's Est., 5 C. C. 87.

⁷ Gentner's Est., 16 Phila. 618.

⁸ Yorke's Est., 5 D. R. 264.

⁹ Emig's Est., 18 York, 157.

¹⁰ Cullen's Est., 16 Phila. 385. (See Neill's Will, 12 Phila. 160.)

51. Depositions on motions and rules.

Section 4 of rule 11, Allegheny County, provides:

"The testimony of witnesses to be used on the hearing of motions and rules to show cause shall be taken on reasonable notice, before any justice of the peace, or other competent authority, and if deemed necessary, a rule for the purpose may be entered of course by the clerk on application of either party; and no witness shall be examined at the bar without special order of the court."

52. Auditor's report — Notice to parties.

It was well said by Lowrie, J.:²⁴

"An excellent rule for securing careful reports is that the auditor shall give the several parties ten days' notice that his report is ready for signing, that they may have an opportunity of excepting to it before him. If it be thus excepted to, he reconsiders, and, if necessary, amends his report before filing it, and no exceptions are noted in the court which were not filed before the auditor. Thus no report can be set aside except on points, to which the auditor's attention has been directed, and then the same point is distinctly presented to the court below and reviewed by them."

53. Form and substance of report.

The auditor's report should state what he finds are the facts from the testimony, and should not be a mere review of it.²⁵ He should also return the testimony to the court, or hold it subject to its order.²⁶ When appointed to state an account, his statement of it is part of his report and must come before the court.²⁷ The report of the auditor was held to be the record and the best evidence of what transpired before him.²⁸ His finding of facts is similar to a special verdict.²⁹ His report, disposing of a matter in controversy, is sufficient without specifically referring to the evidence upon which his conclusion is founded.³⁰

54. Filing of the report.

A rule of court regarding the extension of time for filing an auditor's report (as in Schuylkill County), must be strictly followed.³¹ In Philadelphia, section 4 of rule 5 requires auditors to file their reports within sixty days after their appointment, but the court, to reach the special justice of the case may extend the time.³²

55. Return of testimony.

It is not the practice now for the auditor to return the testimony to court, unless ordered so to do.³³ Therefore, a party excepting to

²⁴ Mengas' Ap., 19 Pa. 221.

²⁵ Ford's Est., 8 Phila. 196; Wesco's Ap., 52 Pa. 195; Harper's Est., 1 Brewster, 471; Killion's Ap., 3 Brewster, 235.

²⁶ Lomeson's Est., 5 Kulp, 405.

²⁷ Young's Est., 4 Dauphin County, 173.

²⁸ White's Est., 11 Phila. 100.

²⁹ Stilwell's Est., 8 Phila. 178.

³⁰ Kleinfelter's Ap., 1 Pitts. 376; Spellisy's Est., 174 Pa. 628.

³¹ Brennan's Est., 65 Pa. 16.

³² Hansall's Est., 11 Phila. 47.

³³ Gegen's Est., 4 W. N. C. 127; Stilwell's Est., 8 Phila. 178.

the auditor's finding of the facts should obtain an order that the notes of testimony be filed,³⁴ otherwise the court cannot look into it and review it.³⁵

56. Re-committal of report.

Where the court is left in doubt by the report, it may re-commit it to the auditor for further findings.³⁶ It will be referred back for the correction of an error,³⁷ but it is discretionary for the court to re-commit for the allowance of the collateral tax, after confirmation.³⁸ When referred back on a specific matter, his duties will be confined to that³⁹ and the audit will not be generally opened.⁴⁰ Where a decree, over-ruling the report of an auditor, has been reversed and the record remitted, the auditor need not go into the matter *de novo*, if he has before him all the facts justifying his findings.⁴¹ A report may be referred back to take further testimony in support of a claim;⁴² or upon a fact in dispute not clearly found.⁴³

57. Effect of confirmation.

The confirmation of an auditor's report cures any irregularity as to the scope of matters submitted to him.⁴⁴ All presumptions in favor of the regularity of the proceedings will be made on appeal.⁴⁵

The auditor's award of a distributive share on the request of the accountant will not be disturbed, on the accountant's appeal.⁴⁶

58. Conclusiveness of findings of fact.

The rule is that the findings of fact by an auditor or an auditing judge are entitled to the same weight as the verdict of a jury and will not be set aside except for clear error.⁴⁷ The appellate court will not disturb a finding of an auditor or auditing judge, approved by the Orphans' Court, except in cases of fraud, clear mistake or manifest want of consideration.⁴⁸

³⁴ Quinn's Est., 1 W. N. C. 9; Mayer's Est., 18 Phila. 46.

³⁵ Vogdes' Est., 1 W. N. C. 21; Thomas' Est., 5 Kulp, 213; Digkson's Ac., 21 Pitts. L. J. 109; Huber's Est., 9 Lanc. L. R. 337.

³⁶ Stine's Est., 16 Supr. C. 12.

³⁷ Schutze's Est., 18 York, 145.

³⁸ Radigan's Est., 13 Supr. C. 131.

³⁹ Hughes' Est., 19 Supr. C. 534.

⁴⁰ Landis' Est., 6 Lanc. Bar, 57; Carter's Est., 1 Del. Co. 170; Donnelly's Est., 3 Phila. 18.

⁴¹ Roberts' Est., 12 Mont'g Co. 11.

⁴² Croxall's Est., 7 York, 35.

⁴³ Weaver's Est., 22 Lanc. L. R. 41.

⁴⁴ Bloom's Ap., 106 Pa. 198.

⁴⁵ Bull's Ap., 24 Pa. 286; Stephen's Ap., 56 Pa. 409.

⁴⁶ Garman's Est., 32 Supr. C. 494.

⁴⁷ Crawford's Est., 10 Supr. C. 587; Furbush's Est., 16 D. R. 205; 220 Pa. 166, P. & L. Dig., vol. 14, col. 24559; 2 C. R. A., col. 3714; 4 C. R. A., col. 1848.

⁴⁸ Whiteside's Ap., 23 Pa. 114; Fague's Est., 19 Supr. C. 638; P. & L. Dig., vol. 14, col. 24565; Barnes' Est., 221 Pa. 399; Gallagher's Est., 218 Pa. 609; Shadle's Est. (No. 1), 30 Supr. C. 151; Taylor's Est., 35 Supr.

[The duties of auditors in stating accounts and distribution of balances will be more fully considered under the appropriate heads.]

59. Enforcement of orders and decrees.

Section 57 of the act of 1832, *supra*, continues:

“XI. Compliance with an order or decree of the court may be enforced by attachment or sequestration, or, in case of a decree for the payment of money against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of *feri facias*, which writs may be allowed by the court, or by any judge thereof in vacation.

“XII. Writs of attachment and sequestration shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county.”

[The subjects of attachment and sequestration, with complete forms, will be treated of under their appropriate heads.]

60. Rule for attachment as for contempt.

Section 1 of rule 3, Allegheny County, provides:

“Rules for attachments, as for contempt, may be granted on petition made by a party interested, under oath, setting forth:

“1. The order or decree sought to be enforced;

“2. Demand made for compliance with such order or decree; and

“3. Refusal or failure of compliance.”

61. Process directed to other counties.

Section 57 of the act of 1832, *supra*, further provides:

“XXV. When any executor, administrator or guardian shall reside or move out of the county in which his appointment shall have taken place, or shall not possess real or personal estate in such county sufficient to satisfy any decree or order of the Orphans' Court of such county, it shall be lawful for the Orphans' Court of such county to issue process to the county in which such executor, administrator or guardian may be, or in which he may have any real or personal estate, amenable to such process, and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such executor, administrator, or guardian may be, or may possess real or personal estate as aforesaid.”

62. Transfer of orders and decrees to other counties.

The act of June 5, 1885, P. L. 78, providing for the transfer of definite orders and decrees for the payment of money, to the corresponding court of another county, applies to the Orphans' Court.

63. Rules and orders upon officers and attorneys.

Section 28 of the act of June 16, 1836 (Vol. I, Johnson, page 144), applies to the Orphans' Court as well as the Common Pleas. The same law which authorizes admission of attorneys to practice in all the courts embraces the Orphans' Court (see Attorneys, Vol. I, Johnson's Practice).

64. Orphans' Courts may perpetuate testimony of lost records.

Section 1 of the act of April 1, 1863, P. L. 205, provides:

"The Orphans' Courts of the several counties of this commonwealth shall have the jurisdiction and powers of a Court of Chancery, so far as relates to the perpetuation of testimony in cases of lost or destroyed records of the Orphans' Court of any county in this commonwealth, whether such records were lost or destroyed before or after the passage of this act, and the same proceedings, orders, decrees and judgments shall be had therein, *mutatis mutandis*, as in cases now authorized by law, and with the like effect; and when proved, such record shall have the same legal operation as the original record would have had: *Provided*, That in all cases the application to perpetuate testimony shall be made in the same court in which the record may be lost or destroyed: *Provided also*, Where minors are interested, that notice of said proceeding shall be served upon said minors and their guardians."

In a proceeding under this act to perpetuate the evidence as to the existence and contents of a guardian's bond, which has been lost, it cannot be objected in an action on the bond in the Common Pleas, that the bond was not a record within the contemplation of this act; the Orphans' Court is the best judge of what constitutes its records, and even if the bond is not a record, it must be presumed from the decree that a record existed and had been lost and that proof of these facts was before the Orphans' Court. * * * The Common Pleas may, however, determine whether the Orphans' Court had jurisdiction. * * * This act extends the practice under the act of June 16, 1836, P. L. 784, to the Orphans' Court and the procedure by bill instead of petition is therefore proper practice.⁴⁹

65. Sending issues to the Common Pleas.

Section 55 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court shall have power to send an issue to the Court of Common Pleas of the same county, for the trial of facts by a jury, whenever they shall deem it expedient so to do."

This is a power derived from Chancery. It is intended only as advisory to the judge who sits as chancellor, and he is not bound by the verdict.¹ It is discretionary with him whether he grants the issue or not.² It is improper to send an issue of mixed law and fact to a jury. Only questions of fact should be submitted.³ An issue is only demandable when there is strong evidence to support it, arising in distribution under the act of June 16, 1836, P. L. 755 (sections 86 and 87).⁴

⁴⁹ Wheaton, J., in *Watson v. Monroe*, 11 *Wulp*, 150.

¹ *Kates' Est.*, 148 Pa. 471; *Sheehan's Est.*, 139 Pa. 168.

² *Baker's Ap.*, 59 Pa. 313; *Cobb's Exs. v. Burns*, 61 Pa. 278; *Thompson's Ap.*, 103 Pa. 603; *Kates' Est.*, *supra*. *Draper's Est.*, 10 C. C. 231; *Graham's Ap.*, 61 Pa. 43; *Ruoff's Ap.*, 26 Pa. 219.

³ *Cobb's Exs. v. Burns*, 61 Pa. 278; *Armstrong's Est.*, 38 Leg. Int. 402; *Davis' Est.*, 37 Leg. Int. 512.

⁴ *Dickerson's Ap.*, 7 Pa. 255; *Knight's Ap.*, 19 Pa. 493; *Benson's Ap.*, 48 Pa. 159; *Martin's Ap.*, 97 Pa. 85; *Wills' Ap.*, 22 Pa. 325; *Craig's Ap.*, 77 Pa. 448.

[Of issues *devisavit vel non, infra*, under Wills.]

It would be futile to grant an issue where there is not sufficient evidence to support the facts alleged.⁵ Where a case has been referred to an auditor, the demand for an issue should be made to him before his report is made up.⁶ If not in proper form and where it embraces both law and fact and cannot affect the result, it will be refused.⁷

66. Request for an issue, Allegheny County.

Section 9 of rule 5, Allegheny County, provides:

"It shall be the duty of any person desiring an issue, under the acts of assembly relating to executions, to present his request in writing to the auditor within forty-eight hours after the hearing of the evidence has been concluded; which request shall particularly set forth the specific facts in dispute, on which he founds his claim to an issue, verified by affidavit; and it shall be the duty of the auditor forthwith to report the same to the court."

Section 5 of rule 11, Allegheny County, provides:

"All applications for issues shall state specifically the material facts in dispute, and set forth the nature and character thereof."

67. Issue on distribution.

Section 2 of the act of April 20, 1846, P. L. 411, provides:

"Before an issue shall be directed upon the distribution of money arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal by such applicant, if the issue be refused, in like manner as in other cases in which such writ now lies."

This act is mandatory and not discretionary⁸ and will be further considered under Distribution, *infra*.

68. Decrees in the Orphans' Court.

A decree in the Orphans' Court is the equivalent of a judgment at law. It is the final determination of the matter by the judge, unless interlocutory only, and must be recorded as such, although it was early held that it need not be drawn up at length during the term.¹ But such should not be the practice; on the contrary, counsel seeking a decree should carefully prepare it, and submit it to the court when he moves for it, as the rules of court ought to or do require.² "Decree" is sometimes confused with "order." For example, the examination and confirmation of an account *nisi* is an order and not a decree. It is equivalent to an order to the clerk that unless exceptions be taken within the time allowed by rule of court,

⁵ Cozzen's Will, 61 Pa. 196; Knight's Ap., 19 Pa. 493.

⁶ Barnes' Ap., 3 Grant, 315; Foster's Ap., 87 Pa. 67.

⁷ Sander's Ap., 57 Pa. 498.

⁸ Dormer v. Brown, 72 Pa. 404.

¹ Hartman's Ap., 21 Pa. 488.

² See section 5, rule 12, Phila.

a decree shall be by him entered finally confirming the same. Such decree finally entered does not entitle the person to come in as a judgment creditor on a deficiency of assets.³ Now a decree of confirmation, showing a balance in the hands of an executor or administrator, when filed by transcript in the Common Pleas becomes a judgment.⁴

69. Decrees, satisfaction of.

Section 1 of rule 15, Philadelphia, provides:

"Acknowledgment of satisfaction of all sums of money or property ordered to be paid or transferred by any decree of the court may be made on the docket in the manner practiced in the courts of common law, to be attested by the clerk or a deputy, and any officer or party distributing or paying out money or other property may, at the time thereof, or at any time thereafter, require such satisfaction to be so entered by the party in person or his attorney, or upon a written authority by him to the clerk of the court."

70. Decree, enforcement of.

Section 2 of rule 15, Philadelphia, provides:

"All applications to enforce a decree or adjudication for the payment of costs or any other sum of money, or for the delivery of any goods, chattels or other property of an estate, by an executor, administrator, guardian or trustee, shall be by petition of the person or persons entitled to the same, briefly setting forth the facts upon which such application is based. If the same be satisfactory to the court, a peremptory order to pay, or transfer, assign or deliver, as the case may be, will be granted; a certified copy of which must be served personally upon the respondent, at least ten days prior to the day named in the order. And if the order of court be not complied with on or before the day so named, upon proof of personal service of the order, an attachment will, upon petition setting forth the necessary facts, be awarded."

71. Exemplifications of the record.

An exemplification of the record, when necessary, must embrace the record as it appears in the Orphans' Court, and attached to the copy a certificate to the fact that it is of the full and complete record as it remains in his office, and a certificate by the judge that he is the clerk and by the clerk that the judge is now the judge of said court.

Following is a form:

72. Form of certificate of the clerk.

Commonwealth of Pennsylvania, County of —, ss.

I, —, clerk of the Orphans' Court in and for the county [Seal.] of —, do certify that the above and foregoing is a true, correct, and entire copy of the records and proceedings in the matter of the appointment of Ralph Stone, guardian of the minor

³ Shaw v. M'Cameron, 11 S. & R. 252.

⁴ Act of April 27, 1909, P. L. 202.

children of Abram Hewit, deceased, so full and entire as the same remains of record and on file in said office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Orphans' Court, at —, this — day of —, A. D. one thousand nine hundred and —.

—, —,
Clerk of Orphans' Court.

73. Form of certificate of the judge.

Commonwealth of Pennsylvania, County of —, ss.

I, — —, President Judge of the Orphans' Court in and for the county of —, do certify that — —, Esq., by whom the annexed record, certificate, and attestation were made, and who, in his own proper handwriting, has thereunto subscribed his name and affixed his official seal, was, at the time of so doing, and now is, clerk of the Orphans' Court in and for said county, duly commissioned and qualified; to all whose official acts, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that said record, certificate, and attestation are in due form of law, and made by the proper officer, and that the seal affixed to said certificate is the seal of the said court.

In testimony whereof, I have hereunto set my hand and seal this — day of —, A. D. 19—.

— —, [Seal.]
President Judge Orphans' Court.

74. Form of certificate of the clerk.

Commonwealth of Pennsylvania, County of —, ss.

I, — —, Esq., clerk of the Orphans' Court in and for the county of —, do certify that the Honorable — —, by whom the foregoing certificate and attestation were made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, president judge of the Orphans' Court in and for said county, duly commissioned and qualified; to all whose official acts, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at —, this — day of —, A. D. 19—.

— —,
Clerk of Orphans' Court.

75. Form of register's certificate.

Commonwealth of Pennsylvania, — County, ss.

I, — —, register for the probate of wills, granting letters of administration, etc., in and for the county aforesaid, do hereby certify, that on the — day of —, A. D. 19—, letters — on the estate of — —, deceased, late of — County aforesaid, were duly granted unto — —, who was duly qualified, well and truly to administer the goods and chattels, rights and credits which were of said decedent. Therefore, all faith and credit are of right due and ought to be paid to all his lawful acts as such throughout the United States and elsewhere.

Given under my hand and seal of office at —, this — day of —, A. D. 19—, —, Register.

76. Form of judge's certificate.

Commonwealth of Pennsylvania, — County, ss.

I, —, president judge of the Court of Common Pleas in and for the county aforesaid, do hereby certify, that —, whose certificate is above written, is the register for the probate of wills, granting letters of administration, etc., in and for the said county, duly commissioned and sworn, to all whose official acts, full faith and credit are due, and that his certificate is in due form of law, and that the seal affixed to said certificate is the seal of said register.

Witness my hand and seal at Pittsburgh, this — day of —, A. D. 19—.

—, [Seal.]

President Judge of the Court of Common Pleas.

Commonwealth of Pennsylvania, — County, ss.

I, —, Prothonotary of the Court of Common Pleas in and for the county of —, do hereby certify, that the Hon. —, whose certificate is above written, and in his own proper hand subscribed, is, and was at the time of so doing, acting president judge of the said Court of Common Pleas in and for the said county of —, duly commissioned and sworn, to all whose official acts full faith and credit are due.

Witness my hand and seal of said court, at Pittsburgh, this — day of —, A. D. 19—.

—, Prothonotary.

77. Writs of execution in the Orphans' Court.

Section 57 of the act of 1832, *supra*, provided:

"XVI. Writs of *feri facias* shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county, and the proceedings thereon shall be the same as on writs of *feri facias* issued by the Court of Common Pleas of the same county."⁹

By clause XI of the act, *supra*, this writ "may be allowed by the court or by any judge thereof in vacation."

And section 2 of the act of April 21, 1846, P. L. 430, provides:

"Writs of *venditioni exponas*, and writs of *testatum feri facias* and *venditioni exponas*, may be issued out of any Orphans' Court, in the same manner that writs of execution in the nature of writs of *feri facias* are allowed by the fifty-seventh section of an act relating to Orphans' Court, passed March 29, 1832; and the sheriff or other officer to whom any such writ is directed, shall proceed to levy and sell the real and personal property of the person or persons against whom the same shall be issued, and convey the real estate sold to the purchaser or purchasers thereof, in the same manner, in all respects, as if such writ had issued out of a Court of Common Pleas; * * *

The remainder of the section relates to process issued before the passage of the act.

⁹ Helfrich v. Stem, 17 Pa. 143.

78. Manner of issuing executions.

A *fi. fa.* or a *lev. fa.* cannot be issued out of the Orphans' Court without a petition, allowance and order fixing the notice, terms of sale and return day of the writ, where the court has not by rule fixed a regular return day.¹⁰ Although an attachment has previously issued, the court may allow a *fi. fa.* to levy.¹¹ The respondent accountant cannot defeat this process by setting up matter which should have been presented to the auditor.¹² A *fi. fa.* having issued and the real estate levied upon, having been extended and the defendant allowed to retain on paying the rentals, a *vend. ex.* may issue after five years, without the necessity for revival, since there is no such process as a *scire facias* to revive known in the Orphans' Court.¹³

79. Form and character of writ.

The form of the writ follows that issuable in the Common Pleas, but it must recite the decree of the Orphans' Court upon which it is founded, in its body, and it should be signed and attested by the clerk of the Orphans' Court and not the prothonotary, and be returnable at a day fixed in the order, or the regular return day.¹⁴ Such writ will be set aside, upon rule, where it appears that counsel for claimants has sufficient money in his hands to satisfy the demand.¹⁵ The act of 1846, *supra*, authorizes the sale of land¹⁶ and, if the defendant has no land in the county, a *testatum* writ may issue to the sheriff of the county where he has.¹⁷ Where the land is sold, the deed should be acknowledged in the court from which the writ issued.¹⁸

80. Special writs of execution, when allowed.

The act of March 27, 1873, P. L. 49, provides:

"Wherever any person, against whom a decree for the payment of money has been made by the Orphans' Court of any county, is possessed of, or entitled to, any stock, deposits or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is provided by the act of June 16, 1836, entitled 'An act relating to executions,' and by the tenth section of the act of April 13, 1843, entitled 'An act to convey certain real estate and for other purposes'; a writ of attachment for said purpose may be allowed by said court or any judge thereof, as writs of *fi. fa.* in said courts are now allowed, and may be

¹⁰ Oviatt's Est., 3 D. R. 620.

¹¹ Miles' Est., 4 Kulp, 152. Rhone, P. J.

¹² Siegfried's Est., 1 Woodward, 77.

¹³ Weyand's Ap., 62 Pa. 198.

¹⁴ Peckham's Est., 1 Kulp, 353. Elwell, P. J. (See vol. 2, Johnson, "Executions.")

¹⁵ Miles' Est., 4 Kulp, 152.

¹⁶ Weyand's Ap., 62 Pa. 198.

¹⁷ Helfrich v. Stem, 17 Pa. 143.

¹⁸ Oviatt's Est., 3 D. R. 620. *Quære*, whether the late act changes this. (See vol. 2, Johnson, Sheriff's Deeds.)

served out of the county in which the same may be issued, but service on the party against whom such decree was made shall not be required, if he be not found in said county.¹⁹

81. Costs in the separate Orphans' Courts.

Section 1 of the act of March 24, 1877, P. L. 37, provides:

"In counties wherein separate Orphans' Courts are now or may be established, the said courts shall establish a bill of costs to be chargeable to parties and to estates, for the probate of wills and testaments and granting letters testamentary and of administrations, and for all the services of the register of wills of such county in the transaction of the business of his office: *Provided*, The tax to be paid to and received by the register for the use of the commonwealth shall not be less than the sum now or hereafter to be fixed by law."

82. Costs generally.

The officers are held strictly to the amount of fees allowed by the acts of assembly and cannot charge more;²⁰ and a rule of court which allows more is void.²¹ In separate Orphans' Courts the judge performs the duties of auditing accounts without cost, but it is confined to that single function.²² The costs of printing allowed by the Equity rules are not generally allowed in the Orphans' Courts;²³ though where, as in Philadelphia, certain petitions, answers, etc., are required by the rules to be printed, it is different.²⁴ The costs of a copy of testimony taken before the judge as auditor will not be allowed.²⁵

This subject will be further considered, *infra*. And as to costs generally, see Vol. II, Johnson's Pr. Costs.

83. Stenographer's fees.

Under section 6 of the act of May 24, 1887, P. L. 199, the court fixed the compensation of a stenographer required by an examiner, but allowed nothing for copies, as costs.²⁶ Section 9 of the act of May 1, 1907, P. L. 135 (Johnson's Pr., Vol. I, page 179), regulates the duties and compensation of an official stenographer, by agreement of the parties, before an examiner, etc. Prior to that the courts regulated the matter equitably.²⁷

84. Counsel and witness fees.

Where a petitioner is allowed to withdraw his petition, the opposing party cannot claim counsel fees as costs.²⁸ The act of June 6,

¹⁹ See Executions, vol. 2, Johnson's Practice.

²⁰ Mumma's Est., 2 D. R. 592.

²¹ Reeser's Petition, 12 Lanc. L. R. 33.

²² Watson's Est., 7 W. N. C. 424.

²³ Parker's Est., 1 W. N. C. 115.

²⁴ Drum's Est., 16 Phila. 203; Nixon's Est., 16 Phila. 251.

²⁵ Tasker's Est. (No. 3), 15 D. R. 174.

²⁶ Drinkhouse's Est., 1 D. R. 92; Taylor's Est., 3 Supr. C. 275.

²⁷ Pearson's Est., 8 Northam. 23; Hays' Est., 33 Pitts. L. J. 202.

²⁸ Harrah's Est., 7 D. R. 698.

1887, P. L. 359, does not authorize counsel fees or expenses as costs,²⁹ and, in any event, the accountant cannot charge for his personal services at the audit of his account, when he is claimant against the estate.³⁰

As to witness fees, there seems to be no fixed rule in the Orphans' Court, each case being governed by its own facts.³¹ But where there is a manifest purpose to harass, delay and vex a claimant, he may be allowed his witness fees.³² As a general rule, the party calling witnesses is required to pay them himself.³³ Where they are called in the interest of the estate, they should be allowed out of the fund.³⁴ But when called to support an unfounded claim, their fees cannot be allowed.³⁵

85. Liability for costs.

The Orphans' Court being guided in its procedure according to equitable principles, possesses a large discretion in the imposition of costs, which it would not have were it a court of law or of equity, wherein the rules are rigid³⁶ and inflexible, as they are not in the Orphans' Court, where the circumstances of each case appeal to the discretion of the judge and he may be truly said to act *in foro conscientiae*.³⁷ The fund for distribution may generally be held for the costs of the audit, unless the circumstances should render it unjust to do so.³⁸ The general rule is that the losing party should pay the costs his action has entailed.³⁹ In an unsuccessful effort to surcharge the accountant, the costs may be charged to the estate.⁴⁰ Even where the creditor or claimant is unsuccessful, the costs may be charged to the fund;⁴¹ or where the audit was caused by the accountant's errors, in part.⁴²

See Costs, Vol. II, Johnson's Practice.

²⁹ Goodman's Est., 6 C. C. 254.

³⁰ Eckert's Est., 7 D. R. 698.

³¹ Young's Est., 2 Chester County, 117.

³² Moss' Est., 4 Kulp, 236. Rhone, P. J.

³³ Spear's Est., 2 Chester Co. 156; Balliet's Ap., 2 Walker, 268; Toomey's Est., 150 Pa. 535.

³⁴ Young's Est., 2 Chester Co. 117; Decker's Est., 22 C. C. 46.

³⁵ Bartolet's Ap., 1 Walker, 77; Danner's Est., 2 L. V. L. R. 422; Raber's Est., 5 York, 202.

³⁶ Spangler's Est., 21 Pa. 335; Lusk's Est., 150 Pa. 517; Hertzler's Est., 15 Lanc. L. R. 353; 192 Pa. 531; Hoffer's Est., 156 Pa. 473; Snyder's Est., 18 Supr. C. 462; Shadle's Est. (No. 2), 30 Supr. C. 160; P. & L. Dig. of Dec., vol. 14, col. 24747.

³⁷ John's Est., 1 Lanc. L. R. 291. Rockefeller, P. J.

³⁸ Verner's Est., 6 Watts, 250; Crawford's Est., 10 Supr. C. 587; P. & L. Dig., vol. 14, col. 24748; Rowe's Est., 11 Kulp, 32; 22 Supr. C. 597.

³⁹ Larimer's Ap., 22 Pa. 41.

⁴⁰ Hodgson's Est., 158 Pa. 151.

⁴¹ Kindig's Est., 9 York, 18; Lusk's Est., 150 Pa. 517; McCullough's Est., 8 C. C. 247; Snyder's Est., 18 Supr. C. 462.

⁴² Harding's Est., 24 Pa. 189; Yoder's Ap., 45 Pa. 394.

CHAPTER VII.

DEBTS OF THE DECEDENT — PREFERENCE — EVIDENCE AND COMPETENCY OF WITNESSES.

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| 1. Debts of the decedent. | 18. Claims of relatives other than parent and child. |
| 2. Preference of payment. | 19. Right to recover on <i>quantum meruit</i> . |
| 3. Personalty the primary fund. | 20. Admissibility and sufficiency of evidence. |
| 4. Order of payment. | 21. The confidential relation. |
| 5. Claims for medical attendance. | 22. Competency of witnesses. |
| 6. Funeral expenses. | 23. Enlarged competency, act of 1891. |
| 7. Monument or tombstones. | 24. Scope and effect of acts. |
| 8. Wages of servants and laborers. | 25. One year's time for payment. |
| 9. Claims for rent. | 26. Limitation as to debts due the estate. |
| 10. Law of domicile as to preference. | 27. Proceedings to relieve decedent's land from lien of debts. |
| 11. General debts. | 28. Reference to master or examiner. |
| 12. Interest on claims. | 29. Decree of court. |
| 13. Notice to present claims. | 30. Exclusive power of Orphans' Court. |
| 14. Claims for services, attendance, etc. | |
| 15. Services in anticipation of will. | |
| 16. Claims for additional compensation. | |
| 17. Claims of relatives — parent and child. | |

1. Debts of the decedent.

The estate of a decedent is liable for his just debts, legally due or payable at his death or coming due thereafter, whether of record or not. Those which are of record are fully treated in Volume II, page 243, under the title of "Judgment," and those not of record made liens upon the real estate, are now regulated by act of May 3, 1909, P. L. 386, also printed in full in Volume II, page 242.

2. Preference of payment.

Section 21 of the act of February 24, 1834, P. L. 70, provides:

"All debts owing by any person within this state, at the time of his decease, shall be paid by his executors or administrators, so far as they have assets, in the manner and order following, viz.:

"I. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servant's wages, not exceeding one year.

"II. Rents, not exceeding one year.

"III. All other debts, without regard to the quality of the same, except debts due the commonwealth, which shall be last paid."

3. Personalty the primary fund.

It was said by Rogers, J.:¹ "The personal property of a decedent is the primary fund for the payment of all debts; and this is as true of a judgment which is a lien on the real estate in the lifetime of the decedent, as of any other debt. It is only in case there is an insufficiency of personal estate, that an Orphans' Court will order a sale of real estate to pay debts." Said Woodward, J.:² "Accordingly those preferences created by our intestate laws in favor of funeral expenses, medical attendance, etc., have never been permitted to postpone record liens, though they may, for want of personalty, be paid out of the proceeds of real estate. It has been correctly said, and the observation illustrates the policy of our lien laws, that a man dying the owner of ample real estate, might have to be buried at public expense as a pauper, if he had no personal property, and his realty was encumbered by liens to its full value."

It was held that notice of such claims as are preferred need not be given within the year after public notice in a newspaper by the administrator or executor, as provided in section 19 of the act of March 29, 1832, P. L. 190.³

4. Order of payment.

If the estate be solvent, so that all the preferred debts may be paid in their order as named, no difficulty arises, but where there is not sufficient to pay all those of the first class named, they must share pro rata.⁴ Otherwise the order named by classes must be observed. If a claim is presented which joins something not preferred with something preferred, these must be treated as separate debts;⁵ and if one cannot be separated from the other, the whole will be treated as a general claim not entitled to preference.⁶ It was held that where a creditor took a note from decedent, it lost its preference.⁷ The widow's exemption is prior to all these preferred claims.⁸ A claim due the United States is entitled to priority over the claims of all other creditors, by act of Congress of March 3, 1797, Rev. St., sections 3466-67.⁹ This follows the English maxim: "The king's debtor dying, the king shall be served before the executors."¹⁰

5. Claims for medical attendance.

The medical attendance and medicine furnished "during the last illness of the decedent," are not contemplated to cover a former illness, from which he had recovered, though his death ultimately

¹ Ramsey's Ap., 4 Watts, 71.

² Wade's Ap., 29 Pa. 328.

³ Greenough's Ap., 9 Pa. 18.

⁴ Ritter's Est., 11 Phila. 12.

⁵ Dawson's Est., 4 Lanc. L. R. 343.

⁶ Orum's Est., 18 Phila. 85.

⁷ Silver v. Williams, 17 S. & R. 292.

⁸ Norton's Est., 4 D. R. 198; Groome's Est., 7 C. C. 519; Weir's Est., 10 C. C. 187.

⁹ Gregory's Est., 11 Phila. 126; Comth. v. Lewis, 6 Binney, 266.

¹⁰ 27 Elizabeth, 3.

resulted from the cause of such former illness.¹⁰ It is "the last illness," i. e., that which ended in death, for which a preference is given.¹¹ It does not matter as to the length of its duration¹² or that the services ended some time before the patient died.¹³ Whether or not the services were rendered during such last illness, and whether the time for which the bill was rendered be unreasonable, is a matter of fact for the court to decide.¹⁴ In the inordinate desire to pile up bills and accounts upon a man's estate after he can no longer contest their justice or validity, the courts should exercise a healthy scrutiny and sound discretion. A book account standing in a lumped sum will not be allowed.¹⁵ A claim for nursing decedent comes within the scope of the act.¹⁶

6. Funeral expenses.

What expenses at the funeral are reasonable depends upon the condition of the estate, whether solvent or otherwise. They must be moderate and appropriate and when the estate is involved in debt, an undertaker who gives what he calls "a first-class funeral" must take the risk as to its solvency.¹⁷ They must be gauged by the condition of decedent's estate and his position in life.¹⁸ A moderate sum has been allowed for "mourning," although the estate was insolvent;¹⁹ but an extravagant sum has been disallowed on the objection of the next of kin.²⁰ A funeral dinner in the country, as customary, has been allowed for.²¹ And so the cost of transporting the body a long distance has been allowed, where the funeral was conducted as moderately as possible.²² "A wake" item, according to the local custom, has been allowed;²³ but where the auditor disallowed such an item, the court sustained him.²⁴ Where a person disappeared and expenses were incurred in searching for and reclaiming the body, they were held to be validly preferred.²⁵ Where decedent belonged to a beneficial society which paid funeral benefits, these must be applied towards the expenses, or the accountant will be surcharged with the sum.²⁶

Under the common law, which was based on reason, the necessary expenses of a funeral were first payable out of a man's personal

¹⁰ Reese's Est., 2 Pearson, 482; Orum's Est., 18 Phila. 85.

¹¹ Baker's Est., 11 Northam. 9.

¹² Wasson's Est., 8 D. R. 480.

¹³ Jones' Est., 2 Chester County, 302; Dawson's Est., 4 Lanc. L. R. 343.

¹⁴ Stagger's Est., 8 Supr. C. 260; Duckett's Est., 1 Chester Co. 78.

¹⁵ Miller's Est., 188 Pa. 214.

¹⁶ Larer's Est., 11 D. R. 72.

¹⁷ Cullen's Est., 8 Supr. C. 494.

¹⁸ Metz's Ap., 11 S. & R. 204; White's Est., 13 Phila. 287; Gorman's Est., 2 Kulp, 61; Hasson's Est., 19 Phila. 24; Gantz's Est., 10 York, 201.

¹⁹ Wood's Est., 1 Ashmead, 314.

²⁰ Flintham's Ap., 11 S. & R. 16.

²¹ Sutton's Est., 1 Del. Co. 343; Reck's Ap., 78 Pa. 432.

²² Carpenter's Est., 16 Phila. 290.

²³ Johnson's Est., 20 Phila. 22.

²⁴ White's Est., 13 Phila. 287.

²⁵ Maury's Est., 4 D. R. 752.

²⁶ Hyneman's Est., 11 Phila. 135; Sharp's Est., 11 Phila. 2; Nixon's Ap., 6 W. N. C. 496.

estate. Our statutes are but the *leges scriptæ* of that law, crystallized and sometimes stripped of the reason and *crux* of the law.

It is said by Coke that "funeral expenses, according to the quality of the deceased, are to be allowed out of the goods, before any other debt or duty whatsoever; for that is *opus pium et charitativum*."²⁷ Wentworth gives these reasons: "First, of charity to the dead, that he may be Christianly and seemly interred; secondly, to prevent and avoid annoyance to the living, who by the very view of the dead carcass would be both affrighted and, within a few days, distasted at the nose."²⁸ So important was this duty held at the common law, that the decent burial of the dead, being so necessary and pious, if performed by a stranger, did not constitute him an *executor de son tort*.²⁹ So particular was the law, on this point, that where the assets were meagre, no other expenses were allowed but coffin, shroud, tolling the bell, and the fees of the parson, clerk, sexton and bearers, but not for pall or ornaments.³⁰ As it is quaintly put by Wentworth:³¹ "Festival expense is to be forborne, except the executor will out of kindness bear it with his own purse; for dead debtors must not feast to make their living creditors fast."

Where a stranger or relative has attended to the burial, the estate is liable for the charges.³²

A claim for money advanced for the funeral has been held to be preferred;³³ and where the estate is ample, all the expenses incident to the transportation of the body from a foreign country, are proper funeral expenses, including the services of an attorney employed by the widow to attend to the duty.³⁴ A direction in a will to pay funeral expenses, though ordinarily unnecessary, becomes important where the estate consists of a trust fund over which the decedent had a power of appointment.³⁵ Such a direction in a married woman's will transfers the liability from her husband, but does not authorize extravagance at the expense of creditors and legatees.³⁶ A son-in-law may claim reasonable charges for refreshments, etc., at the funeral;³⁷ so also, claim for use of house and services.³⁸ The court will cut down the charge if deemed exorbitant;³⁹ and so also of an exorbitant charge by the undertaker.⁴⁰ A claim out of one's estate, for the funeral of his daughter, is not allowable where the lien of the debt has expired, and in no event is it entitled to preference.⁴¹ There are cases where the claim for allowing a funeral in

²⁷ 3 Coke's Inst. 202.

²⁸ Wentworth on Ex., p. 258.

²⁹ 11 Viner's Abr. 207.

³⁰ 3 Bacon's Abr. 85; Shelly's Case, 1 Salkeld, 296; Flintham's Ap., 11 S. & R. 16; Wood's Case, 1 Ashmead, 314.

³¹ Justice Dodderidge (Wentworth on Ex., p. 259).

³² France's Est., 75 Pa. 220; Burke's Est., 34 W. N. C. 359.

³³ Jessop's Est., 11 Kulp, 39; Harding's Est., 7 D. R. 679.

³⁴ Parry's Est., 188 Pa. 38.

³⁵ Fahnestock's Est., 22 Lanc. L. R. 381.

³⁶ Williams' Est., 14 D. R. 407.

³⁷ Kraan's Est., 14 D. R. 136.

³⁸ Ewing's Est., 18 Lanc. L. R. 73; Baer's Est., 20 Lanc. L. R. 126.

³⁹ Wisner's Est., 22 Lanc. L. R. 50.

⁴⁰ Bauman's Est., 5 C. C. 579.

⁴¹ Felton's Est., 7 D. R. 262.

one's house has not been approved.⁴² A funeral suitable to decedent's position in life, although it absorb a large part of the estate, has been held to be chargeable to the fiduciary, and his promise to pay will be implied, though he did not order it.⁴³

7. Monument or tombstones.

The cost of erecting a suitable monument or tombstones over the grave of decedent, has been held to be a proper charge in an administrator's or executor's account.¹ But this rule is subject to a reasonable and suitable exercise. If the charge is extravagant² or the estate is insolvent, it will not be allowed. Said Rhone, J.: "Every one should be just to the living, before he can expect to ornament his grave."³ A fiduciary has the right to provide a tombstone with economy,⁴ and where the testator orders such expenditures out of the residue, it is not the ground of exception.⁵ The expense of enclosing the burial plat or "lot" is not a part of the funeral expenses;⁶ but where a contract was made with the administrator for a tombstone and enclosure, the contractor was awarded the sum, though the work was not yet placed.⁷

8. Wages of servants and laborers.

The wages of servants intended to be preferred by the act, *supra*, is what is due those connected with the household in menial employment,⁸ although the compensation consisted of a monthly salary;⁹ or where the menial was also a tender of a bar in a tavern.¹⁰ But a farm laborer was not so protected.¹¹ The one year's wages was held not necessarily to mean one year immediately preceding the death of the employer.¹² This right was restricted to money due on a contract of hiring and did not authorize a claim for damages for breach of contract;¹³ and where the servant accepted a single bill in settlement, his lien was gone.¹⁴ The act of 1834, *supra*, is not superseded by the acts of April 9, 1872, P. L. 47; June 13, 1883, P. L. 116, and May 12, 1891, P. L. 54, which gave a preferred lien to laborers, enlarging the classes, for six months' wages due for services immediately preceding the death or insolvency of the em-

⁴² Seitz's Est., 1 Lehigh, 344; Bard's Est., 21 York, 142.

⁴³ Sinnott's Est., 15 D. R. 873.

¹ M'Glinsey's Ap., 14 S. & R. 64; Porter's Est., 77 Pa. 43; Barclay's Est., 2 W. N. C. 447; Webb's Est., 165 Pa. 330; Titlow's Est., 5 D. R. 40; Luton's Est., 17 Supr. C. 342; Fisher's Est., 46 P. L. J. 168.

² Sheetz's Est., 2 Woodward, 407; Connelly's Est., 13 Lanc. Bar, 16; Taylor's Est., 3 D. R. 691; Griffith's Est., 1 Lack. L. N. 311.

³ Moyer's Est., 5 Kulp, 167.

⁴ Hirst's Est., 5 Law Times (N. S.) 6.

⁵ Bainbridge's Ap., 97 Pa. 482.

⁶ Meyer's Est., 18 Phila. 42.

⁷ Crosson's Ap., 125 Pa. 380.

⁸ Meason's Case, 5 Binney, 167.

⁹ Miller's Est., 1 Ashmead, 323.

¹⁰ Boniface v. Scott, 3 S. & R. 351.

¹¹ Graham's Est., 2 York, 186.

¹² Martin's Ap., 33 Pa. 395.

¹³ Womrath's Est., 23 W. N. C. 434.

¹⁴ Silver v. Williams, 17 S. & R. 292.

ployer, for a sum not exceeding 200.¹⁵ This preference is not confined to the particular factory or property in and about which the laborer was employed;¹⁶ and while it takes priority over the landlord's claim for rent,¹⁷ it does not take priority over a widow's exemption.¹⁸

[For the acts above cited, see Vol. II, title Executions.]

9. Claim for rent.

The preference for one year's rent given the landlord is not confined to a fund produced from property which the landlord might have distrained.¹⁹ But it is confined to rent which has accrued and is due and payable at the time of decedent's death.²⁰ There must, however, be a relation of landlord and tenant. Where one occupies a room in a hotel, he is a guest and not a tenant in the legal sense, and the keeper of the hotel is not entitled to the preference.²¹ The relation of landlord and tenant exists in respect to a privilege of taking coal from a mine, as between joint owners.²² Where rent included the payment of taxes as part of it, such taxes are preferred;²³ so also of water rents,²⁴ and the widow's interest charged on the land in partition.²⁵

10. Law of domicile as to preference, controls.

Section 23 of the act of 1834, *supra*, provides:

"Whenever the laws of the place in which was the decedent's domicile, at the time of his death, contain any provisions whereby a preference may be given in the payment of debts due to the citizens or residents thereof, as such, over the citizens or residents of this state, the executor or administrator shall, in the disposition of such of the assets as may come into his hands, observe the like rules of preference in favor of the citizens or residents of this commonwealth, over the citizens or residents of such place, in the same manner as if such rules were hereby expressly enacted."

11. General debts.

When a reasonable time has gone by and the executor or administrator has had no notice of claim for preferred debts, he may pay inferior debts,²⁶ though he takes risks, within the year. He is obliged to take constructive notice of record debts, such as judg-

¹⁵ Hume's Est., 12 D. R. 248.

¹⁶ Dawson's Est., 4 Lanc. L. R. 343.

¹⁷ Yeager v. Tool, 1 Dauphin Co. 120.

¹⁸ Gish's Ap., 31 Pa. 277.

¹⁹ Dawson's Est., 4 Lanc. L. R. 343.

²⁰ Jaquette's Est., 1 Chester Co. 197; Kemp's Est., 34 Pitts. L. J. 82; Rainow's Est., 4 Kulp, 153; Walker's Est., 6 C. C. 515; McKim's Est., 2 Clark, 224.

²¹ Ferris' Est., 7 D. R. 425.

²² Greenough's Ap., 9 Pa. 18.

²³ Morgan's Est., 11 C. C. 536.

²⁴ Scott's Est., 35 Pitts. L. J. 443.

²⁵ Turner v. Hauser, 1 Watts, 420.

²⁶ 3 Bacon's Abr. 82n.

Given under my hand and seal of office at —, this — day of —, A. D. 19—.

—, Register.

76. Form of judge's certificate.

Commonwealth of Pennsylvania, — County, ss.

I, —, president judge of the Court of Common Pleas in and for the county aforesaid, do hereby certify, that —, whose certificate is above written, is the register for the probate of wills, granting letters of administration, etc., in and for the said county, duly commissioned and sworn, to all whose official acts, full faith and credit are due, and that his certificate is in due form of law, and that the seal affixed to said certificate is the seal of said register.

Witness my hand and seal at Pittsburgh, this — day of —, A. D. 19—.

—, [Seal.]

President Judge of the Court of Common Pleas.

Commonwealth of Pennsylvania, — County, ss.

I, —, Prothonotary of the Court of Common Pleas in and for the county of —, do hereby certify, that the Hon. —, whose certificate is above written, and in his own proper hand subscribed, is, and was at the time of so doing, acting president judge of the said Court of Common Pleas in and for the said county of —, duly commissioned and sworn, to all whose official acts full faith and credit are due.

Witness my hand and seal of said court, at Pittsburgh, this — day of —, A. D. 19—.

—, Prothonotary.

77. Writs of execution in the Orphans' Court.

Section 57 of the act of 1832, *supra*, provided:

"XVI. Writs of *feri facias* shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county, and the proceedings thereon shall be the same as on writs of *feri facias* issued by the Court of Common Pleas of the same county."*

By clause XI of the act, *supra*, this writ "may be allowed by the court or by any judge thereof in vacation."

And section 2 of the act of April 21, 1846, P. L. 430, provides:

"Writs of *venditioni exponas*, and writs of *testatum feri facias* and *venditioni exponas*, may be issued out of any Orphans' Court, in the same manner that writs of execution in the nature of writs of *feri facias* are allowed by the fifty-seventh section of an act relating to Orphans' Court, passed March 29, 1832; and the sheriff or other officer to whom any such writ is directed, shall proceed to levy and sell the real and personal property of the person or persons against whom the same shall be issued, and convey the real estate sold to the purchaser or purchasers thereof, in the same manner, in all respects, as if such writ had issued out of a Court of Common Pleas; * * *

The remainder of the section relates to process issued before the passage of the act.

* Helfrich v. Stem, 17 Pa. 143.

78. Manner of issuing executions.

A *fi. fa.* or a *lev. fa.* cannot be issued out of the Orphans' Court without a petition, allowance and order fixing the notice, terms of sale and return day of the writ, where the court has not by rule fixed a regular return day.¹⁰ Although an attachment has previously issued, the court may allow a *fi. fa.* to levy.¹¹ The respondent accountant cannot defeat this process by setting up matter which should have been presented to the auditor.¹² A *fi. fa.* having issued and the real estate levied upon, having been extended and the defendant allowed to retain on paying the rentals, a *vend. ex.* may issue after five years, without the necessity for revival, since there is no such process as a *scire facias* to revive known in the Orphans' Court.¹³

79. Form and character of writ.

The form of the writ follows that issuable in the Common Pleas, but it must recite the decree of the Orphans' Court upon which it is founded, in its body, and it should be signed and attested by the clerk of the Orphans' Court and not the prothonotary, and be returnable at a day fixed in the order, or the regular return day.¹⁴ Such writ will be set aside, upon rule, where it appears that counsel for claimants has sufficient money in his hands to satisfy the demand.¹⁵ The act of 1846, *supra*, authorizes the sale of land¹⁶ and, if the defendant has no land in the county, a *testatum* writ may issue to the sheriff of the county where he has.¹⁷ Where the land is sold, the deed should be acknowledged in the court from which the writ issued.¹⁸

80. Special writs of execution, when allowed.

The act of March 27, 1873, P. L. 49, provides:

"Wherever any person, against whom a decree for the payment of money has been made by the Orphans' Court of any county, is possessed of, or entitled to, any stock, deposits or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is provided by the act of June 16, 1836, entitled 'An act relating to executions,' and by the tenth section of the act of April 13, 1843, entitled 'An act to convey certain real estate and for other purposes'; a writ of attachment for said purpose may be allowed by said court or any judge thereof, as writs of *fieri facias* in said courts are now allowed, and may be

¹⁰ Oviatt's Est., 3 D. R. 620.

¹¹ Miles' Est., 4 Kulp, 152. Rhone, P. J.

¹² Siegfried's Est., 1 Woodward, 77.

¹³ Weyand's Ap., 62 Pa. 198.

¹⁴ Peckham's Est., 1 Kulp, 353. Elwell, P. J. (See vol. 2, Johnson, "Executions.")

¹⁵ Miles' Est., 4 Kulp, 152.

¹⁶ Weyand's Ap., 62 Pa. 198.

¹⁷ Helfrich v. Stem, 17 Pa. 143.

¹⁸ Oviatt's Est., 3 D. R. 620. *Quære*, whether the late act changes this. (See vol. 2, Johnson, Sheriff's Deeds.)

by proof that decedent admitted his liability to pay for the services.¹⁵ It is the character of the services which determines whether the claimant is within the class entitled as servants.¹⁶ The general rule, founded upon custom, is that the wages of domestic servants are presumed to be paid periodically, either weekly or monthly. So a claim for wages for an unusual time, made after the death of a decedent, must be supported by affirmative proofs.¹⁷ "This rule, however, does not cover a case where the man had assumed intimate relations with his servant girl and by his conduct indicated that he intended to marry her."¹⁸

15. Services in anticipation of remembrance in a will.

A claim for services based upon anticipation of a favorable provision in a will cannot be allowed, where the party has been disappointed,¹ nor upon an alleged contract to make provision, where the evidence is not clear or definite.²

16. Claims for additional compensation.

The decedent having made compensation, nothing further can be claimed without proof of a special contract.³ This applies to a nurse who has been allowed a fixed compensation,⁴ or any servant with a stipulated allowance.⁵ But where there is a definite contract, it will not be satisfied by the mere payment of a weekly sum for boarding.⁶ It must be based on an agreement; mere expressions of gratitude, or statements of belief or intention, of an indefinite character, are insufficient.⁷ But if the circumstances are such that the services rendered are clearly not included in the hiring, compensation ought to be allowed.⁸ The facts may establish a new contract and obligation to pay for additional services independently of the kind of services originally contemplated by the parties,⁹ and a recovery may be had on the *quantum meruit*.¹⁰ But in the absence of a contract

¹⁵ Cottrell's Ap., 4 W. N. C. 237; Carpenter v. Ulmer, 29 W. N. C. 551; Harrington v. Hickman, 148 Pa. 401; Mayhew's Est., 155 Pa. 94.

¹⁶ Taylor v. Beatty, 202 Pa. 120, distinguished in Schrader v. Beatty, 206 Pa. 184.

¹⁷ Hayes' Est., 17 Supr. C. 412. For many cases on this principle see P. & L. Dig., vol. 1, C. R. A. 1675.

¹⁸ Schrader v. Beatty, 206 Pa. 184, affirming 19 Supr. C. 212. (See also Winings v. Hearst, 17 Supr. C. 314.)

¹ Hartman's Ap., 3 Grant, 271; Weaver's Est., 182 Pa. 349; P. & L. Dig., vol. 4, cols. 6279-80; Piersol's Est., 27 Supr. C. 204; 1 C. R. A. 1678.

² Cook's Est., 32 W. N. C. 231; Miller's Est., 136 Pa. 239; King's Est., 150 Pa. 143; Hoffman's Est., 15 D. R. 524.

³ McHugh's Est., 152 Pa. 442; Brose's Est., 155 Pa. 619; P. & L. Dig., vol. 4, cols. 6281-82.

⁴ Grossman v. Thunder, 212 Pa. 274.

⁵ Rosencrance v. Johnson, 191 Pa. 520; Smith's Est., 23 Lanc. L. R. 9.

⁶ Phile's Est., 14 Phila. 330.

⁷ Moore's Est., 12 Supr. C. 599; Howard v. Drexler, 14 Supr. C. 59; Piersol's Est., 27 Supr. C. 204.

⁸ Weld's Est., 50 Pitts. L. J. 281.

⁹ Harrington v. Hickman, 148 Pa. 401; Moore's Est., 12 Supr. C. 599.

¹⁰ Heilman's Est., 17 York, 149.

or an obligation fairly implied from the new character of services rendered, and not embraced in the intention of the parties by their original contract, no charge for extra compensation will be allowed.¹¹

17. Claims of relatives — Parent and child.

As between parent and child, there can be no recovery of compensation for services without an express contract to pay, even after the child has arrived at full age.¹² Clear and unequivocal evidence of an express contract is necessary to support actions by children against the estates of their parents for services rendered to the latter while living. Mere declarations by a father that he appreciated the services of his daughter and that she would be well paid, as she would get his property, will not support an action.¹³ Nor can the husband of an adult daughter, making his home with her father, recover on an implied contract.¹⁴ The same rule applies to a daughter-in-law.¹⁵ But the brother-in-law does not come within the presumption of gratuity.¹⁶ If, however, an express promise be proved, a recovery may be had and the presumption of gratuity based upon filial duty overthrown.¹⁷ If the services rendered are such as would not ordinarily be rendered under such duty, a contract may be implied.¹⁸ The same is true of a mother boarding her son.¹⁹ Where a niece accepts a devise under her aunt's will, she thereby assumes a family relation and brings herself within the rule as to services;²⁰ but a girl living in the family as though a daughter, but not adopted, may recover on the *quantum meruit* where she proves that decedent had agreed to leave all to her and she is competent to testify as to conversations between her and the decedent, as to which others had testified, thus removing the rule of disqualification.²¹ A niece who renders her uncle trifling services must show a clear and definite promise to pay.²² A child, in order to recover for services to its parent, must show a contract or promise to pay which is unambiguous and convincing.²³ General expressions of gratitude and good inten-

¹¹ *Rosencrance v. Johnson*, 191 Pa. 520; *Gillen's Est.*, 16 York, 77; *Peter's Est.*, 9 Northam. 405; *Normile v. Osborne*, 207 Pa. 367; vol. 1, C. R. A., cols. 1681-2; vol. 3, C. R. A. 635.

¹² *Walker's Est.*, 3 Rawle, 243; *Candor's Ap.*, 5 W. & S. 513; *Prizer's Est.*, 12 Montg. 186; *Hertzog v. Hertzog*, 29 Pa. 465; *Foust's Est.*, 6 Luz. L. R. 92; *Good's Est.*, 11 Lanc. L. R. 17; *Whitmer's Est.*, 19 C. C. 533; *Webster's Est.*, 13 Montg. 168.

¹³ *Murphy v. Corrigan's Ex.*, 161 Pa. 59; 3 C. R. A., col. 635.

¹⁴ *Houck's Exs. v. Houck*, 99 Pa. 552; *Gerz v. Weber*, 151 Pa. 396; *Patton v. Conn.*, 114 Pa. 186.

¹⁵ *Slonaker's Est.*, 1 Chester Co. 446.

¹⁶ *Shunberger v. Hoy*, 7 Supr. C. 206.

¹⁷ *Unger's Est.*, 20 C. C. 168; *Gibbon's Est.*, 8 Lanc. L. R. 305; *Snyder v. Castor*, 4 Yeates, 353.

¹⁸ *Young's Est.*, 32 Pitts. L. J. 403.

¹⁹ *Strawbridge's Ap.*, 5 Wharton, 568.

²⁰ *Lackey's Est.*, 181 Pa. 638.

²¹ *Kauss v. Rohner's Admr.*, 172 Pa. 481.

²² *Miller's Est.*, 222 Pa. 334.

²³ *McFeaters v. Pattison*, 188 Pa. 270; *Dettenmaier's Est.*, 13 Supr. C. 170; *Monroe's Est.*, 9 Kulp, 334; *Bailey's Est.*, 18 York, 186.

tions are insufficient.²⁴ But where the son is called to manage and superintend his father's business, together with undoubted evidence of declarations of the father that he would compensate him, he may recover.²⁵ The same rule was applied to a daughter who had married and left home, when she was induced to return and nurse her invalid mother.²⁶

18. Claims of relatives other than parent and child.

The presumption of services gratuitously rendered applies only to parent and child and those immediately in such relation, and not to other relatives. Whilst relationship more remote may be considered in connection with the services rendered, it is not sufficient to overcome proof of a promise to pay.²⁷ But if there is no promise to pay, it will have its weight.²⁸ The burden of proving a family relationship by a relative more distant than parent and child is upon him who so alleges.²⁹ The relations which the parties sustain are generally the criterion by which their claims are measured to their legal rights. Where a young woman is housekeeper to a man aged eighty-four and receives a check from him for a large amount, the burden of explaining her services is upon her.³⁰

Where the relationship is such that it rebuts the implication of an agreement to pay, the claim will be disallowed.³¹ This is so where in the meantime there have been settlements and discharges between them.³² The cases are so numerous illustrating the rule and the exceptions, that it is manifestly inconvenient to refer to them all here. Reference is made to Pepper & Lewis Digest, Vol. IV, columns 6296-6302, which show when and when not an express contract has been held requisite.³³

19. Right to recover on quantum meruit.

A contract to pay for services, being shown, the amount may be established by evidence of the *quantum meruit*.³⁴ The measure is

²⁴ Campbell's Est., 17 Montg. 89; Gwynne's Est., 50 Pitts. L. J. 303.

²⁵ Harper's Est., 196 Pa. 137.

²⁶ Payne's Est., 204 Pa. 535; P. & L. Dig., 1 C. R. A., col. 1684.

²⁷ Gerz' Ex. v. Demarrara's Ex., 162 Pa. 536; Perkins v. Hasbrouck, 155 Pa. 494; Ranninger's Ap., 118 Pa. 20; Barry's Ap., 2 Cent. R. 291; Spackman's Ap., 16 W. N. C. 79; Leidy's Ap., 3 Penny. 195; P. & L. Dig., vol. 4, col. 6287.

²⁸ Denlinger's Est., 23 Lanc. L. R. 329; McKallen's Est., 15 D. R. 338; Fulton's Est., 19 York, 133; Haines' Est., 17 D. R. 420; 1 C. R. A., cols. 1685-6.

²⁹ Shumberger v. Hoy, 7 Supr. C. 206.

³⁰ Knee v. McDowell, 25 Supr. C. 641. (See Ritchie v. Deposit, Etc., Co., 189 Pa. 410, as to presumption from possession of a check.)

³¹ Welch's Ap., 1 Penny. 9; Hunt's Est., 15 Phila. 511; Moyer's Ap., 112 Pa. 290; P. & L. Dig., vol. 4, cols. 6293-4-5.

³² Ruckman's Ap., 61 Pa. 257.

³³ Barhite's Ap., 126 Pa. 404; Bryant's Est., 180 Pa. 192; Neale v. Engle, 7 Atl. 60.

³⁴ Bash v. Bash, 9 Pa. 260; Wells' Est., 13 Phila. 250; Eichelberger's Est., 170 Pa. 242; Kauss v. Rohner, 172 Pa. 481; Smith v. Reimer, 179 Pa. 442; P. & L. Dig., vol. 4, cols. 6303-4-5; 1 C. R. A., col. 1688.

what the services are ordinarily worth.³⁵ The question is one for the jury, and it is not error to charge them that they might consider the relation of the parties.³⁶ Evidence of the value of the services is a requisite where the contract fixed no rate,³⁷ but where there was a fixed agreement, such evidence is immaterial.³⁸ The amount justly allowable depends upon the nature of the case and the evidence of reasonable worth.³⁹

20. Admissibility and sufficiency of evidence.

It has been held that stronger proof is required to sustain a contract to pay for services between father and son, than between strangers.⁴⁰ Mere expression of gratitude, or loose declarations, in general terms, that he intends to reward or remember or compensate the claimant have been held to be insufficient to fix liability.⁴¹ It must be more than the evidence of circumstances.⁴² But evidence of promises, coupled with the service and the specification of amount in the conversation, is properly submitted to a jury;⁴³ but a mere understanding that the father was to compensate his son is not evidence of a fact.⁴⁴ It seems that a promise of a father to deliver certain notes to his son, for past services, is not based on a valid consideration, so that the son may claim the amount out of the estate.⁴⁵ The court may refuse binding instructions, where there is direct evidence of a contract.⁴⁶ A provision of a will allowing a daughter for services, such as might be recovered by due course of law, was held to be a promise to pay.⁴⁷ Evidence of a declaration of a decedent that his housekeeper should be paid, was held sufficient to recover on the *quantum meruit*.⁴⁸ But such declarations, when the person was named as a legatee in the will, are for the jury to find whether the provision in the will was or was not intended as compensatory.⁴⁹ Notwithstanding such declarations, unless the party proves the services and what they were worth, he cannot recover

³⁵ Moffett's Est., 11 Phila. 79; Funk v. Holahan, 13 D. R. 38; Dorsey's Est., 21 Lanc. L. R. 405.

³⁶ McFeaters v. Pattison, 188 Pa. 270.

³⁷ Hamilton's Est., 11 D. R. 103; 1 C. R. A. 1688.

³⁸ Wait's Ap., 20 W. N. C. 19; P. & L. Dig., vol. 4, col. 6307.

³⁹ Metz's Ap., 11 S. & R. 204; Kost's Ap., 107 Pa. 143.

⁴⁰ Bash v. Bash, 9 Pa. 260.

⁴¹ Graham v. Graham's Ex., 34 Pa. 475; Leidig v. Coover, 47 Pa. 534; Pollock v. Ray, 85 Pa. 428; Wallace's Ap., 2 Chester Co. 403; Walls' Ap., 111 Pa. 460; Ulrich v. Arnold, 120 Pa. 170; Zimmerman v. Zimmerman, 129 Pa. 229; Reed's Est., 8 Mont'g, 98; Carpenter v. Hays, 153 Pa. 432; Murphy v. Corrigan, 161 Pa. 59; P. & L. Dig., vol. 4, cols. 6310-15.

⁴² Burgess v. Burgess, 109 Pa. 312.

⁴³ Neel's Admr. v. Neel, 59 Pa. 347; Titman v. Titman, 64 Pa. 480; Thompson v. Stevens, 71 Pa. 161; Moist's Ap., 74 Pa. 166; Watson's Exs. v. Stem, 76 Pa. 121; Miller's Ap., 100 Pa. 568; Cake's Ap., 110 Pa. 65; Curry v. Curry, 114 Pa. 367; P. & L. Dig., vol. 4, col. 6319.

⁴⁴ Mosteller's Ap., 30 Pa. 473.

⁴⁵ Fross' Ap., 105 Pa. 258.

⁴⁶ McLaughlin v. McLaughlin, 145 Pa. 582.

⁴⁷ Knauss' Est., 148 Pa. 265.

⁴⁸ Harrington v. Hickman, 148 Pa. 401.

⁴⁹ Hughes v. Keichline, 168 Pa. 115.

anything.⁵⁰ A son's claim for boarding his father and grandson may be supported by proper evidence notwithstanding the presumption of gratuity.⁵¹ The degree of proof required is such as shall convince the court of the truth and justice of the claim.⁵² There being an express promise to pay, such evidence must be considered, and the court will be reversed, if it disregards it upon the wrong assumption that the promise was without consideration.⁵³ The proof must be clear and convincing, not only that there was a contract, but that it was performed.⁵⁴ An obligation in a will to pay a son must be supplemented with proof of the amount to which he is entitled.⁵⁵ A claimant cannot fix the amount of his claim for services by a revoked legacy in a will.⁵⁶ The testimony of one disinterested and credible witness, unimpeached, is sufficient to sustain a claim.⁵⁷ On the sufficiency or insufficiency of various claims, see 1 C. R. A. (P. & L.), column 1690. Also 3 C. R. A. 638.⁵⁸ Where there is a conflict of testimony, it is for the jury.⁵⁹

21. The confidential relation.

When a claim against a decedent is presented by one who was in a confidential relation, the burden is upon the claimant to prove good faith.⁶⁰ The confidential relation in law is not confined to trustee and *cestui que trust*, guardian and ward, attorney and client, parent and child, husband and wife, but it extends to and embraces partners, principal and agent, master and servant, physician and patient, and generally all persons associated in trust and confidence, and where it exists, the one who seeks his own benefit of a transaction must show that it was fair and conscientious, beyond the reach of suspicion, the intelligent act of the other, performed with the full understanding of its nature and consequences.⁶¹

22. Competency of witnesses.

An important question at the threshold of every claim against a decedent's estate is the competency of the witnesses to prove it. The law has undergone some changes since the act of 1869 upon which the courts split wide apart, and the Supreme Court executed a number of somersaults, which are now merely historical, but at the time caused some grievous hurts.

By clause (e) of section 5 of the act of May 23, 1887, P. L. 158, it is provided that, "Nor where any party to a thing or contract in

⁵⁰ Riemensberger's Est., 29 Supr. C. 596; McKallen's Est., 15 D. R. 338.

⁵¹ Shadle's Est. (No. 1), 30 Supr. C. 151.

⁵² Fry's Est., 35 Supr. C. 446.

⁵³ Currey's Est., 26 Supr. C. 479.

⁵⁴ Black's Est., 12 D. R. 720; O'Mara's Est., 14 D. R. 259.

⁵⁵ Fehl's Est., 13 Supr. C. 601.

⁵⁶ Wolf v. Yeager, 20 Lanc. L. R. 67.

⁵⁷ Ewing's Est., 18 Lanc. L. R. 73.

⁵⁸ See also Bitler's Est., 30 Supr. C. 84.

⁵⁹ Bleadingheiser v. Crumrine, 34 Supr. C. 241.

⁶⁰ Glentworth's Est., 17 D. R. 292 (221 Pa. 329).

⁶¹ Darlington's Est., 147 Pa. 624, citing Greenfield's Est., 14 Pa. 489, a case of trust; Wistar's Ap., 54 Pa. 60; Worrall's Ap., 110 Pa. 349, case of a deed; Yardly v. Cuthbertson, 108 Pa. 395, a case of a will.

action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the proceeding is by or against the surviving or remaining partners, joint promissors or joint promisees of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promissors or joint promisees and the other party on the record, or between such surviving or remaining partners, promissors or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; * * * or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses."

23. Enlarged competency, act of 1891.

By section 1 of the act of June 11, 1891, P. L. 287, it is provided:

"That hereafter in any civil proceeding before any tribunal of this commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed, either by his own act or by the act of the law, to a party on a record who presents his interest in the subject in controversy, nevertheless any surviving or remaining party to such thing or contract, or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party or the adjudication of his lunacy, if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such surviving or remaining party, or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person."

Section 2 of the same act provides:

"The testimony now made competent by the foregoing section may also be taken by commission or deposition, in accordance with the laws of this commonwealth, and the rules of the proper court, and, in that event, the deposition thus taken, shall be competent evidence at the trial or hearing, although the person with whom or in whose presence or hearing such relevant matter occurred, may die or become incompetent after the taking of such deposition."

24. Scope and effect of these acts.

Under these acts only such persons whose interest is adverse to the right or interest of the deceased or lunatic who is civilly dead,

are rendered incompetent, and not those whose interest is in favor of the estate.¹

Under the act of 1891, *supra*, the survivor can only be called where the person has testified in chief, in relation to the matter in controversy as to events in the lifetime of the decedent.² But the relevant matter must have occurred between the survivor and the living witness.³ His competency will be confined to the matters testified to by such witness.⁴ While a party who has contracted with a partnership cannot testify to declarations of a deceased partner, he is competent to rebut the testimony of the surviving partner.⁵ Under the acts of 1869, 1887 and 1891, an agent who makes a contract is not a party to the thing or contract in action.⁶ The testimony of such witness under the act of 1891 must be adverse to the survivor in order to open the lips of the latter.⁷ Unless such living witness is called, the survivor cannot testify to what transpired before the death of his adversary.⁸ But it must be in a case where the party to the record represents the interest of the decedent.⁹ Where a living defendant is called to testify as to matters prior to the death of the other defendant, against the plaintiffs, it opens the door for them to testify to such matters, and the plaintiff can cross-examine as to who was present.¹⁰ The act of 1887 does not change the common law rule that a party calling and examining generally an incompetent witness, and having the benefit of his testimony, cannot object to his competency when called by the other side as to other relevant matters. If the witness is called for cross-examination, he may testify generally as to other relevant matters, although such matters were not touched upon in his cross-examination.¹¹ Competency of witnesses in civil cases is the rule and incompetency the exception.¹² When another is called adversely the act of 1891 unseals the mouth of the person which had been closed by the death of his adversary.¹³

¹ *Smith v. Hay*, 152 Pa. 377; *Gerz v. Weber*, 151 Pa. 396; *Fowler v. Smith*, 153 Pa. 639; *Arrott, Etc., Co. v. Way Mfg. Co.*, 143 Pa. 435.

² *Roth's Est.*, 150 Pa. 261; *Cake Ex. v. Cake*, 162 Pa. 584.

³ *Irwin v. Patchen*, 164 Pa. 51; *Krumrine Ex. v. Grenoble*, 165 Pa. 98; *Thomas v. Miller*, 165 Pa. 216; *Rudy v. Myton* (No. 1), 19 Supr. C. 312; *Brumbach v. Johnson*, 187 Pa. 602; *Montelius v. Montelius*, 209 Pa. 541.

⁴ *Kauss v. Rohner*, 172 Pa. 481.

⁵ *Huntley v. Goodyear*, 182 Pa. 613.

⁶ *Sargeant v. Natl., Etc., Co.*, 189 Pa. 341.

⁷ *Robbins v. Farwell*, 193 Pa. 37.

⁸ *Wright v. Hanna*, 210 Pa. 349.

⁹ *Gold v. Scott*, 5 Supr. C. 262.

¹⁰ *Proper v. Campbell*, 15 Supr. C. 153, distinguishing *Cake v. Cake*, 162 Pa. 584.

¹¹ *Shadle's Est.* (No. 1), 30 Supr. C. 151, citing *Seip v. Storch*, 52 Pa. 210; *Bennett v. Williams*, 57 Pa. 404; *Forrester v. Torrence*, 64 Pa. 29; *Bierly's Est.*, 81 * Pa. 419; *Hambleton's Est.*, 166 Pa. 500.

¹² *Pattison v. Cobb*, 212 Pa. 572.

¹³ *Shannon v. Castner*, 21 Supr. C. 294; *Smith v. Summerhill*, 31 Supr. C. 235; *Steele v. Nichols' Admr.*, 3 D. R. 517; *Karch v. Karch's Admr.*, 10 C. C. 669; *Cox v. Cox*, 15 Lanc. L. R. 45; *Hess' Est.*, 22 Lanc. L. R. 404; *Wright v. Hanna*, 210 Pa. 349.

Under the act of 1887, a devisee is competent to prove a fact which existed after the death of a party, although inferentially it proves the existence of the same prior to such death.¹⁴ The purpose of the act of 1869 which the act of 1887 somewhat enlarged was to close the mouth of him who is adversary to the deceased assignor.¹⁵ The policy of the law which rendered a husband or wife incompetent also made the consort incompetent,¹⁶ except for a brief period, under *Dellinger's Ap.*,¹⁷ which was followed by the court below in *Bierly's Est.*,¹⁸ but over-ruled in *Taylor v. Kelley*,¹⁹ which held that in *Dellinger's Appeal* "due consideration was not given." In *Bierly's Est.* the assignments of error on the incompetency of the witnesses were sustained, but the decision of the court below sustaining the auditor whose finding was based wholly on incompetent testimony, was affirmed because "the learned judge of the Orphans' Court was right in following *Dellinger's Ap.*; for at that time it stood unshaken."²⁰ In other words, the judge below was not responsible for the errors of the judges above. This policy of the law has since remained unshaken. On account of the identity of interest of husband and wife, when one of them is incompetent to testify as a witness the other is also incompetent.²¹ A release or disclaimer by the party will render an incompetent witness competent.²² A grantor who is without interest has been held competent to testify to extraneous facts, in an action of ejectment.²³ Where the subject of controversy was the validity of a deed the vendee being dead, declarations of the husband in his lifetime, in his own interest, were held inadmissible to affect the title of his wife, when made in her absence.²⁴ The act of 1887 did not open the door for adverse testimony to the right of the deceased which had passed by assignment or otherwise.²⁵ An incompetent witness may be made competent by being called by his adversary as if upon cross-examination under section 7 of the act of 1887, as to matters occurring in the lifetime of the decedent and he then becomes competent as to all relevant matters.²⁶ The exclusion

¹⁴ *Porter v. Nelson*, 121 Pa. 628.

¹⁵ *Karns v. Tanner*, 66 Pa. 297; *Hess v. Gourley*, 89 Pa. 195; *DeCoursey v. Johnston*, 134 Pa. 328; *Mell v. Barner*, 135 Pa. 151.

¹⁶ *Diehl v. Emig*, 65 Pa. 320.

¹⁷ 71 Pa. 425, May 6, 1872.

¹⁸ 81 * Pa. 419 (1875).

¹⁹ 80 Pa. 95. *Mercur, J.* (1875). (See also *McBride's Ap.*, 72 Pa. 480; *Eshelman's Ap.*, 74 Pa. 42.)

²⁰ Opinion of Paxson, J. *Bierly's Est.*, 81 * Pa. 419.

²¹ *Bitner v. Boone*, 128 Pa. 567, citing *Pipher v. Lodge*, 16 S. & R. 214; *Pringle v. Pringle*, 59 Pa. 283; *Hitner's Ap.*, 54 Pa. 117; *Sower v. Weaver*, 78 Pa. 443; *Daisz's Ap.*, 128 Pa. 572; *Sutherland v. Ross*, 140 Pa. 379; *Brown v. Carey*, 149 Pa. 134; *Darragh v. Stevenson*, 183 Pa. 397; *Dickson v. McGraw*, 151 Pa. 98.

²² *Tarr v. Robinson*, 158 Pa. 60, overruling *Duffield v. Hue*, 129 Pa. 94.

²³ *Palmer v. Farrell*, 129 Pa. 162.

²⁴ *Parry v. Parry*, 130 Pa. 94.

²⁵ *Duffield v. Hue*, 136 Pa. 602; *King v. Humphreys*, 138 Pa. 310; *Keener v. Zartman*, 144 Pa. 179; *Crothers v. Crothers*, 149 Pa. 201.

²⁶ *Corson's Est.*, 137 Pa. 160; *Boyd v. Conshohocken Mills*, 149 Pa. 363.

depends upon the adverse interest of the party.²⁷ So, if their interest is favorable to the estate, as against the executor, they are no longer incompetent.²⁸ If no right has passed, the act does not apply.²⁹ In an action by a mother to rescind a gift to her daughter, the latter being dead, the mother is incompetent.³⁰ The son of a deceased partner, in an action by the surviving partners, may testify to occurrences in the lifetime of his father, other than conversations and transactions between the deceased personally and the defendant.³¹ In an action of trespass *quare clausum fregit*, where defendants claim that their father, from whom they derived title, was a tenant in common with plaintiff, his brother, and that parol partition was made between them, the plaintiff is incompetent.³² For other cases applying the act of 1887, see footnote.³³ The principle contained in these acts applies to actions of tort as well as of contract.³⁴ Where a party deposited money in a savings fund in her name and that of another, in a suit by her administrator to recover the fund from the joint depositee who drew it after her death, claiming it as *donatio mortis causa*, defendant is incompetent to testify to anything occurring between him and decedent in regard to the subject matter in controversy.³⁵ A partner in a firm is incompetent to testify adversely to the interest of a deceased member.³⁶ A widower may testify in the interest of his wife's estate to swell it by proof of his indebtedness thereto.³⁷ It is the adverse interest not the adverse testimony that disqualifies the witness.³⁸ In an action of ejectment where the question in controversy is the location of a division line between farms, the defendant is incompetent to prove an agreement for a consentable line between himself and the plaintiff's grantor in the lifetime of the latter.³⁹ A witness cannot make title in himself to a thing or contract in action by his own testimony of what occurred in the lifetime of his grantor who is dead.⁴⁰ "Since the passage of the act of 1887 competency is the rule, incompetency

²⁷ Dickson v. McGraw, 151 Pa. 98.

²⁸ Gerz v. Weber, 151 Pa. 396; Brose's Est., 155 Pa. 619.

²⁹ Hamill v. Supreme Council, Etc., 152 Pa. 537.

³⁰ Yeakel v. McAtee, 156 Pa. 600.

³¹ Graff v. Callahan, 158 Pa. 380. (See Lancaster, Etc., Bank v. Henning, 171 Pa. 399.)

³² Wolf v. Wolf, 158 Pa. 621.

³³ Irwin's Est., 160 Pa. 82; Carpenter v. U. S. Life Ins. Co., 161 Pa. 9; Kuhn's Est., 163 Pa. 438; Smith v. Rishel, 164 Pa. 181; Frack v. Gerber, 167 Pa. 316; N. Y., Etc., Co. v. Weidner, 169 Pa. 359; Royer v. Ephrata, 171 Pa. 429; Dutton v. Beatty, 181 Pa. 426; Dumbach v. Ephrata, 171 Pa. 429; Dutton v. Beatty, 181 Pa. 426; Dumbach v. Bishop, 183 Pa. 602.

³⁴ Irwin v. Nolde, 164 Pa. 205; Kyte v. Foran, 167 Pa. 252.

³⁵ Flanagan v. Nash, 185 Pa. 41.

³⁶ Jack v. Moyer, 187 Pa. 87.

³⁷ Rine v. Hall, 187 Pa. 264.

³⁸ Horne v. Petty, 192 Pa. 32.

³⁹ Reiter v. McJunkin, 194 Pa. 301. As to conversations between partners, one of whom has died, see Equitable Trust Co. v. Bowen, 201 Pa. 534.

⁴⁰ Paschall v. Fels, 207 Pa. 70; Wright v. Hanna, 210 Pa. 349.

the exception. Departures from the common law rules of evidence are for the legislature and, when so made, inequalities, real or apparently so, resulting from the legislative removal of the disqualifications of witnesses, cannot be urged as reasons why judges ought not to read the words of legislators as they are written."⁴¹ These acts apply to civil proceedings before any tribunal in the commonwealth.⁴² Neither the acts of 1887 or 1891, makes the plaintiff or defendant a competent witness to testify in a suit in equity by a wife against her husband to cancel a deed and compel reconveyance of her separate property.⁴³ One is competent who is not really a party to the contract in action, but an independent contractor in a contract, not in suit, as a guarantor of a note by indorsement.⁴⁴ There is now no interest or policy of the law which will render a witness incompetent unless he comes within one of the specified exceptions of the act of 1887.⁴⁵ The wife of a plaintiff is incompetent to prove his claim for services to decedent by conversations with decedent.⁴⁶ Sons who are interested in the outcome of the controversy so far as the collection of a claim is concerned have a disqualifying interest.⁴⁷ The principle of exclusion does not apply to a designated beneficiary of an association who takes in his own right.⁴⁸ The mere lapse of time does not put the rule of exclusion to sleep where it applies.⁴⁹ A woman claiming to be a surviving widow is competent to prove her marriage.⁵⁰

25. One year's time for payment.

Section 22 of the act of 1834, *supra*, provides:

"No executor or administrator shall be compelled to pay any debt of the decedent, except such as are by law preferred in the order of payment to rents, until one year be fully elapsed, from the granting of the administration of the estate."

The rights of creditors are fixed at the time of the death of decedent, and if a judgment be entered on the same day, but after the death occurred, such judgment is not entitled to priority over the general creditors.¹ Funeral expenses come within the limitation of the two years as prescribed by the various acts of assembly.² Although an administrator need not pay any debts within the year, suit may be brought against the estate within the year.³

⁴¹ Brown, J., in Allen's Est., 207 Pa. 325. *Quære*, whether this would not be a good rule to apply to all laws.

⁴² Crosetti's Est., 211 Pa. 490.

⁴³ Heckman v. Heckman, 215 Pa. 203.

⁴⁴ Pattison v. Cobb, 212 Pa. 572, reversing 26 Supr. C. 72.

⁴⁵ Strause v. Braunreuter, 4 Supr. C. 263.

⁴⁶ Winings v. Hearst, 17 Supr. C. 314.

⁴⁷ Murphy v. Murphy, 24 Supr. C. 547.

⁴⁸ Broadrick v. Broadrick, 25 Supr. C. 225.

⁴⁹ Weaver v. Oberholtzer, 31 Supr. C. 425.

⁵⁰ Miller's Est., 34 Supr. C. 385; Comly's Est., 185 Pa. 208; Luce's Est., 3 Supr. C. 289; Drinkhouse's Est., 151 Pa. 294; Hine's Est., 10 Supr. C. 124.

¹ Patterson's Ap., 96 Pa. 93, reviewing authorities.

² McNutt's Est., 15 D. R. 429.

³ Forney's Ex. v. Ebersole, 18 Lanc. L. R. 207.

A suit brought in the Common Pleas within the year, against the executor, relieves the creditor from any charge of laches. If the executor has settled his account and distributed the money before the end of the year, without taking refunding bonds, he is liable to the creditor.⁴ The rule that claims must be presented to the administrator within twelve months after public notice given by him of his appointment, will be relaxed to reach the equities of all the creditors as long as such relaxation does not prejudice the representative and does not disregard any superior equity of a particular creditor.⁵

The proviso of section 19, of the act of March 29, 1832, P. L. 190, above referred to is that "No creditor who shall neglect or refuse to exhibit his account to the executor or administrator within twelve months after public notice given in one or more newspapers in the county in which letters testamentary or of administration have been granted * * * and continued for six [by act February 24, 1834, P. L. 70] weeks, shall be entitled to receive any dividend of such remaining assets." This has been construed not to be an act of limitation, but a direction in aid of the administrator or executor to facilitate the settlement of the estate.⁶

26. Limitation as to debts due decedent's estate.

Section 1 of the act of April 6, 1905, P. L. 114, provides:

"That the statute of limitations shall begin to run against a debt or demand arising or falling due to the estate of a decedent, after his or her death, from the time such debt or demand shall arise or fall due as aforesaid, notwithstanding that letters testamentary or letters of administration have not been taken out on such estate."

Section 2 repeals all inconsistent laws.

27. Proceedings to relieve decedent's land from lien.

Section 2 of the act of June 8, 1893, P. L. 392, provides:

"It shall and may be lawful for any executor, administrator, trustee or any party interested in the real estate of any decedent, to present his, her or their petition to any court having jurisdiction of the settlement of such estate, setting forth all the particulars, and also that there are just and reasonable grounds for believing that said decedent left no debts not of record, and that it is desirable to have the real estate of said decedent relieved from any lien now given by law for such debts."

28. Reference to master or examiner.

Section 3 of the said act of 1893, *supra*, provides:

"It shall be lawful for said court, having jurisdiction, as aforesaid, to hear and determine the same, and shall have power to refer such petition to an examiner or master, whose duty it shall be to diligently inquire into the facts and circumstances alleged in any

⁴ Rastaetter's Est., 15 Supr. C. 549.

⁵ Cowan's Est., 184 Pa. 339.

⁶ Smith's Est., 1 Ashmead, 352; Cowan's Est., 184 Pa. 339, criticizing Mitchell's Est., 2 Watts, 88; Rudy's Est., 4 Dauphin Co. 150.

such petition, and report the same to said court, and the said court may in its discretion direct such notices to be given of such application, either by publication or otherwise, as may be deemed necessary."

29. Decree of court.

Section 4 of said act of 1893, *supra*, provides:

"It shall be the duty of said court, upon being fully satisfied as to the truth and justice of the matters alleged in any such petition and application to decree and direct that the real estate of any such decedent shall be held and enjoyed free and clear of any lien of debts not of record, of said decedent."

30. Exclusive power of the Orphans' Court.

The Orphans' Court has exclusive jurisdiction of the debts of decedents and creditors must enforce their claims in it, though they may recover judgment in the Common Pleas. A creditor cannot attach a debt which is due a decedent.⁷

⁷ Strouse v. Lawrence, Admx., 160 Pa. 421; Beaton v. Gorman, 18 D. R. 257; Hammett's Ap., 83 Pa. 392; Lex's Ap., 97 Pa. 289; Otterson v. Middleton, 102 Pa. 78.

CHAPTER VIII.

ASSETS WHICH COME INTO THE HANDS OF EXECUTORS AND ADMINISTRATORS FOR PAYMENT OF DEBTS — STATUS OF DEBTS.

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| 1. Things which shall come into the hands of a legal representative. | 8. Beneficiary funds. |
| 2. Choses in action. | 9. Insurance money. |
| 3. Goods and chattels. | 10. Emblements. |
| 4. Assets for the payment of debts. | 11. Arrears due a soldier. |
| 5. Lands as assets. | 12. Status of debts determined at the death of decedent. |
| 6. What rents are assets. | 13. Debts which are liens. |
| 7. License and good will. | 14. Debts in form of judgments, order of. |
| | 15. Debts in form of mortgages. |

1. Things which shall come into the hands of a legal representative.

The things which shall come into the hands of an executor are all those committed to him by the will and may be many or few. Wentworth classifies them as: Either possessory or things in action; and the possessory into chattels, real and personal, or movable and immovable. All these are *assets in maines l' executors* — for the payment of testator's debts.¹ But things in action are not chargeable to the executor until he receives the fruits.² Assets in the hands of one executor are in the hands of all.³ Things which come into the hands of an administrator are those inventoried and which the law authorizes him to collect.

Among things personal is bank stock of the testator even when bequeathed specifically;⁴ literary works and copyrights by law; remainder of partnership assets after settlement and account by the survivor;⁵ and emblements, which include "everything which is raised annually, by labor and manurage, and extends therefore to roots planted, as carrots, parsnips, turnips, corn growing, hops, saffron, hemp, clover, artificial grapes, etc.,"⁶ for the maxim is "*Quicquid plantatur solo, solo credit.*"⁷ But when trees are severed in waste, as if cut down by tenant in dower, or by the curtesy, or after possibility of issue extinct, they shall belong to the rever-

¹ Assets in the hands of the executors. *Termes de la ley* — Shepherd's Touchstone, 496. "Wentworth on Executor," by Justice Dodderidge.

² Case of Sellenger, Gouldsborough, 30.

³ Fenwike, C. J., in Keilway, 51 (Law French Reports).

⁴ Bank of England v. Moffatt, Douglas, 524.

⁵ Bell v. Newman, 5 S. & R. 86.

⁶ 3 Bacon's Abr. 64.

⁷ For he alone who planteth, alone shall reap.

sioner.⁸ Trees belong to the realty.⁹ When a tenant for life, who soweth the land and is disseized, dies before severance, the emblements go to his executor and not the disseizer nor the reversioner.¹⁰ But as against the heir, a devisee of lands, is in general entitled to the emblements.¹¹

"The rule that an executor hath the same interest as his testator, holds equally in chattels real, if the latter, as lessee of a term, had only a special property therein. The executor shall have only the same qualified enjoyment; but if the demise was without impeachment of waste, acquires an absolute property in the profits which accrue, as timber, provided they be actually severed from the freehold during the term.¹² As to fixtures, the rule now is that such things as can be readily taken away without injury to the freehold, shall generally go to the executor; and this rule is more intended to favor trade, where furnaces, mills, factories, etc., have been erected to promote trade and industry.¹³ He may redeem pledges of his testator.¹⁴

Equity will not follow assets for the benefit of a creditor, unless fraud or collusion with the executor be proved.¹⁵ A mere charter without any title to the land, falls to the executor.¹⁶ Where there is a covenant that money shall be laid out in the land, equity will decree it to the heir.¹⁷ Damages out of land which the ancestor recovered go to the executor.¹⁸

2. Choses in action.

"It is clear that debts due to the testator, be it by bond, statute or judgment, or for arrearages of rent, are not assets to charge the executor until receipt of them: and it is clear that the action to recover these doth pertain to the executor, and that the debt and damages recovered shall be assets to charge the executor."¹⁹ If one received money due the testator after his decease the executor may bring an action of assumpsit for money had and received in his right, and if an administrator receive money he ought not, he must be sued for it personally.²⁰ If notes, bills, bonds, book accounts, etc., are inventoried and prove uncollectible, the executor or administrator may claim credit for them in his account having charged himself with the inventory. Even, when he fails to take credit the balance is not assets as to unrecovered debts, and he may have it

⁸ Bowle's Case, 11 Coke, 83; Shult v. Barker, 12 S. & R. 272.

⁹ Coke on Litt., 55b.

¹⁰ 3 Bacon's Abr. 64; Knevit v. Poole, Gouldsbrough, 143.

¹¹ Coke on Litt., b. n. 2.

¹² 4 Coke, 90, b.

¹³ Poole's Case, Salkeld, 368; Hope v. Bague, 3 East, 3.

¹⁴ 3 Bacon's Abr. 58.

¹⁵ McLeod v. Drummond, 14 Vesey, Jr., 353; Petrie v. Clark, 11 S. & R. 385.

¹⁶ 11 Viner's Abr. 145.

¹⁷ Lingen v. Sowray, 1 Peere Williams, 172-5-6; Martin v. Mowlin, 2 Burrow, 969.

¹⁸ 11 Viner's Abr. 145, 169.

¹⁹ Wentworth on Ex., p. 159.

²⁰ Grier v. Huston, 8 S. & R. 402.

corrected on review. But when he releases a debt he is chargeable therewith, for the release is equivalent to a receipt.²¹ When the cause of action accrues after the death of the testator, the debt or damages become assets immediately.²²

In whatsoever form of action or kind of proceeding, whether for assumpsit or damages, the executor or administrator recovers aught that belonged to the decedent in his lifetime, or survived to his personal representative at his death, it becomes assets of the estate to be accounted for. So, also, when he recovers anything by decree in equity, of the rights of the decedent in personalty.²³

3. Goods and chattels.

These words were esteemed one by the doctors of the spiritual law — *bona et catalla*, and comprehended a lease as well under *bona* as *catalla*, in a will though not in a deed. Chattels were not at the common law considered "moveables," which goods are. *Ad repetenda bona prædecess* gives the right to the successor in the trust. So where a testator wills his real estate to his executor to pay debts he does not will the freehold, for, if he should die seised in fee the heir would take it, and not the successor in the trust.²⁴ A will with powers to the executor is good if executed, though execution could not be compelled at law, where the powers are discretionary. But equity ought to decree that which is unexercised.²⁵

4. Assets for the payment of debts.

Among the things which come to the hands of an administrator or executor which are assets for the payment of debts are these:

Bond and mortgage of distributee for money loaned to him by the testator;¹ property pledged by bill of sale for a debt, but held by decedent at his death;² surcharge of the administrator;³ advance payment of liquor license;⁴ judgment recovered from delinquent purchaser for difference at re-sale;⁵ a sum reserved by the grantor in a deed which is a lien, the interest of which is payable to him during life.⁶ These are some of the things decided not to be assets of the estate: A mortgage held by a foreign decedent on lands in Pennsylvania;⁷ U. S. bonds deposited in a Pennsylvania institution by a foreign owner who dies abroad;⁸ a bond by a son to his father which was to be delivered to the former at the death of the latter;⁹ a note from a person to the wife of decedent

²¹ Cocke v. Jennor, Hobart, 66; Cro. Eliz. 43.

²² Jenkins v. Plume, 1 Salkeld, 207.

²³ 3 Bacon's Abr. 59.

²⁴ 1 Inst. 113.

²⁵ Pitt v. Pelham, Cases in Chancery, 177.

¹ Willock's Est., 165 Pa. 522.

² Heft's Ap., 19 W. N. C. 302.

³ Martin's Ap., 33 Pa. 395.

⁴ Fury's Est., 17 D. R. 608.

⁵ Hughes v. Miller, 205 Pa. 627.

⁶ Miller v. Withers, 188 Pa. 128.

⁷ Gray's Est., 1 Kulp, 449.

⁸ Shakespeare v. Fidelity Trust Co., 97 Pa. 173.

for a store purchased by her from her husband and sold to that person;¹⁰ an accepted order from the testator on his debtor to his creditor.¹¹

5. Lands as assets.

Lands of a decedent are assets for payment of decedent's debts, notwithstanding the heirs may have sold them to *bona fide* purchasers.¹² Where the personal estate is insufficient the proceeds of a sale of land in partition may be applied to just debts, but not if their lien on the realty is lost.¹³ As to partnership property it is all primarily liable for the debts of the firm, and the executor of a deceased partner cannot be surcharged with one half the proceeds.¹⁴ If there would be anything left after payment of firm debts and an accounting, it would become assets in the hands of the executor. Where the widow being administratrix retains her share, when she dies it passes to the *admr. d. b. n.* of the first,¹⁵ If there be a deficiency of assets, after sale under the act of April 18, 1853, P. L. 503, the guardian of a minor may be required to pay over a proportion to the administrator.¹⁶ Claimant having obtained judgment in the Common Pleas against the administrator, if there be a *devastavit*, he may issue his *sci. fa.* to the heirs and recover judgment, while his judgment is a lien.¹⁷

6. What rents are assets.

Rents which have accrued at the death of the landlord are assets, but the legal representative has nothing to do with rents that accrue after his death.¹⁸ For rent in arrear the executor may distrain,¹⁹ but he has no right to distrain on a lease made by the heirs.²⁰ The fact that the lease reserves the rent to decedent, his executors, etc., does not affect the law, which is that the rent passes to the heir or reversioner.²¹ If the administrator collects rents which accrue after the death of decedent the heirs may sue him and recover.²² For rents which accrue subsequently, the heirs are not accountable to the legal representative.²³ But where rents are

⁹ Thomas v. Smith, 3 Wharton, 401.

¹⁰ Griffith's Est., 1 Lack. L. N. 311.

¹¹ Ferran's Est., 1 Ashmead, 319.

¹² Graff v. Smith, 1 Dallas, 481; Nokes v. Smith, 1 Yeates, 238; Cunningham's Est., 9 Phila. 308.

¹³ Comth. v. Pool, 6 Watts, 32.

¹⁴ Williams' Ap., 122 Pa. 472.

¹⁵ Trueman v. Trueman, 3 Clark, 101.

¹⁶ Yard's Est., 17 Phila. 436.

¹⁷ Wright v. Taylor, 26 C. C. 369.

¹⁸ Haslage v. Krugh, 25 Pa. 97; Reiff's Est., 5 Montg. 171; Klein's Est., 14 C. C. 94; Burnell's Est., 9 W. N. C. 334.

¹⁹ 32d. Henry VIII., ch. 37, section 1; Roberts' Dig., p. 254-5.

²⁰ Grier v. McAlarney, 148 Pa. 587.

²¹ Merkel's Est., 131 Pa. 584.

²² Bakes v. Reese, 150 Pa. 44; McCoy v. Scott, 2 Rawle, 222; Robb's Ap., 41 Pa. 45; Howard's Est., 8 D. R. 125; Law's Est., 7 C. C. 605; Weightman's Ap., 10 W. N. C. 155.

²³ Adams v. Adams, 4 Watts, 160.

devised in trust, after payment of debts, a different rule applies.²⁴ The title of the heir vests at the death of decedent, although there is a power to sell, and conversion is not wrought thereby as to the heir, until the sale is made. Meantime the executor has no authority to collect the rents and use them as assets.²⁵ This is the rule, unless the testator puts the power in his executor, which is a question of intent and not of conversion.²⁶

7. License and good will.

A liquor license is not an asset of an estate.²⁷ It is a personal privilege, but where the executor procures a transfer he is liable to account for the profits.²⁸ And so, where the administrator takes the lease and runs the business, he is chargeable with the value of the leasehold interest and good will.²⁹ But the widow is not.³⁰ As to the hotel the good will and unexpired term are to be accounted for.³¹ So is the value of a renewable lease.³² There can be no "good will" where there is nothing tangible or visible either in the way of ownership of real estate or lease of it, or of personalty used in the business.³³

In the case of a saloon, where the widow took over the business and replenished the stock she was held accountable only for a proportion of the license which decedent had paid.³⁴ As to a newspaper plant, it was held that the subscription list is not an asset, but a mere incident and not separable.³⁵

8. Beneficiary funds.

The benefits payable to the beneficiary on the death of a member of a society are not assets for the payment of decedent's debts.¹ Such funds must be applied strictly to the purposes for which they were intended,² and if paid out for funeral expenses, cannot be recovered out of an insolvent estate.³ Where the benefits are payable to the "heirs and legal representatives," in default of a widow they go to the next of kin, which are the father and mother, when there are no children or widow.⁴

²⁴ Pennock's Est., 2 Phila. 143.

²⁵ Penna. Co.'s Ap., 168 Pa. 431.

²⁶ Searight's Est., 163 Pa. 218.

²⁷ Grimm's Est., 181 Pa. 233.

²⁸ Reilly's Est., 6 D. R. 252.

²⁹ Wiley's Ap., 8 W. & S. 244.

³⁰ Elliott's Ap., 60 Pa. 161; Lange's Est., 12 Phila. 52.

³¹ Coppel's Est., 4 Phila. 378; Johnson's Ap., 115 Pa. 129.

³² Emeret's Est., 2 Parsons, 195; Fow's Est., 3 D. R. 316.

³³ McGovern's Est., 2 Northam. 194.

³⁴ Immendorf's Est., 190 Pa. 590. (See also Schroeter's Est., 50 Pitts. L. J. 431; Fechter's Est., 51 Pitts. L. J. 323.)

³⁵ M'Farland v. Stewart, 2 Watts, 111.

¹ Northwestern, Etc., Assn. v. Jones, 154 Pa. 99; Masonic Mutual Assn. v. Jones, 154 Pa. 107; Morrell's Est., 8 W. N. C. 183; Zinn's Est., 2 D. R. 801; Kendrick's Est., 15 C. C. 24.

² Haas' Est., 18 Phila. 185; Oelson v. Schiller, Etc., Soc., 9 Lanc. L. R. 113.

³ Schaubel's Est., 12 Lanc. L. R. 166.

⁴ Hodge's Ap., 8 W. N. C. 209.

9. Insurance money.

The proceeds of a fire insurance policy made payable to the insured or his executor or administrator, are assets for the payment of his debts;⁵ so also a life insurance policy so payable.⁶ Where the insured assigns a policy to another for the payment of a debt, all in excess of the debt belongs to the estate for the use of other creditors.⁷ A policy which a wife takes out on the life of her husband is not an asset for the payment of his debts.⁸ Where a man has two policies, one payable to his wife and the other to his estate, the latter is liable to her claim as his creditor.⁹ The assignment of a policy to the company for a claim extinguishes it.¹⁰ The doctrine that insurance money on land belongs to the judgment creditor, has been applied to damages recovered by a devisee for injuries to the land.¹¹

10. Emblements.

Growing crops on the land at the time of the death of the decedent are assets for the payment of debts if they belong to the decedent.¹² If the widow takes them, except as part of her exemption, she must account for them.¹³

11. Arrears due a soldier.

Arrears of pay due a soldier in the service of the United States are assets for the payment of debts.¹⁴ So are arrears of bounty.¹⁵ But pension money is not.¹⁶

12. Status of debt determined at the death of decedent.

The death of the debtor determines the status of the debts as to their priority or the right of the creditor to participate.¹⁷ A judgment entered against the decedent on the day of his death does not relate back to the beginning of the day, and therefore, if it be entered after the death, its owner is not a preferred but a general creditor.¹⁸ So, one general creditor cannot gain priority by obtaining judgment,¹⁹ issuing execution²⁰ or an attachment.²¹

⁵ *Nichol's Ap.*, 128 Pa. 428; *Hurley's Est.*, 13 Phila. 276; *Callahan's Est.*, 5 Lack. L. N. 105.

⁶ *Kennedy's Est.*, 2 W. N. C. 492; *Deginther's Ap.*, 83 Pa. 337; *McCauley's Ap.*, 93 Pa. 102; *Miller's Ap.*, 30 Leg. Int. 28.

⁷ *Harrisburg Natl. Bank v. Hiester*, 2 Pearson, 253.

⁸ *Tiedeken's Est.*, 11 Phila. 95.

⁹ *Karch's Est.*, 133 Pa. 84.

¹⁰ *Schramm's Est.*, 5 D. R. 331.

¹¹ *Helbling's Est.*, 49 Pitts. L. J. 378.

¹² *Kupp's Est.*, 2 Woodward, 228; *Cobel v. Cobel*, 8 Pa. 342.

¹³ *Lau's Est.*, 8 York, 173.

¹⁴ *Maitland v. Grissinger*, 1 Woodward, 294.

¹⁵ *Seidel's Est.*, 2 Woodward, 259.

¹⁶ *Quickel's Est.*, 5 York, 71.

¹⁷ *Stulzfoos' Ap.*, 3 P. & W. 265; *Willing v. Yohe*, 1 Phila. 223.

¹⁸ *Patterson's Ap.*, 96 Pa. 93; *Kier's Est.*, 27 Pitts. L. J. 21.

¹⁹ *Wootering v. Stewart*, 2 Yeates, 483; *Scott v. Ramsay*, 1 Binney, 221; *Prevost v. Nicholls*, 4 Yeates, 479; *Penna., Etc., Bank v. Stambaugh*, 13 S. & R. 299.

²⁰ *White v. Adkins*, 2 Kulp, 120.

When the stockholder of a corporation dies, the rights of his creditors are fixed and no by-law afterwards adopted will change them.²² A judgment before a justice of the peace, unless a transcript is filed in the Common Pleas, gains no priority over other general debts, not being a lien.²³ The same was held as to a mechanic's lien for repairs, under the old law.²⁴

13. Debts which are liens.

Debts which are liens at the death of the decedent are preferred to such claims as are given a preference by section 21 of the act of February 24, 1834, P. L. 70, as to funds arising from the sale of the real estate upon which they are liens;²⁵ and this is so, although the decedent is not correctly named in the judgment.²⁶ Where a building is burned on land of decedent, after his death, the judgment creditors are entitled to the insurance.²⁷ The rule was prior to the late acts of assembly that even though a judgment was not revived it stood preferred as against the heirs and devisees and general creditors;²⁸ and as to the devisee, a judgment obtained in the lifetime of decedent had preference over one obtained after his death.²⁹ *Quære* whether the act of 1909 has not erased all distinctions.

Mechanics' liens duly filed, though not reduced to judgment, are entitled to priority.³⁰ An execution levied on personal property before the death of decedent, which occurs before the sale, is preferred, even to the landlord's claim for rent, it has been held.³¹

14. Debts in form of judgments, order of.

Judgments entered in the lifetime of the decedent and kept revived are entitled to participate in the order of their priority.³² A senior judgment confessed for a former judgment will hold its rank.³³ The proceeds of personalty being the primary fund for the payment of debts, owners of judgments are entitled to participate therein *pro rata* and as to any balances they will be paid in their order of priority out of the realty.³⁴ But where the owners of judgments against the realty have purchased it at nomi-

²¹ Kane v. Coyle, 20 W. N. C. 317; Strouse v. Lawrence, 160 Pa. 421; Gottshall v. Knipe, 11 Montg. 159.

²² Steamship Dock Co. v. Heron, 52 Pa. 280.

²³ Patterson's Est., 1 Ashmead, 336.

²⁴ Hoff's Ap., 102 Pa. 218. (See Langbein's Est., 15 D. R. 961.)

²⁵ Bond's Ap., 2 Penny. 241; Hocker's Est., 14 Phila. 659; Bryan's Est., 4 Phila. 228; McKenna's Est., 1 W. N. C. 517.

²⁶ Wright's Est., 31 Pitts. L. J. 210.

²⁷ O'Brien's Est., 19 C. C. 467, following Nichols' Ap., 123 Pa. 428, and Grevemyer v. Ins. Co., 62 Pa. 340.

²⁸ Aurand's Ap., 34 Pa. 151; Timmon's Est., 7 Lanc. L. R. 97.

²⁹ Rigby's Est., 1 Del. Co. 55.

³⁰ Langhein's Est., 15 D. R. 961.

³¹ Schroeter's Est., 50 Pitts. L. J. 431.

³² Girard v. McDermott, 5 S. & R. 128.

³³ Gross' Est., 6 C. C. 478.

³⁴ Ramsey's Ap., 4 Watts, 71; Mason's Ap., 89 Pa. 402; Ramsay's Est., 1 Leg. Rec. R. 189.

nal sum by agreement, they have been held estopped from coming in on the personalty.³⁵ A judgment obtained in Connecticut, when the decedent died domiciled in Pennsylvania, although it be a decree for alimony in divorce, has no preference over general creditors.³⁶ If a creditor stays his execution, having levied on a writ issued by an alderman before the death of the defendant, he loses his preference and must come in *pro rata*.³⁷ An executor who in good faith, believing the estate to be solvent, pays a judgment may be subrogated as to the personalty, but not to be preferred to junior liens on the realty.³⁸

Where one of two defendants appealed from an award of arbitrators, the award as to the one not appealing, was held to have the effect of a judgment and lien and the defendant dying, the fund should be retained until the appeal is determined.³⁹

15. Debts in form of mortgage.

A mortgage debt may be collected out of the personalty⁴⁰ and funds may be distributed to the mortgage in the absence of the mortgagee, unless it be shown that the mortgager intended to charge the debt specifically upon the real estate.⁴¹ His bond may be satisfied out of the personalty, even though he gave notice at the sale that the land was sold subject to his mortgage.⁴² Where the devisees settled without an account by the executor, a mortgagee whose mortgage was not fully paid may hold the executor on the bond for the deficiency.⁴³

³⁵ Drennen's Est., 10 Lanc. L. R. 221.

³⁶ Dean's Est., 11 D. R. 84.

³⁷ Hughes' Est., 1 Lack. Jur. 317.

³⁸ Coyle's Ap., 163 Pa. 222.

³⁹ Ramsey's Ap., 4 Watts, 71. (This case has been modified by the acts of April 21, 1840, P. L. 449, as to lien and 1907 as to judgment on a transcript of balance.

⁴⁰ Mansell's Est., 1 Parsons, 367; Merkel's Est., 131 Pa. 584; Burton's Est., 3 D. R. 755; McKee's Est., 30 Pitts. L. J. 393.

⁴¹ Zweidinger's Est., 32 Pitts. L. J. 202; Stuard's Est., 17 Phila. 498.

⁴² Tubb's Ap., 161 Pa. 252. *Quære*, whether it would not be a wise and politic act to amend the law confining mortgages to the *corpus* mortgaged.

⁴³ Gardiner's Est., 18 Phila. 30.

CHAPTER IX.

SALE OR MORTGAGE OF REAL ESTATE FOR THE PAYMENT OF DEBTS.

1. Power to order sales or mortgages.
2. Power to order sales or mortgages in several counties.
3. Order of sale when land lies in different counties.
4. Order to sell.
5. Claims upon which a sale may or may not be ordered.
6. Mortgage debts.
7. Estates and property that may be sold.
8. The petition to sell.
9. Petitions — rule in Philadelphia.
10. Inventory must be exhibited.
11. Form of petition.
12. Form of order of sale.
13. Private sale.
14. Legal representatives must first give security.
15. Form of bond.
16. Justification of sureties.
17. Form of approval.
18. Liability of surety.
19. Appointment of auditor on petition.
20. Petitions for sale not for payment of debts, Philadelphia.
21. Private sales in Philadelphia — rule.
22. Notice of petition in Philadelphia.
23. Form of notice, Philadelphia.
24. Fixing terms of sale.
25. Form of order of sale.
26. Notice of sale.
27. Form of notice of sale.
28. Authorization of legal representative to bid.
29. Form of leave to bid.
30. Consent of heirs, etc.
31. Form of return to leave to bid.
32. Return to order of sale — form.
33. Form of confirmation *nisi*.
34. Form of petition for private sale.
35. Form of affidavit of value.
36. Form of order for private sale.
37. Form of return of private sale.
38. Form of affidavit of notice.
39. Form of final confirmation.
40. Form of return unsold.
41. Form of order for alias.
42. Terms and order of sale.
43. Lien creditor as purchaser.
44. Proceedings on return — contest.
45. Investment of proceeds, *pendente lite*.
46. Expenses of guaranteeing investment.
47. Form of return under lien creditor act.
48. Form of confirmation *nisi*.
49. Form of final confirmation.
50. Return of sale, generally.
51. Postponement and rescission.
52. Alias order and resale.
53. Powers and duties of legal representative.
54. Deed to purchaser.
55. Title of purchaser.
56. Title by estoppel.
57. Form of deed.
58. Execution of deed when legal representative is incapacitated.
59. Deed when fiduciary dies.
60. Power of surviving fiduciary.
61. Rights and liabilities of purchaser.
62. Right of purchaser as lien creditor.
63. Liability for purchase money.
64. Payment into court.
65. Title not affected by revocation of letters.
66. Defective qualification not to affect title.

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|--|--|
| 67. Rights of purchaser when sale is set aside. | 71. Form of petition to set aside sale on offer of higher bid. |
| 68. Enforcement of sale. | 72. Form of order for citation. |
| 69. Mortgaging real estate. | 73. Form of decree setting aside, etc. |
| 70. Form of petition to compel purchaser to comply with his bid. | |

1. Power to order sales or mortgages of real estate.

Section 31 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court which possesses jurisdiction of the accounts of an executor, administrator or guardian shall have power to authorize a sale or mortgage of real estate by such executor, administrator or guardian, in the following cases, viz.:

I. On the application of the executor or administrator, setting forth that the personal estate of the decedent is insufficient for the payment of debts and maintenance and education of his minor children, or for the purpose of paying the debts alone.

II. On the application of such executor or administrator, or of any person interested, setting forth, that on the final settlement of the administration account, it appears that there are not sufficient personal assets to pay the balance appearing to be due from the estate of such decedent, either to the accountant or others.

III. On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate, or that the estate of said minor is in such a state of dilapidation and decay, or so unproductive or expensive that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold, and the Orphans' Court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case, as in the cases particularly mentioned in the 32d section of this act."

2. Power to order sale or mortgage in several counties.

Section 32 of the act of 1832, *supra*, is as follows:

"When the real estate, with respect to which application shall be made to the Orphans' Court, in the cases mentioned in the preceding section, is situated in the same county, the said court may order the sale or mortgage of such part, or so much of such real estate as to them shall appear necessary; when the real estate is situated in another county or counties, or in the same and another county or counties, and the Orphans' Court which possesses jurisdiction over the accounts of such executor, administrator or guardian, shall be satisfied of the propriety of a sale or mortgage of some portion of such real estate not within their jurisdiction it shall be lawful for such court to make a decree, authorizing such executor, administrator or guardian to raise so much money as the said court may think necessary, from real estate situated in such county or counties as they may designate; and thereupon, it shall be the duty of the Orphans' Court of the county wherein the real estate so designated is situated, upon the petition of such executor,

administrator or guardian, to make an order for the sale or mortgage, as they shall think expedient, of so much and such parts of such real estate, as shall, in their opinion, be necessary to raise the specified sum; and such executor, administrator or guardian, shall in all cases make return of his proceedings in relation to such sale or mortgage, to the Orphans' Court of the county in which the real estate so sold or mortgaged lies, when, if the same be approved by the court, it shall be confirmed."

Under this section an order to sell or mortgage must first be obtained on petition to the Orphans' Court of the county having jurisdiction of accounts, and then this order forms a basis of the petition and order of sale in the county where part of the land lies, since a record must be made and notice be given in both counties under the act of June 4, 1883, P. L. 65.¹

The act of May 21, 1901, P. L. 272, changes the practice as to guardians, dispensing with the ancillary order.

3. Order of sale when the land lies in different counties

The act of 1883, cited above, provides:

"That notice of said sale, as now required by law, be given in all the counties in which the land is situated: And *provided further*, That any mortgage, judgment, bond or other obligation taken by such executor or administrator to secure the purchase money or any part thereof, by lien on such lands, shall be duly recorded or entered in each of the counties in which said lands lie, as now required by law."

The power of the Orphans' Court to order sales of decedent's real estate is limited by the statutes and these must be strictly pursued to confer jurisdiction.² The incipient order of court adjudicates the necessity for the sale or mortgaging and the court of the second county can only determine whether it shall be one or the other.³ A sale will not be ordered unless it be shown to the satisfaction of the court that the personal estate is insufficient to pay the debts.⁴ If the deficiency be only temporary, the heir or devisee will be entitled to have restoration made out of personalty subsequently coming into the hands of the legal representative.⁵ A sale will not be ordered to make good a *devastavit*, in any event.⁶ So also, where the proceeds of a former sale for the purpose have been misappropriated or lost.⁷ An administrator or executor may apply for an order before settlement of his accounts, but another "person interested" cannot until a settlement shows a deficiency.⁸

¹ Lane v. Nelson, 79 Pa. 407; Spencer v. Jennings, 114 Pa. 618; Burkhardt's Est., 6 C. C. 374; O'Brien v. Wiggins, 14 Supr. C. 37.

² Penrose, J., in Van Dusen's Est., 29 W. N. C. 573.

³ Clayton's Est., 1 Chester Co. 21; Souder's Est., 20 Lanc. L. R. 231.

⁴ Hart's Est., 4 Kulp, 14. Rhone, P. J. Baum's Est., 25 Pitts. L. J. 1; Fasig's Est., 1 Woodward, 213; Orwig's Est., 7 C. C. 71.

⁵ Phipps v. Phipps, 3 Clark, 275.

⁶ Kelly's Est., 11 Phila. 100; Miller's Est., 18 Lanc. L. R. 53; P. & L. Dig., vol. 14, col. 24787; Pry's Ap., 8 Watts, 253.

⁷ Kane's Est., 19 Phila. 185; Stifler's Est., 8 D. R. 400; Benner v. Phillips, 9 W. & S. 13.

⁸ Fox v. Winters, 4 Rawle, 174; Freno's Est., 11 Phila. 42; P. & L. Dig., vol. 14, col. 24789.

NOTICE OF PRIVATE SALE OF REAL ESTATE

The Act of June 9, 1911, provides.

No. 297.

"Section 1. That before authorizing, decreeing or approving such private sale, public notice thereof shall be given by advertisement printed in at least one newspaper, and in the legal periodical, if any, designated by the rules of court of the proper county for the publication of legal notices, published in the county where such real estate is located, for at least twenty days prior to the date fixed by such order for authorizing, decreeing or approving such sale, and also by written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of such notices shall be posted at three of the most public places in the vicinity of such real estate.

"Section 2. Before authorizing, decreeing or approving such sale the court shall require proof, by affidavit to be filed in the proceeding, that the notice required by the first section hereof has been given.

"Section 3. On the day fixed by such order and notice for authorizing, decreeing or approving such private sale, any creditor of such decedent, or party interested as heir, devisee or intending purchaser, may appear and object to such private sale on account of the price, and offer to give or pay a substantial increase therefor; and the court, at its discretion, may thereupon decree or approve such sale, or refuse to decree or approve the same, and accept any substantially increased offer, and approve or decree such real estate to such new bidder upon compliance with the conditions of sale and giving security in accordance with the order of the court.

"Section 4. All private sales of real estate of decedents heretofore made under and by virtue of decrees of orphans' courts, under and in pursuance of the said act of May ninth, one thousand eight hundred and eighty-nine, shall and the same are hereby declared to be valid and effectual to vest in the purchasers thereof the title of such decedents in the real estate so decreed to be sold: Provided, That adequate security, conditioned for the faithful application of the purchase money, shall have been given by such executors or administrators, as the case may be, in accordance with such decree."

INSERT, P. 135, VOL. 3.

It need not be a final settlement.⁹ An order having been granted and a sale consummated, the title will not be allowed to be impeached collaterally.¹⁰ A creditor, however, may proceed by citation against the legal representative under section 36 of the act of February 24, 1834, P. L. 70.¹¹ An order will not be granted to sell for the expenses of administration until an account has been filed.¹² The fact that proceedings are pending to enforce a mortgage on the land will not preclude an order to sell.¹³ But where proceedings in partition are pending, the court may suspend an order to sell for payment of debts.¹⁴ Pending an issue *devisavit vel non*, where certain lands are charged with the payment of debts, an order should not be granted.¹⁵

Section 4 of rule 16, Allegheny County, provides:

"In all cases in which it is sought to sell or mortgage, under the act of April 18, 1853, P. L. 503, and its supplements; and the act of May 9, 1889, P. L. 182, real estate situated in this county, and the court having jurisdiction of the settlement of the accounts of an executor or other trustee seeking such sale, etc., is located in another county, leave shall first be obtained from such domiciliary court to apply to this court. The proceedings here shall be by original petition containing the necessary jurisdictional averments, signed and sworn to and be accompanied by a certified copy of the order of leave granted by the domiciliary court and by the usual affidavits as to value, upon which decree shall be made after due notice to parties interested, as to justice and equity may seem meet."

4. Order to sell real estate for payment of debts.

Section 20 of the act of February 24, 1834, P. L. 70, provides:

"Whenever it shall satisfactorily appear to the executor or administrator that the personal estate of the decedent is insufficient to pay all just debts, and the expenses of the administration, he shall proceed, without delay, in the manner provided by law, to sell, under the direction of the Orphans' Court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency; and such real estate so sold shall not be liable in the hands of the purchaser, for the debts of the decedent."

By section 67 of the same act, it is declared that "all and singular the provisions of this act, relative to the powers, duties and liabilities of executors, are hereby extended to administrators with a will annexed."

Under this section and section 31 of the act of 1832, *supra*, it is the duty of the legal representative to procure an order of court to mortgage or sell the real estate of the decedent, when the per-

⁹ Rhoad's Est., 3 Rawle, 420.

¹⁰ Snyder v. Markel, 8 Watts, 416.

¹¹ Weaver's Ap., 19 Pa. 416; P. & L. Dig., vol. 14, col. 24791.

¹² Kautz's Est., 1 D. R. 691; Honeywell's Est., 9 Kulp, 340; Grice's Est., 11 Phila. 107; McCormick's Est., 4 Kulp, 15.

¹³ Fitzsimmon's Ap., 40 Pa. 422.

¹⁴ Himelspark's Est., 8 D. R. 327; Kennedy's Est., 17 Phila. 407.

¹⁵ Smith's Est., 177 Pa. 17.

sonalty is insufficient to pay the debts;¹⁶ but to give jurisdiction the land must be such as decedent died seized of.¹⁷ He need not delay the step for any length of time¹⁸ nor until all the personal estate is exhausted;¹⁹ or the creditors have commenced suit to charge the land.²⁰ Indefinite delay will not be tolerated.²¹ Under the act of 1811, supplied by section 31 of the act of 1832, *supra*, one of several legal representatives may apply for the order to sell.²² It was held that the court cannot order the legal representative to apply for an order to sell, under section 36 of the act of 1834, P. L. 70, unless the creditor or other person interested brought himself within the act²³ which provides:

"It shall be competent for the court, in the cases aforesaid, on the application of the plaintiff in such judgment, or of any other person interested as heir, devisee, or otherwise, to order the executors or administrators to make application to the Orphans' Court, for the purpose as is hereinbefore mentioned, and to enforce such order by attachment."

The creditor must file a petition under the 31st section of the act of 1832, *supra*,²⁴ and it must be in the form of prayer for a citation to the legal representative to show cause why he should not present his petition for authority to sell, etc.²⁵ When so cited, if he neglects to appear or present his petition, a petition may be presented for his removal for neglect of duty and the appointment of a successor;²⁶ or the court may appoint some one to execute the trust.²⁷ The court may, in its discretion, refuse to order a legal representative to sell the real estate, if satisfied that it can serve no useful purpose.²⁸ If the legal representative answers that he has no funds to defray the expenses of a sale, the petitioner may be required to give bond to pay the costs and expenses, to be reimbursed out of the proceeds of the sale.²⁹ Where there is a will and the real estate is mortgaged, the court may grant an order to the executor to sell for the payment of debts, notwithstanding a power in the will.³⁰ Section 1 of rule 16, Allegheny County, provides that "all proceedings for the sale or partition of real estate shall be initiated by citation." ^{30a}

¹⁶ Payne's Est., 49 Pitts. L. J. 311; Wilkinson's Est., 4 Luz. L. R. 119; P. & L. Dig., vol. 14, col. 24794.

¹⁷ Shontz v. Brown, 27 Pa. 123.

¹⁸ Winpenny's Est., 16 Phila. 207.

¹⁹ Walker's Ap., 1 Grant, 431.

²⁰ Weaver's Ap., 19 Pa. 416.

²¹ Young's Est., 8 C. C. 4.

²² Snyder v. Snyder, 6 Binney, 483; Bickle v. Young, 3 S. & R. 234; Selin v. Snyder, 7 S. & R. 166.

²³ Hutchinson's Est., 10 C. C. 592; Roessler's Est., 19 C. C. 161; Luken's Est., 10 D. R. 118.

²⁴ Wilkinson's Est., 4 Luz. L. R. 119. Rhone, P. J.

²⁵ Titlow's Est., 2 D. R. 512. Hanna, P. J.

²⁶ Kitchenman's Est., 15 Phila. 519.

²⁷ Wilkinson's Est., 4 Luz. L. R. 119.

²⁸ Gamble v. Woods, 53 Pa. 158.

²⁹ Kitchenman's Est., 15 Phila. 519.

³⁰ Snodgrass' Ap., 96 Pa. 420.

^{30a} Digby's Rules of Court, p. 159, citing among others, Simmond's

5. Claims upon which a sale may or may not be ordered.

The Orphans' Court has power to order a sale or mortgaging, but the acts are not mandatory, and if the court deem it unwise or inexpedient, it may refuse an order, without sending the matter to an auditor.³¹ If the lien of the debts has expired no order can be granted;³² although the legal representative paid such debts out of his own funds before the lien was gone³³ or where a stranger advanced the money to pay the debt.³⁴ But the fact that unsecured debts whose lien had expired were coupled with the costs of administration, did not prevent the court's granting an order,³⁵ prior to the act of May 3, 1909, P. L. 386, which included "the cost of settlement of the estate," within the limitation of two years. Debts barred by the statute are in the same class.³⁶ But where a suit in equity or at law has been commenced within the time fixed by law, it cannot be excluded;³⁷ nor where judgment was obtained in the lifetime of the decedent.³⁸ If all debts but one have ceased to be liens, this lone creditor will not be heard to object, because the sale will be valid and pass a good title,³⁹ which would be otherwise, if none of them were liens.⁴⁰ On application for an order of sale for the payment of debts, the court should be satisfied not only that the personal estate is insufficient for the payment of debts, but that the claims alleged to exist are *bona fide* debts due and unpaid, and that the only means of payment is by a sale or mortgage of real estate.⁴¹ A widow who pays her husband's funeral expenses has a claim on which to base a valid order,⁴² but the two-years' limitation applies.⁴³ The limitation has been applied to accountant's individual claim against the estate.⁴⁴ An alias order of sale will be refused, where the only unsecured debt has lost its lien.⁴⁵ A sale may be ordered to pay the commissions due the accountant for the administration when there are no other assets for the purpose,⁴⁶ the funds having been used to pay debts.⁴⁷ The expenses of an audit and

Est., 19 Pa. 439; Wall's Ap., 31 Pa. 62, and Irwin v. Guthrie, 198 Pa. 267, as Allegheny cases.

³¹ Lynn's Est., 2 Lehigh V. L. R. 231.

³² Pry's Ap., 8 Watts, 253; Taylor's Est., 15 Phila. 515; Oliver's Ap., 101 Pa. 299; Elberts' Est., 3 C. C. 611; Rogers' Est., 4 Northam. 3; Meskill's Est., 8 D. R. 52; Kurtz's Est., 16 Lanc. L. R. 205.

³³ McCurdy's Ap., 5 W. & S. 397; Demmy's Ap., 43 Pa. 155.

³⁴ Moyer's Est., 1 D. R. 600.

³⁵ Turner's Est., 27 C. C. 372; Mayer's Est., 16 D. R. 120.

³⁶ Hemphill v. Pry, 183 Pa. 593; Smith v. Wildman, 194 Pa. 294; 178 Pa. 245.

³⁷ Hook v. McCune, 184 Pa. 292.

³⁸ Demmy's Ap., 43 Pa. 155.

³⁹ Everman's Ap., 67 Pa. 335.

⁴⁰ Smith v. Wildman, 178 Pa. 245.

⁴¹ Sando, P. J., in Ford's Est., 7 Lack. Jur. 117.

⁴² Galboesch's Est., 16 D. R. 259.

⁴³ McNutt's Est., 15 D. R. 429.

⁴⁴ Oberley's Est., 10 Northam. 391.

⁴⁵ Butts' Est., 20 Lanc. L. R. 41.

⁴⁶ Cobaugh's Ap., 24 Pa. 143; Demmy's Ap., 43 Pa. 155; Hays' Est., 29 Pitts. L. J. 355.

⁴⁷ Bowker's Est., 12 Phila. 161.

administration afford a proper basis for an order to sell.⁴⁸ In a proper case the order may be directed to a trustee to make the sale.⁵⁰ The court must be satisfied that the claim is *bona fide* and that some useful purpose will be served by the sale or mortgaging, before it will grant the order.⁵¹ If there is a conflict about it the court may award an issue⁵² or appoint an auditor, but there must be more than a naked denial of the claim to justify an issue.⁵³ A *prima facie* case of indebtedness is sufficient to award an order.⁵⁴ A judgment in the Common Pleas Court cannot be attacked except for fraud.⁵⁵ There being sufficient ground laid for an order, the court will not direct an issue.⁵⁶ There being a substantial dispute, however, the parties interested will be given ample opportunity to come in and be heard.⁵⁷

6. Mortgage debts.

It is unnecessary to dilate upon the cases and statutes relating to mortgages, here, which were formerly discharged by a sale, when the mortgagee looked to the proceeds of the sale.¹ Now, by act of May 8, 1901, P. L. 141, it is provided that no sale, judicial or other, shall divest a mortgage whose lien is "prior to all other liens upon the same property except other mortgages, ground rents, and purchase money due the commonwealth, and except taxes, municipal claims and assessments not at the date of said mortgage duly entered as a lien in the office of the prothonotary of the proper county, and except taxes, municipal claims and assessments, whose lien though afterwards accruing has by law priority given it"; except as provided in the second section of the act of May 19, 1893, P. L. 110, and also except that it "shall not apply to cases of mortgages upon unseated lands or sales of the same for taxes."

Section 2 of the act of 1893, *supra*, provides:

"That whenever the application for an order or decree of the sale of real estate shall be made by an executor or administrator for the purpose of paying the debts of the decedent, it shall and may be lawful for the Orphans' Court having jurisdiction of such petition to decree a sale of the premises freed and discharged from the lien of a mortgage, or mortgages, as mentioned in the first section of this act, if the holder or holders of such mortgage, or mortgages, by writing filed in said court, shall consent to the sale being so made, that the sale should be made freed and discharged from the lien of the mortgage or mortgages as aforesaid."

⁴⁸ Elbert's Est., 3 C. C. 611.

⁵⁰ Rogers' Est., 4 Northam. 3.

⁵¹ Nino's Est., 33 Pitts. L. J. 189; Eddy's Est., 12 Phila. 118; Titlow's Est., 2 D. R. 512.

⁵² Eddy's Est., 12 Phila. 118.

⁵³ Ike's Est., 8 D. R. 501; 200 Pa. 202.

⁵⁴ Schmidt's Est., 5 D. R. 17.

⁵⁵ Bucknor's Ap., 18 W. N. C. 118; Schmidt's Est., 4 D. R. 161.

⁵⁶ Rose's Est., 17 C. C. 514.

⁵⁷ Murphy's Ap., 8 W. & S. 165; Dean's Ap., 87 Pa. 24; Clark's Est., 7 C. C. 308; Roessler's Est., 5 D. R. 776.

¹ Cadmus v. Jackson, 52 Pa. 295.

Taxes and water rents accruing after the death of the decedent are not his debts.²

7. Estates and property that may be sold.

As stated above, the decedent must have died seized of the land to warrant its sale for the payment of debts;³ that is, he must have the legal title,⁴ although it may be in dispute,⁵ the interest which he possesses alone passing by the sale. But a life interest ceases with the death of the tenant and there is nothing left to sell.⁶ Land conveyed by deed, though the deed or evidence of title be held by a third person as security, may be sold to pay the debts of the grantee.⁷ Where land has been fraudulently conveyed in the lifetime of decedent, the jurisdiction of the Common Pleas is concurrent with that of the Orphans' Court in the premises.⁸

8. The petition to sell.

The petition by the legal representative or creditor is the basis of the order to sell and the facts set out in it determine the jurisdiction of the court to make the order.⁹ A creditor has a right to petition.¹⁰ The petition must follow the statute in detail, and if it does not, a decree may be vacated if moved for in time.¹¹ The schedule of debts annexed to the petition should be as particular as can be, from the information attainable by the petitioner.¹²

The administrator alone, and not the guardian of a minor, must petition for the mortgaging of real estate for the payment of debts and the education of a minor.¹³ Personal notice of the petition need not be given the heirs, although some of them be minors.¹⁴ An imperfect and deficient schedule, which does not comply with the rules of court may be amended,¹⁵ but if defective as to parties, the sale will be set aside.¹⁶

The petition should be entitled as of the estate of the one whose land is about to be sold.¹⁷ An error of appellation, such as terming petitioner "guardian" instead of "testamentary trustee," will not affect the validity of the mortgage decreed under the petition.¹⁸ Where rules of court regulate the matter they must be observed. Examine your rules of court.

² Grice's Est., 11 Phila. 107; Taylor's Est., 15 Phila. 515.

³ Shontz v. Brown, 27 Pa. 123.

⁴ Beam's Ap., 2 Walker, 512.

⁵ Walker's Est., 23 C. C. 657; Bloodhart's Est., 2 C. C. 476.

⁶ Campbell v. Rheim, 2 Yeates, 123; Grim's Ap., 1 Grant, 209.

⁷ Gebensleben's Est., 6 York, 104.

⁸ Irwin v. Hess, 12 Supr. C. 163.

⁹ Torrance v. Torrance, 53 Pa. 505.

¹⁰ Shisler's Est., 4 W. N. C. 156.

¹¹ Hilton's Ap., 19 W. N. C. 541.

¹² Thomas' Est., 3 W. N. C. 96.

¹³ Barnett's Est., 3 W. N. C. 412.

¹⁴ Weaver's Ap., 19 Pa. 416; Wall's Ap., 31 Pa. 62.

¹⁵ Galboesch's Est., 16 D. R. 259.

¹⁶ Albright's Est., 6 Lack. L. N. 108.

¹⁷ Titlow's Est., 2 D. R. 512.

¹⁸ Biles' Est., 8 Phila. 587.

9. Petition — Rule in Philadelphia.

Section 1 of rule 14, Philadelphia, provides:

"Petitions for the sale or mortgaging of real estate of a decedent for the payment of debts shall set forth the date of his death, the name of his personal representative and of the persons interested in his estate, under his will or under the intestate laws, as the case may be, stating such as are married women, minors or lunatics, with the names of husbands, guardians or committees. Such petitions shall also set forth a description of all real estate of which the decedent died seized, a copy of the inventory of personal property filed in the register's office and a list of debts of the decedent, and shall be accompanied by a certificate from the Board of Revision of Taxes, of the official valuation of the real estate proposed to be sold."

[Compare your rules.]

Petition to Sell or Mortgage.

Section 2 of rule 16, Allegheny County, provides:

"Petitions for the public sale or mortgaging of real estate for the payment of the debts of a decedent shall be accompanied by a description of all the real estate, a certified copy of the inventory of personal property filed in the register's office, and a list of the debts of such decedent."

Petition for Private Sale.

Section 3 of rule 16, Allegheny County, provides:

"All applications for the private sale of real estate shall have annexed county and city certificates of official valuation, and affidavits from not less than two property owners residing in the vicinity of the property described, as to the value."

10. Inventory must be exhibited.

Section 33 of the act of March 29, 1832, P. L. 190, provides:

"No authority for the sale or mortgage of real estate, lying in the same or another county or counties, shall be granted, until the executor, administrator or guardian, as the case may be, shall have exhibited to the said court a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the decedent or minor, wherever situated, which has come to his knowledge; and also in the case of an executor or administrator, a just and true account, upon oath or affirmation, of all the debts of the decedent which have come to his knowledge; nor in any case shall such authority be granted, until such executor, administrator or guardian shall have filed in the office of the clerk of the said court, a bond with sufficient security, to be approved of by the court, conditioned for the faithful appropriation of the proceeds of such sale or mortgage, according to their respective duties: *And provided further*, That no real estate contained in any marriage settlement, shall, by virtue of this act, be sold or disposed of contrary to the form and effect of such settlement, and that the mansion house or most profitable part of the estate shall be reserved to the last."

The word "exhibited" in this section is not satisfied by filing. The inventory and appraisement must be shown to the court with the petition.¹⁹ The jurisdiction is exclusively in the Orphans' Court.²⁰

¹⁹ Stiver's Ap., 56 Pa. 9.

²⁰ Spencer v. Jennings, 123 Pa. 184.

Where the description of a farm includes a lot subsequently purchased and used as a part of it, the sale will not be set aside for misdescription on that account.²¹ If the guardian files an answer to the petition denying its averments and alleging that not all the real estate is included in the schedule, under the rules in Philadelphia a replication must be filed or the answer will be taken as true and the petition be dismissed.²² The petition must be consistent and particular in its statements of the requisites or it will be defective.²³ The petition, with its accompanying schedules, must be sworn to.²⁴ A statement in gross sums is insufficient.²⁵ It is best to attach a certified copy of the inventory,²⁶ though this rule is not generally enforced; and where there is no personal estate, as sworn to by petitioner, there can be no inventory.²⁷ The petition must contain a complete statement in detail of the several tracts, lots or parcels of real estate. If it does not, it is fatally defective.²⁸ The petition cannot be amended *nunc pro tunc* so as to include real estate sold, which was not embraced in it.²⁹ It need not set forth the probable value of the land.³⁰ The schedule of debts annexed should be as full and detailed as possible, to inform the court of the character of claims for the payment of which the sale is ordered.³¹ If, however, no schedule is filed, and the court takes jurisdiction on the petition, it will not be reversed for the informality³² which is amendable.³³ A mortgage debt to which the land is subject, unless the mortgagee files a paper agreeing to its discharge, should be mentioned in the petition but not included in the schedule.³⁴ When a sale is made subject to a mortgage it means the mortgage debt, and the purchaser cannot contest its validity.³⁵

11. Form of petition.

Following is a form of petition:

✓ To the Honorable Judge of the Orphans' Court of Luzerne County.

The petition of ———, of the County of ———, State of Pennsylvania, who ——— the ——— of ———, deceased, respectfully represents:

1. That the said decedent died on or about the ——— day of ———, A. D. 19—. That the residence of said decedent at the time of

²¹ Smith's Est., 188 Pa. 222.

²² Eddy's Est., 5 W. N. C. 568.

²³ Taylor's Est., 11 W. N. C. 192.

²⁴ Atherton's Est., 1 Pearson, 406; Fowler v. Fuller, 8 W. N. C. 146; O'Brian v. Wiggins, 14 Supr. C. 37; Walker's Ap., 1 Grant, 431.

²⁵ Thomas' Est., 3 W. N. C. 96; Barnett's Est., 3 W. N. C. 412.

²⁶ Clayton's Est., 1 Chester Co. 21.

²⁷ Fitzsimmon's Ap., 40 Pa. 422.

²⁸ Eddy's Est., *supra*; O'Brian v. Wiggins, 14 Supr. C. 37.

²⁹ McAvoy's Est., 2 W. N. C. 384.

³⁰ Atherton's Est., 1 Pearson, 406.

³¹ Thomas' Est., 3 W. N. C. 96; Taylor's Est., 15 Phila. 515.

³² Sager v. Mead, 164 Pa. 125.

³³ Smith v. Wildman, 178 Pa. 245.

³⁴ Penn., Etc., Assn's Ap., 81 * Pa. 330.

³⁵ Steele v. Walter, 204 Pa. 257.

— death was in the — of —, in the County of —, State of —; that — died testate, and on the — day of —, A. D. 19—, letters — on — estate were duly granted to your petitioner by the register of wills of Luzerne County.

2. That the interest of your petitioner in the estate of said decedent is —.

3. That the names and residences of all the legal representatives of the said decedent, so far as they are known to your petitioner, and the names and residences of the guardians of such as are minors, are as follows: —, —, —. That your petitioner knows of no other person who is interested in the estate of said decedent by contract or purchase from — — in — lifetime, or from any of the said legal representatives, or in any other manner (except — —).

4. That a true and perfect inventory and conscionable appraisement of all the personal estate of said decedent, amounting to — dollars, is herewith exhibited, and is insufficient for the payment of — just debts and the expenses of the administration of — estate.

5. That your petitioner further exhibits a just and true account of all the debts of said decedent and the expenses of the administration of — estate so far as the same have come to — knowledge, amounting to — dollars; and — also exhibit a full and correct statement of all the real estate of said decedent wherever situated, which has come to — knowledge, with its probable annual income, which will not exceed — dollars, less taxes and repairs, and the estimated market value of such real estate at public sale, amounting in all to the sum of — dollars.

All of these exhibits are attached hereto, and made a part hereof. (Here state any other facts necessary to give jurisdiction.)

6. Your petitioner therefore prays the court to grant — — an order authorizing — to make sale of the land described in said exhibit as number —, situated —, said County of Luzerne, valued at — dollars, for the purpose of —, as provided by act of Assembly, approved the — day of —, 19—.

And — will ever pray, etc.

C. Jones,
Administrator.

(Affidavit of truth.)

NOTE. Notice of this application should be given in all cases to those persons interested who can be conveniently reached.

Attach as exhibits the inventory, a list of debts, and a description of all the real estate, numbering each lot.

12. Form of order of sale.

Now, — —, 19—, sale authorized as prayed for, on filing bond in the sum of — dollars, with security to be approved by the court. Terms of sale — dollars down, — per cent. of balance on confirmation of sale and delivery of deed, and the balance with interest from confirmation, as follows: —.

Deferred payments to be secured by bond and mortgage on the premises. Returnable on the first day of next term, at 2 P. M.

By the Court.

[Rhone's O. C., Vol. II.]

13. Private sale.

Section 1 of the act of May 9, 1889, P. L. 102, provides:

"That the Orphans' Court of the several counties of this commonwealth, in all cases where, under existing laws, the court has power to order the sale of real estate for the payment of the debts of decedents and for other purposes, may decree and approve a private sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause."

The court should consider all the circumstances to determine whether a better price can be obtained at private than at public sale.³⁶ The act of 1832 must be complied with in the manner of the execution of the order. The petition must bring the matter within the scope of sections 31 and 33 of said act. It must show that the personal estate is insufficient to pay the debts; there must be an appraisement of it and a full and correct statement of the decedent's debts, as far as they have come to the knowledge of the petitioners.³⁷ The act is silent as to notice, but the same notice should be given as in cases of public sale.³⁸ Prior to the act, *supra*, there was no authority to sell real estate at private sale, for the payment of debts,³⁹ though such sales were authorized under the Price Act, which see, *infra*. And also under the act of 1849.

Section 1 of the act of March 14, 1849, P. L. 164, provides:

"All powers of sale contained in any instrument which shall hereafter be made and delivered by any person or persons to his, her or their agent or attorney in fact and all powers to sell or let real estate on ground rent, contained in any deed, will or other instrument hereafter executed, shall be deemed and taken to authorize sales, conveyances or leases, either public or private, unless expressly restricted by the said instrument to one or the other mode; and that all private sales, or such leases as aforesaid, heretofore made by any such agent, or any executor, administrator, trustee or assignee, by virtue of a power contained in any deed, will or other instrument, or any act of assembly, are hereby declared to be as valid as if that mode of sale or lease had been expressly authorized, except in such cases where such power expressly required a public sale or lease, and except, also, all such sales, conveyances or leases as shall have been finally adjudicated and pronounced invalid by the proper courts."

Section 2 of the act of March 14, 1850, P. L. 195, further validates such private sales.

Section 2 of the act of May 21, 1901, P. L. 272, authorizes private sales by guardians.

14. Legal representatives must first give security.

Section 43 of the act of February 24, 1834, P. L. 70, provides:

"No executor or administrator shall have power to execute any order or decree of the Orphans' Court for the sale of any real estate,

³⁶ Smith's Est., 188 Pa. 222.

³⁷ O'Brian v. Wiggins, 14 Supr. C. 37.

³⁸ O'Brian v. Wiggins, *supra*.

³⁹ Jacoby v. McMahon, 174 Pa. 133; Kiskaddon v. Dodds, 21 Supr. C. 351.

for the purpose of distribution or otherwise, nor to receive the proceeds of the sale of any of the real estate of the decedent made by authority of law, until he shall have given security, to be approved by the Orphans' Court having jurisdiction of his accounts, for the faithful application of the proceeds of such real estate according to law."

A sale made without security was held to be valid after confirmation.⁴⁰ A sale under order of court is a judicial sale,⁴¹ and although made five years after the order granted, may be validated under section 3 of the act of April 13, 1854, P. L. 368.⁴²

The Orphans' Court having jurisdiction of the accounts must approve the security.⁴³ The petition should in all cases be accompanied with the required bond for the court to approve when the order is made. The bond may be in the following form:

15. Form of bond.

Know all men by these presents that we, —, —, and —, of —, of the County of —, and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the penal sum of — dollars, lawful money of the United States, for which payment, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, jointly by these presents. Sealed with our seals and dated this — day of —, A. D. 19—.

Whereas, at an Orphans' Court for the County of —, held the — day of —, A. D. 19—, the petition of — — was presented to said court, and thereupon it was so proceeded in, that on the — day of —, A. D. 19—, the said court ordered and decreed that the premises in said petition described should be [sold or mortgaged, etc.].

Now, the condition hereof is such that if the above bounden — — [executor or as the case may be], of — —, late of —, deceased, shall and do faithfully execute the powers committed to him by the said Orphans' Court in the premises, for the — of the real estate of said decedent, and shall and do make faithful application of the proceeds of said [sale or mortgaging] according to law and his duty, and in such manner as the said court shall legally decree, then the above obligation to be void, otherwise to be in full force and effect.

Signed and sealed in presence of

— —,
— —.

— —, [Seal.]
— —, [Seal.]
— —, [Seal.]

— County, ss.

— —, principal in the foregoing bond, being duly sworn, says that the said bond is in double the amount which will probably come into his hands from the [—] of the real estate ordered [sold or mortgaged].

Sworn to, etc. — —.

⁴⁰ Lockhart v. John, 7 Pa. 137.

⁴¹ Moore v. Shultz, 13 Pa. 98.

⁴² See Craig's Ap., 5 W. N. C. 243.

⁴³ Morris v. Chadon, 4 Phila. 89.

16. Justification of sureties.

— and —, the sureties in the foregoing bond, being each duly sworn, say, each for himself, that he is seized and possessed of real estate in his own name and right, situate in the county of —, State of —, which he verily believes is worth the amount of the above bond, over and above all incumbrances and the amount exempt by law from levy and sale under execution.

— —,
— —.

Sworn to, etc.

[The forms above may be modified so as to suit various cases of sale and mortgaging in the Orphans' Court.]

17. Form of approval.

The court, on inspection of the bond, if approved, will endorse it: "Foregoing bond and sureties approved and bond ordered filed." Per Cur.

— —, P. J.

Date —.

Section 6 of rule 16, Allegheny County, provides:

"No certificate of an order of sale shall be issued by the clerk until the bond of the administrator, executor, guardian, or other trustee, as the case may be, shall have been approved by the court and filed."

18. Liability of surety.

A surety in the bond or recognizance is liable upon it, for a sale on an alias or pluries order¹ but they are released where, without their consent, the distributee takes a judgment bond from the administrator, with a stay of execution.² Where the court makes an order as to the retention of the widow's interest, they remain bound.³ They are not liable for rents collected; but they are for interest from the date of the decree of distribution; the costs and fees on an attachment against the legal representative, and an attorney fee.⁴ They cannot be heard to object to an order modifying a decree of distribution, fifteen years after it was made.⁵ An affidavit of defense by a surety on a bond is sufficient when the statement does not aver that the plaintiff was awarded a portion of the proceeds of the sale and that the account included rents without separation.⁶ The liability of a surety cannot be fixed by an administration account composed of items of personalty and realty.⁷ It is different where the surety asked to have the account opened and reviewed.⁸

¹ *Sawyers v. Hicks*, 6 Watts, 76.

² *Sawyers v. Hicks*, 6 Watts, 76.

³ *Comth. v. McGovern*, 4 Supr. C. 598.

⁴ *Kuhlman v. Lancaster Trust Co.*, 14 Lanc. L. R. 284.

⁵ *Dalton's Est.*, 33 Supr. C. 210.

⁶ *Comth. v. Magee*, 24 Supr. C. 329.

⁷ *Comth. v. Winters*, 4 W. N. C. 346; *Comth. v. Hilgert*, 55 Pa. 236.

⁸ *Miles v. Comth.*, 2 Walker, 64. (See P. & L. Dig., vol. 14, col. 24841, as to actions on the bond.)

19. Appointment of auditor upon petition.

Section 34 of the act of March 29, 1832, P. L. 190, provides:

"In all cases where an application shall be made to any Orphans' Court for a decree authorizing the sale or mortgage of real estate, under any of the provisions contained in this act, the court may appoint suitable persons to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale or mortgage; and upon such report being made, the court may decree accordingly."

By a later act the court may at its option appoint one or more auditors.

The auditor appointed gives the parties an opportunity to be heard, as in other cases, and his report as to the advisability of granting the petition is subject to exceptions in the same manner.⁹ Before a decree is made mortgaging decedent's estate, the better practice is held to be to appoint an auditor, who, after giving notice to all parties in interest, will report upon the claims and propriety of making the order.¹⁰

20. Petitions for sale, not for payment of debts.

Section 2 of rule 14, Philadelphia, provides:

"Petitions for the sale of real estate, in other cases, shall set forth all necessary facts, with names of parties in interest, etc. [as in the preceding section 1], and shall be accompanied by the certificate of the board of revision of the valuation of the real estate asked to be sold, and by affidavits of competent persons acquainted with the value of real estate in the particular locality. Where the value of the interest asked to be sold exceeds \$1,000, the petition may be referred by the court to a competent person to examine it and report upon the propriety of granting the same."

21. Petition for private sale in Philadelphia.

Section 3 of rule 14, Philadelphia, provides:

"Petitions for the sale of a decedent's real estate at private sale for the payment of debts, as authorized by act of May 9, 1889, P. L. 182, shall set forth the date of his death, the name of his personal representative, and of the persons interested in his estate under his will or under the intestate laws, as the case may be, stating such as are married women, minors or lunatics, with the names of husbands, guardians or committees. Such petitions shall set forth a description of all the real estate of which the decedent died seized, a copy of the inventory of the personal property filed in the register's office, a copy of the will, if any, a list of debts of the decedent, and shall be accompanied by a certificate from the board of revision of taxes of the official valuation of the real estate proposed to be sold, and affidavits of at least two competent and disinterested persons acquainted with the value of real estate in the particular locality, that the price offered for the real estate or undivided interest therein is a full and fair price and better than can be obtained at public sale."

⁹ Murphy's Ap., 8 W. & S. 165.

¹⁰ Corbett's Est., 10 D. R. 59; Atherton's Est., 1 Pearson, 406.

22. Notice of petition.

Section 4 of rule 14, Philadelphia, provides:

"Such petition shall be filed with the clerk of the court, and notice of the filing thereof shall be given by personal service upon the widow, if any, of the decedent, and his children, if of full age, and upon their guardians, if minors, when resident within this county, at least ten days prior to the day the court will act upon said petition. If said parties reside out of the jurisdiction of the court, said notice may be served by mail addressed to their last known abode. Further notice of the filing of said petition shall be published by the petitioner twice a week for two weeks in a daily newspaper of this county, and once a week for two weeks in the *Legal Intelligencer*; and unless exceptions to the granting of said petition, or objections to the proposed sale, be filed with the clerk before the second Saturday after the expiration of said notice, the court will then take action upon said petition, at which time due proof shall be presented of the service of notice and publication thereof, as above required. Where the value of the real estate, or any interest therein exceeds \$1,000, the petition may be referred by the court to a competent person to examine the facts of the case and report upon the propriety of granting the prayer thereof."

[Compare your rules of court.]

23. Form of notice.

Section 5 of rule 14, Philadelphia, provides:

"The form of the notice to be given, as directed by the preceding section, shall be as follows:

"In the Matter of the Estate } "In the Orphans' Court of Phil-
of —, Deceased. } adelphia County.

"To the heirs, legatees, creditors and other persons interested in said estate:

"Notice is hereby given that — —, executor [or administrator, as the case may be] has filed in the office of the clerk of the court, his [or their] petition, praying for an order of sale of the real estate of said decedent, described in said petition, at private sale, for payment of debts. If no exceptions be filed thereto, or objections made to granting the same, the court will take action upon said petition upon Saturday, —, A. D. 19—.

"[Signed.] A. B.
Attorney for Petitioner."

24. Fixing terms of sale.

Section 1 of the act of March 22, 1859, P. L. 207, provides:

"In all sales of real estate under the order of the Orphans' Court authorized by the laws of this commonwealth, the court decreeing the sale shall have power to direct the terms thereof for cash, not less than one-fourth of the purchase money at the time of the confirmation of the sale, and the balance in such installments and at such times as in the opinion of the court shall be for the interest and advantage of those interested therein, requiring security, to be approved by the court, in at least double the value of the interest proposed to be sold, before such sale shall be ordered or made:

Provided, That the purchase money shall be a lien on the premises sold until fully paid, according to the decree of the court."

Section 2 validated previous sales on longer time than one year.

Under this act, when the court fixes terms of credit and requires a bond to be given with certain security, although not in double the amount of the value of the land, it will be presumed to have had due regard to the sufficiency of the security. The court may, in its discretion, refer the issues of fact raised by a mortgage creditor, to an auditor, or decide the matter itself.¹¹

Where the Orphans' Court grants an order, it should fix the terms of sale in the order. As a general rule a cash sale ought to be prescribed, but the court may direct it on credit, but this should not extend beyond a year from confirmation, and the purchase money should be secured on the premises.¹²

Section 5 of rule 16, Allegheny County, provides:

"Inquisitions and orders for the sale of real estate shall be returnable on regular return days next succeeding the expiration of twenty-one days from the exit of such orders or inquisitions, unless otherwise ordered; and thereupon such return, if deemed sufficient, shall be confirmed *nisi*, and this confirmation become absolute ten days thereafter, unless exceptions be filed thereto in the meantime."

Return of Public Sale.

Section 7 of rule 16, Allegheny County, provides:

"All returns of public sale shall be accompanied by a copy of the hand bills posted, by affidavit of publication, and by certificate of the clerk that bond has been approved and filed."

25. Form of order of sale, Lancaster County.

Lancaster County, ss.

} At an Orphans' Court held at Lancaster, Penn-
sylvania, in and for said County, on the —
day of —, A. D. 19—, before the Honorable
Eugene G. Smith, President Judge, presiding:

In the matter of the petition of — —, of the estate of — —, late of —, said county, deceased, for an order to sell for — the following described real estate of which said deceased died seized —, to-wit: [Describe as in petition or so much as ordered sold.]

And now —, A. D. 19—, petition presented and read, whereupon on motion of — —, Esq., the court award an order of sale, as in petition prayed for, and order and direct said — —, to expose said real estate to sale by public vendue or outcry, and to sell the same according to law for the payment of debts.

Sale to be held — on —, the — day of —, A. D. 19—, at — o'clock — M. —.

Terms: —. Purchase money payable cash on the — day of —, A. D. 19—; one-third of the purchase money remaining after the payment of debts, if any there be left, to remain charged on said real estate for the use of —, widow of said deceased, the

¹¹ Fitzsimmons' Ap., 40 Pa. 422.

¹² Baily's Ap., 32 Pa. 40.

interest on the same to be paid to her annually during the term of her natural life, and at her death the principal sum to be paid to those legally entitled to receive the same.

Due legal and timely notice of the time and place of sale to be given and return made to this order at an Orphans' Court to be held on the — day of —, A. D. 19—.

By the Court.

Attest:

—, Assistant Clerk of Orphans' Court.

26. Notice of sale.

Section 54 of the act of March 29, 1832, P. L. 190, provides:

"Whenever, by the provisions of this act, it shall be lawful for the Orphans' Court to order the sale of real estate, public notice of such sale shall be given by the executor, administrator or guardian, as the case may be, at least twenty days before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or, if there be none, then in the adjoining county; and, in all cases, notice shall also be given by hand bills affixed in at least three of the most public places in the vicinity of such estate."

Having given notice, if the property cannot be sold advantageously on the day fixed, the sale may be adjourned for a time not exceeding twenty days.¹ The legal notice fixed above is sufficient notice to the widow and heirs and no other or special notice need be given them.²

The want of notice in a sale was held cured by the act of April 4, 1901, P. L. 66, which was given a retroactive effect.³ The advertisement required by this act must be published in a newspaper at least twenty days before the day of sale, which is excluded.⁴

27. Form of notice of sale.

Orphans' Court Sale.

Estate of —, Deceased.

By virtue of an order of the Orphans' Court of — County, there will be exposed to public sale, at the — on —, the — day of —, A. D. 19—, at — o'clock — M., the following pieces or parcels of land: [Describe same with improvements and advantages.]

Terms of sale: [As in the order of court, or as fixed by the legal representative.]

—, Attorney.

—, Administrator.

¹ Gillespie's Est., 10 Watts, 300.

² Weaver's Ap., 19 Pa. 416; Wall's Ap., 31 Pa. 62; Stiver's Ap., 56 Pa. 9; Smith's Est., 188 Pa. 222; Irwin v. Guthrie, 198 Pa. 267.

³ Kiskaddon v. Dodds, 21 Supr. C. 351.

⁴ Zech's Est., 15 C. C. 622. (See Adolph's Est., 11 Phila. 157, as to local laws.)

28. Legal representative may be authorized to bid.

Section 2 of the act of May 22, 1878, P. L. 83, provides:

"That whenever any Orphans' Court or Court of Common Pleas having jurisdiction to decree a sale of real estate, shall issue its order to any administrator, guardian, executor or trustee, specially appointed for the purpose, or otherwise, to sell such real estate, and shall in any case within its jurisdiction give authority to any administrator, executor, guardian or trustee to bid at such sale, and said court shall confirm the sale of said real estate to such administrator, executor, guardian or trustee, the said court may make an order directing its clerk to execute a deed for said real estate to such purchaser, who shall account for the amount of such purchase money, in the settlement of his accounts with the register of wills, to said Orphans' Court or Court of Common Pleas, as the case may be."

Prior to this act the rule of law was that a trustee should neither bid nor buy at his own sale, and even now he holds it subject to disaffirmance by the parties interested.⁵ If he buys at a minimum price, and immediately sells at a large advance, he will be surcharged.⁶

29. Leave to bid at sale.

Lancaster County, ss.

At an Orphans' Court, held at Lancaster, Pa., in
and for said County, on the — day of —,
A. D. 19—.

In the matter of the estate of —, late of — in the county of Lancaster, State of Pennsylvania, deceased, and petition of — —, executor [or as the case may be] of said estate, for leave to bid at the sale of said real estate to be sold under power conferred by the last will and testament of the said deceased:

And now, — day of —, A. D. 19—, on motion of — —, Esq., the court grant leave unto the said — — to bid at the sale of said real estate, and to purchase the same if he so desire. And it is ordered and decreed by the court that the said — — do cause this order to be read aloud in public, and a copy hereof to be posted in a conspicuous place, at the time and place of sale. Return to this order to be made on the — day of —, 19—.

By the Court.

Attest:

30. Consent of heirs, etc.

It may be advisable for the executor or other fiduciary to accompany his petition with the written consent of the heirs, chief creditors and his sureties, though this is not essential.

31. Return to leave to bid.

To the Honorable, the Judge of the Orphans' Court of Lancaster County:

⁵ Taylor v. Haskell, 178 Pa. 106; Rigg v. Schweitzer, 170 Pa. 549; Church v. Winton, 196 Pa. 107.

⁶ Hacker's Est., 24 W. N. C. 319.

The undersigned, — —, respectfully returns:

That in compliance with the within order, the same was read aloud in public and a copy thereof posted in a conspicuous place, at the time and place of sale, and that he did — become the purchaser of said real estate at the following price, to-wit: — dollars, etc.

All of which he prays your Honorable Court may confirm.

— —,
Executor.

32. Return to order of sale.

To the Honorable Judge of the Orphans' Court for the County of Lancaster:

The undersigned, — —, administrator [or as the case may be] of the estate of — —, late of —, in the county of Lancaster, deceased, respectfully returns:

That in pursuance of the annexed order of sale, and in accordance with the provisions therein contained, having first given due legal and timely notice of the time and place of sale, —, did, at the time and place, and on the terms in said order prescribed, expose the real estate therein described, to sale by public vendue or outcry, and sold the same to — —, etc., the said — — being the highest and best bidder—, and that the highest and best price bidden for the same at said sale, and which said sale so made, said — — respectfully ask the court to confirm.

Affirmed and subscribed to before me this — day of —, A. D. 19—.

— —,
— —,

33. Form of confirmation nisi.

And now, —, A. D. 19—, return to the within order of sale presented and read, whereupon the court, upon motion of — —, Esq., confirm the said sale *nisi*.

By the Court.

Attest: — —, Clerk of the Orphans' Court.

34. Form of petition for private sale.

To the Honorable the Judge of the Orphans' Court of the County of Lancaster, Pennsylvania:

The petition of — —, administrator, etc., of — —, deceased, late of the — of — in said county of Lancaster, deceased, respectfully represents:

That the said — — died on or about the — day of —, A. D. 19—, intestate.

That the personal estate of said decedent is insufficient for the payment of — debts, as will appear by a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the said decedent, on file with the register of said county, and a just and true account of all the debts of said decedent which have come to the knowledge of the petitioner—, the amount of said inventory and the said account being hereto annexed, and marked respectively schedules "A" and "B."

The petitioner— further represent—, that the said — died seized in his demesne as of fee, of and in certain real estate situate in the — said county, particularly described in a statement hereto annexed, marked schedule "C."

That — —, of the — of —, has offered to purchase — the said real estate at and for the price or sum of — dollars, which your petitioner— believe— to be a full, fair and adequate price for the same and a better price than could be obtained for the same at a public sale.

That your petitioner— has hereunto annexed and marked "Exhibit 1," the affidavits of two competent and disinterested persons acquainted with the value of real estate in that locality; that the price offered is a full and fair price, and better than could be obtained at public sale.

Your petitioner—, therefore, pray— the court to authorize — to make a private sale of said real estate to — — for the sum of — dollars.

And —he— will ever pray, etc.

County of Lancaster, ss.

— —, being duly sworn, say— that the statements in the foregoing petition are true; that the exhibits hereto annexed are respectively a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of said decedent, a just and true account of all the debts of said decedent, and of all the real estate of the decedent, wheresoever situate, which have come to the knowledge of the petitioner— as —he— verily believe—.

Sworn to and subscribed before me, this — day of —, A. D. 19—.

— —,
Clerk.

Schedule A.

Amount of inventory of personal estate of said decedent, as per detailed list on file with the register, and herewith referred to as part of this petition:

[State amount.]

Schedule B.

A statement of all the debts of the said decedent:

[Here state same in detail, name and amount.]

Schedule C.

Description of the real estate of said decedent:

[Describe each tract separately, fully.]

35. Affidavit of value.

Lancaster County, ss.

On this — day of —, A. D. 19—, before me, — —, a — in and for the said county, personally came — — and — —, who being by me duly — according to law depose and say, that they are well acquainted with the value of real estate in the vicinity wherein the real estate in the petition described is situate, and with the real estate therein described in particular, and that they believe the sum or price of — offered for the same

is a full and fair price, and better than could be obtained at a public sale.

_____,
_____,
_____ and subscribed to, this _____ day of _____, A. D. 190____.

36. Form of order for private sale.

Lancaster County, ss.

And now, _____, A. D. 19____, the within petition coming on for hearing, and it appearing from the record that due personal notice and publication of the application for an order of private sale for the payment of debts has been given as required by the rules of court, and no answer having been filed nor cause shown why an order should not be awarded, the court, after full and careful consideration, being of opinion that a better price can be obtained for the said real estate at a private sale than at a public sale, do, on motion of _____, Esq., award an order of private sale as in the petition prayed for; and do order and direct that the said decree be executed by _____, _____ of the said deceased, _____, the petitioner—, before executing the same to enter into bond to the commonwealth in the sum of _____ dollars, with _____ and _____ as sureties, who are hereby approved, conditioned for the faithful performance of the said trust and the proper application of all moneys arising in pursuance of the said trust and decree.

Return to this order to be made at an Orphans' Court to be held at the city of Lancaster on the _____ day of _____, A. D. 19____.

By the Court.

Attest: _____, Assistant Clerk of Orphans' Court.

37. Return to order of private sale.

To the Honorable Judge of the Orphans' Court for the County of Lancaster:

The undersigned, _____, _____ of the estate of _____, late of _____, in the county of Lancaster, deceased, respectfully returns:

That, in pursuance of the annexed order of sale, and in accordance with the provisions therein contained; _____ did, on the terms in said order prescribed, sell the real estate therein described, at private sale to _____, etc., the said _____ being the highest and best bidder—, and that the highest and best price bidden for the same, and which said sale so made, said _____ respectfully ask the Court to confirm.

Affirmed and subscribed before me this _____ day of _____, A. D. 19____.

_____.

38. Form of affidavit of notice.

_____ County, ss.

_____ being duly sworn according to law, deposes and says that he posted at least _____ hand bills, similar to the one hereto attached, in the most public places of said county, adjacent to, and upon the

premises therein described, for at least twenty-one days before the day of sale, as provided by law.

Sworn and subscribed before me this — day of —, A. D. 19—. — —.

(Add also affidavit of publication.)

39. Form of final confirmation.

At time provided by rule of court also indorse on same.

Now, — day of —, 19—, return of sale of real estate confirmed absolutely, and it is further ordered, adjudged, and decreed, that the sale made as returned to the court, be ratified and approved and that the premises sold be and remain to — — and — —, the purchasers, their heirs and assigns, firm and stable forever.

By the Court.

40. Form of return unsold.

If for any good reason the property could not be sold, the following return should be made:

To the Honorable Judges of the Orphans' Court, etc.:

Pearl Irene Clemmer, administrator of all and singular the goods, etc., of Joseph B. Clemmer, deceased, reports:

That pursuant to the within order of court, she did, at the time and place therein mentioned, expose the within described premises to sale, by public vendue or outcry. But the same remains unsold for want of buyers, and she prays that the order for the sale of the said premises may be renewed, and an alias be issued returnable to the next term, and she will ever pray, etc.

Pearl Irene Clemmer.

Sworn to, etc.

41. Form of order for alias.

Now, to-wit: 22d day of September, A. D. 1911, order of sale is renewed as prayed for, on the same terms and conditions and an alias order is directed to issue accordingly returnable the first day of next term.

— —, P. J.

42. Terms and order of sale.

The terms fixed in the order of sale or by the administrator should be read at the sale. The act of March 22, 1859, P. L. 207 (which does not apply to Philadelphia), requires that credit shall not be extended beyond a year from the confirmation.¹ There being no terms stated, the sale will be for cash.² The proviso in section 33 of the act of March 29, 1832, P. L. 190, requires that "no real estate contained in any marriage settlement shall * * * be sold or disposed of contrary to the form and effect of such settlement, and that the mansion house or most profitable part of the estate shall be reserved to the last." This must be carried out,³ unless it requires

¹ Bailey's Ap., 32 Pa. 40 (2 Grant, 225).

² Randolph's Ap., 5 Pa. 242.

³ Taylor's Est., 175 Pa. 60.

the whole estate for the payment of debts,⁴ nor where the owner is a minor, the reason for the law having ceased.⁵ The confirmation of the sale cures irregularities in the manner of conducting it.⁶ The widow, who relinquishes her dower for a devise, has a right to be protected, by selling all other estates first.⁷

43. Lien creditor as purchaser.

Section 1 of the act of April 20, 1846, P. L. 411, provides:

"Whenever the purchaser or purchasers of real estate at Orphans' Court or sheriff's sale shall appear, from the proper record, to be entitled, as a lien creditor, to receive the whole or any portion of the proceeds of said sale, it shall be the duty of the sheriff, administrator, executor, or other person making such sale, to receive the receipt of such purchaser or purchasers, for the amount which he or they would appear, from the record as aforesaid, to be entitled to receive: *Provided*, That this section shall not be so construed as to prevent the right of said sheriff, administrator, executor or other person aforesaid, to demand and receive, at the time of sale, a sum sufficient to cover all legal costs entitled to be paid out of the proceeds of said sale; and *provided further*, That before any purchaser or purchasers shall receive the benefit of this section, he or they shall produce to the sheriff, or other person so making said sale, a duly certified statement from the proper records, under the hand and official seal of the proper officer, showing that he is a lien creditor, entitled to receive any part of the proceeds of sale as aforesaid."

If the purchaser seeks to apply a judgment in another county, exemplified, as part of the purchase money, the issue upon its validity can only be tried in the county wherein the sale was made.⁸

44. Proceedings on return of sale — Contest.

Section 2 of the act of 1846, *supra*, provides:

"It shall be the duty of the said sheriff, executor, administrator or other person making sale as aforesaid, in all cases when he or they shall receive the receipt of the purchaser as aforesaid to state the fact in the return of the proceedings of said sale, and attach thereto a list of the liens upon the property sold, which said return shall be read in open court, on some day during the term, to be fixed by the order of court; and if the right of said purchaser or purchasers to the money mentioned in said return shall be questioned or disputed by any person interested, the court shall thereupon appoint an auditor, who, after due notice given to the persons interested, in such manner as the court may direct, shall make a report, distributing the proceeds of such sale, with the facts and reasons upon which such distribution is made, to be approved by the court; or, to direct an issue to determine the validity of said lien, and all further proceedings shall be stayed until the said issue shall be decided; and in case it shall be determined that the said purchaser

⁴ Snider's Est., 1 Del. Co. 163.

⁵ Drayton's Est., 6 Phila. 157.

⁶ Beeson v. Beeson, 9 Pa. 279.

⁷ Kirk's Est., 13 Phila. 276; Klein's Est., 2 D. R. 813.

⁸ Gordon's Ap., 93 Pa. 361. (See *infra* for cases. See also vol. 2.)

or purchasers were not entitled to receive said money, it shall be the duty of the proper court to set aside the sale, and direct the real estate to be resold, unless the money is paid to the sheriff, or other person making the sale, within ten days thereafter: *Provided*, That nothing in this act shall be so construed as to prevent the purchaser or purchasers, in case the said real estate, upon the second or subsequent sale, does not bring a sum equal to the amount bid by him or them, from being liable for such deficiency: *Provided*, That before an issue shall be directed upon the distribution of money arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal by such applicant, if the issue be refused, in like manner as in other cases in which such writ now lies."

The proceedings under this act are the same as in the case of sheriff's sales. (See Executions, Vol. II.)

Section 1 of rule 19, Allegheny County, provides:

"In all cases where special returns are authorized by law, they shall be read in open court, on Saturday morning at ten o'clock, and the reading thereof shall be noted on the writ and on the minutes by the clerk.

"Section 2. Upon the reading of special returns the same shall be confirmed *nisi*, which confirmation shall become absolute if no exceptions are filed within ten days; and if exceptions are filed, the case shall be immediately placed on the argument list."

45. Investment of proceeds, pendente lite.

Section 3 of the act of 1846, *supra*, provides:

"Upon granting any such issue, it shall be discretionary with the court, so soon as the money arising from such sale shall have been paid into court, upon the application of the party or parties appearing, by the record, *prima facie*, entitled to the said fund, to order the same to be invested, *pendente lite*, in the debt of the United States, or some other sufficient security, subject to the decree of the court."

46. Allowance of expense of guaranteeing investment.

The act of May 28, 1907, P. L. 271, provides:

"Any receiver, assignee, guardian, committee, trustee, executor or administrator, required by law, by the order of any court, or by the provisions of any assignment, deed, will, or other document, under or by the authority of which such receiver, assignee, guardian, committee, trustee, executor or administrator is acting, to invest the funds within his control in mortgages or other securities, may include, as a part of the lawful expense of executing his trust, such reasonable sum, paid a company, authorized under the laws of this state so to do, for guaranteeing the payment of the principal and interest of such mortgage or other securities, not exceeding one-half of one per centum per annum upon the principal of such mortgage or other securities."

A similar act, June 24, 1895, P. L. 248, allowing an administrator

to pay out of the estate one per cent. to a surety company for his bond, was declared unconstitutional.⁹

47. Form of return of sale where the purchaser is a lien creditor.

Sale of Real Estate of _____, Deceased. } In the Orphans' Court of Luzerne County.

Return of Sale.

To the Honorable the Judge of the Orphans' Court of the County of Luzerne.

We, _____ and _____, administrators of the estate of _____, deceased, who were authorized by your court, on the _____ day of _____, A. D. 18—, to sell the real estate of said decedent for the payment of debts, respectfully report:

That having given due public notice of the time and place of sale, in accordance with law, as will appear from the affidavits hereto attached, we exposed the within mentioned real estate to public sale, on the _____ day of _____, A. D. 18—, at _____, at which time and place John Jones bid on the same the sum of _____ dollars, he being the highest bidder.

And failing to obtain what we considered a satisfactory bid we then adjourned the sale until the _____ day of _____, A. D. 18—, at which time, having given due additional public notice, and having obtained an order of court extending the time for making return, we again exposed the same to public sale at the place aforesaid, and sold the same, as follows, viz. (here describe the real estate sold, to whom sold, and amounts received for the same): All of which sales we made upon the terms prescribed by the court.

We further report, that in accordance with the Act of Assembly of 20th April, 1846, we have received the receipts of _____ and _____, purchasers as aforesaid, in discharge of twenty per cent. of their respective bids, they appearing from the certified list of judgments and mortgages hereto attached, to be entitled as first lien creditors to receive the whole of the proceeds of the sale of the parcels purchased by them respectively, less the expenses of the sale, etc. Which sale we pray may be confirmed by the court, and that an order be made allowing the said purchasers to apply their said liens on the balance of purchase-money. Respectfully submitted,

_____,
_____.
_____.

Sworn to, etc.

48. Form of confirmation nisi.

Now, _____ day of _____, A. D. 18—, return of sale filed, and Saturday, the _____ day of _____, A. D. 18—, is fixed for confirmation *nisi*, and for reading the return of sale in open court in accordance with the Act of Assembly in such cases made and provided.

By the Court.

Afterwards indorse on same:

⁹ Clark's Est., 10 Supr. C. 423. (See Eby's Est., 164 Pa. 249.)

Now, — day of —, A.D. 18—, read in open court, and there being no objections, confirmed *nisi*.

By the Court.

49. Form of final confirmation.

Afterwards indorse on same:

Now, — day of —, A.D. 18—, return of sale is confirmed absolutely. And it is hereby ordered that — — and — —, being first lien creditors, be entitled to receive deeds for the lands purchased by them respectively, without giving a bond and mortgage for the balance of purchase-money as prescribed by the terms of sale, upon their giving receipts for the amount of the same, as provided by the Act of Assembly of the 20th day of April, A.D. 1846; and it is further ordered, adjudged and decreed, that the sale made as returned to the court be ratified and approved, and that the premises sold be and remain to the purchasers, their heirs and assigns, firm and stable forever.

By the Court.

[The foregoing forms are from the 2nd volume of Rhone's Orphans' Court.]

50. Return of sale, generally.

The return of sale may be made at the next term or an adjourned or later term, as specified in the order.¹⁰ It is irregular to make the sale after the term to which returnable, but if the sale is confirmed a good title is vested by it.¹¹ The return may not be so amended as to change the name of the purchaser without notice to him, nor to change its character substantively.¹² Amendment should not be made after confirmation.¹³ After confirmation the failure of the administrator to sign his return is cured.¹⁴

51. Postponement and rescission.

The Orphans' Court may postpone a sale to prevent sacrifice and to subserve the interest of all parties;¹⁵ or pending partition;¹⁶ or it may suspend the order for a period;¹⁷ or it may, in its discretion, rescind the order.¹⁸ The record may be amended so as to comply with the facts.¹⁹

52. Alias order and resale.

If the purchaser at the first sale refuses to comply with his bid an alias order will be granted,²⁰ and the repayment of the earnest

¹⁰ Troxell's Ap., 37 Leg. Int. 185.

¹¹ Klingensmith v. Bean, 2 Watts, 486.

¹² Fritz's Est., 14 Phila. 260.

¹³ Diehl's Ap., 33 Pa. 406; George's Ap., 12 Pa. 260.

¹⁴ Snyder v. Snyder, 6 Binney, 483.

¹⁵ Woolman's Est., 6 D. R. 205.

¹⁶ Himelspark's Est., 8 D. R. 327.

¹⁷ Winpenny's Est., 16 Phila. 207.

¹⁸ Single's Ap., 59 Pa. 55.

¹⁹ Kennedy v. Wachsmuth, 12 S. & R. 171.

²⁰ Jaynes' Est., 2 W. N. C. 536.

money is not a condition precedent.²¹ A resale cannot be had when the lien of the debts has expired;²² nor where the fruits would scarcely reimburse the costs.²³ Where a sale is made under a will, the Orphans' Court, by virtue of its equitable powers, may set it aside, order the purchase money restored and a resale to be had by the executors, and authorize the wife of the trustee to bid; or it can order the sale to be made by a trustee under the supervision of its own officer.²⁴ Such resale may be ordered for gross inadequacy of price,²⁵ in the discretion of the judge.²⁶

53. Powers and duties of legal representative.

When the law is invoked by the legal representative he must obey its voice. Before he can sell real estate under his order of court, he must publish and post advertisements as the law directs.²⁷ Under the Statute of 4th Anne the hand bills had to be signed by the clerk of the court, but now they are signed by the legal representative.²⁸ He is under no obligation to make searches concerning the title nor to produce certificates of searches,²⁹ the doctrine of *caveat emptor* applying to the sale. The return day being fixed in the order, the legal representative may adjourn the sale from day to day, if on the first day fixed in the notice, he cannot sell it advantageously, with a limit, it seems that it should be sold at least twenty days before the return day.³⁰ Where there are several administrators, etc., they must act jointly.³¹ If the highest bidder backs out, it may be returned sold to the next bidder,³² or unsold for failure of the bidder to comply with his bid. In the case of an executor or administrator *c. t. a.* it has been held that he is accountable for the rents and profits of the real estate in his possession, up to the payment of the purchase money and the delivery of the deed.³³ A legal representative cannot sell on an agreement privately at a stated sum,³⁴ except as authorized by the act of 1889, *supra*. Where the title is held by a third person, the administrator is the proper party to bring a bill to compel conveyance to the purchaser;³⁵ but a bill will not lie against a trustee who holds the title. The Orphans' Court has power to order the trustee to make a conveyance.³⁶ An administrator who makes a

²¹ Cope's Est., 1 W. N. C. 286.

²² Elbert's Est., 3 C. C. 611.

²³ Miller's Est., 4 Kulp, 205. Rhone, P. J. Gamble v. Woods, 53 Pa. 158.

²⁴ Agnew, J., in Dundas' Ap., 64 Pa. 325.

²⁵ Fricke's Est., 16 Supr. C. 38.

²⁶ Brown's Ap., 68 Pa. 53; Hamilton's Est., 51 Pa. 58.

²⁷ Rham v. North, 2 Yeates, 117.

²⁸ Thomas' Est., 5 Kulp, 213; Myers v. Hodges, 2 Watts, 381.

²⁹ Cramp's Ap., 81 Pa. 90.

³⁰ Gillespie's Est., 10 Watts, 300.

³¹ Kreider's Est., 17 Lanc. L. R. 201.

³² Stiver's Ap., 56 Pa. 9.

³³ Gordon's Ap., 18 W. N. C. 23.

³⁴ Myers v. Hodges, 2 Watts, 381.

³⁵ Ulrich's Ap., 2 Penny. 455.

³⁶ Leiper v. Irvin, 26 Pa. 54.

sale is estopped from setting up his own title against that made as administrator.³⁷ Where he makes a sale which discharges mortgages, he will be personally liable if he does not regard them in the distribution.³⁸ He has no authority to vary the terms or order of sale fixed by the court.³⁹ He cannot give time without authority in the order.⁴⁰ But if the altered terms have been reported to and approved by the court, it is different.⁴¹ He must account for the full purchase price, and if he takes a bond that proves worthless, he is answerable for it.⁴² If the terms require a bond and mortgage generally, he has no right to take security restricted to the land sold.⁴³ Where a sale is made discharging the mortgage, the administrator will not be surcharged for such payment in good faith.⁴⁴ Where no terms are fixed in the order, it means cash, and the legal representative will be held for the whole amount bid.⁴⁵ If he gives a bond of indemnity to the purchaser to satisfy him as to a dispute, he is personally liable on such bond.⁴⁶ But he is not liable on a promise without consideration, to restore the fixtures removed by a trespasser, after the sale, nor is the estate liable.⁴⁷ A sale under a power in a will for the payment of unscheduled debts discharges the land from the statutory lien of testator's debts.^{47a} When the real estate of a decedent is sold for the payment of debts, the balance is distributable as real estate and the widow is entitled to her third for life, but must give security before she can take the principal.^{47b}

54. Deed to purchaser.

After the final confirmation of the sale and the full payment of the purchase money the legal representative shall make a deed to the purchaser for the estate and title which decedent had, the rule of *caveat emptor* applying to the sale.⁴⁸ The making of the deed is a part of the proceedings of the court, to be construed with it and the deed, if erroneous, may be corrected by the record, so as to pass all the land intended to be conveyed by the order of sale.⁴⁹ The

³⁷ Kellerman v. Miller, 5 Supr. C. 443.

³⁸ Linn v. Peters, 2 Pearson, 169.

³⁹ Randolph's Ap., 5 Pa. 242; Kreamer v. Fleming, 191 Pa. 534; Miller's Est., 8 York, 7.

⁴⁰ Davis' Ap., 14 Pa. 371.

⁴¹ Jacob's Ap., 23 Pa. 477.

⁴² Dillebaugh's Est., 4 Watts, 177.

⁴³ Sage v. Nock, 4 Clark, 518.

⁴⁴ Crosson's Ap., 125 Pa. 380. This was before the act of 1893, *supra*, providing for the manner of proceeding to discharge the lien of a mortgage which must now be followed. (See Kreamer v. Fleming, 191 Pa. 534, criticising Crosson's Ap.; also Darrah's Est., 6 D. R. 178, and Smith's Est., 179 Pa. 208.)

⁴⁵ Mitchell's Est., 1 Pearson, 428.

⁴⁶ Kauffelt v. Leber, 9 W. & S. 93.

⁴⁷ Robb v. Mann, 11 Pa. 300.

^{47a} Cadbury v. Duval, 10 Pa. 265.

^{47b} Wales' Est., 11 Phila. 156.

⁴⁸ Bashore v. Whisler, 3 Watts, 490; Foxe v. Wensch, 3 W. & S. 444; Sacket v. Twining, 18 Pa. 199; Smith v. Wildman, 178 Pa. 245.

⁴⁹ McGhee v. Hoyt, 106 Pa. 516.

deed, however, passes title only so far as it is authorized by the confirmation of the sale, and if made to a different purchaser, he gets no title under it.⁵⁰ It must comply with the terms of the order of sale.⁵¹ The title which the purchaser takes by his deed is no greater than that which decedent had,⁵² but it passes the title clear from the claims of heirs,⁵³ assuming that the court had jurisdiction. If the court had no jurisdiction, the rights of the heirs are not divested.⁵⁴ The equitable vendee in possession is not affected by the sale and is entitled to specific performance notwithstanding.⁵⁵ But the jurisdiction to sell is not affected by proceedings in partition and the title of an heir in partition will be divested by a sale for the payment of debts.⁵⁶ The sale of partnership real estate for the payment of a deceased partner's debts passes only his interest in the partnership, notwithstanding the legal title was in him alone.⁵⁷ Where land is partnership stock it never becomes personality, even during the continuance of the firm, so as to give one partner power to dispose of the firm interest in it. It is not subject to the rule that each partner is agent of the firm. But when a member of the firm dies the real estate then becomes personality for the payment of partnership debts, and the advances of the partners, before any goes to the partners or their individual creditors. The time of reconversion is the moment the partnership is wound up and it is determined to be no longer partnership stock nor required for its useful purposes.⁵⁸ So where one partner purchased land in his own name but in trust for the partnership, and gave a judgment for part of the purchase money, and notice of the trust was given at the sale by the other partners, the purchaser took subject to the trust.⁵⁹ If a sale is made under notice of a continuous and apparent easement, given at the sale, although not mentioned in the petition or order of sale, the purchaser and his vendee are affected and bound by such notice.⁶⁰ And so a purchaser will take title subject to a ground rent.⁶¹ An undetermined lease was held extinguished by an Orphans' Court sale.⁶² The effect of a judicial sale upon a leasehold is regulated by the act of April 20, 1905, P. L. 239.⁶³

⁵⁰ *Thompson v. Rogers*, 67 Pa. 39.

⁵¹ *Backenstoss v. Stahler*, 33 Pa. 251.

⁵² *Bean's Ap.*, 2 Walker, 512; *Diehl's Ap.*, 33 Pa. 406; *Walker's Est.*, 23 C. C. 657; P. & L. Dig., vol. 14, col. 24963.

⁵³ *Christy v. Christy*, 176 Pa. 421.

⁵⁴ *W. S. (Tow-head) Allen Case*, *Perrine v. Kohr*, 20 Supr. C. 36; affirmed in 205 Pa. 602.

⁵⁵ *Nelson v. Nelson*, 117 Pa. 278.

⁵⁶ *Dresher v. Allentown Water Co.*, 52 Pa. 225.

⁵⁷ *McCormick's Ap.*, 57 Pa. 54.

⁵⁸ *Sharswood, J.*, in *Foster's Ap.*, 74 Pa. 391, commenting upon *Meily v. Wood*, 71 Pa. 488.

⁵⁹ *Billmyer v. Slifer*, 2 Pitts. 539.

⁶⁰ *Overdeer v. Updegraff*, 69 Pa. 110.

⁶¹ *Bickley v. Biddle*, 33 Pa. 276.

⁶² *Standard, Etc., Co. v. Prince Mfg. Co.*, 133 Pa. 474.

⁶³ See vol. 2, *Proceedings to Obtain Possession*.

55. Title of purchaser.

The purchaser at Orphans' Court sale obtains an equitable title and may maintain a bill, even before confirmation of the sale, to prevent a street railway company from laying its tracks on the road abutting on the property.¹ Having paid part of the purchase money, the sale being confirmed, and entered into possession, after his death, his administrators taking a deed in their names for the heirs on paying the balance, such deed relates back to the confirmation and the purchaser had the title.² The purchaser should look to his deed to see that it embraces the land which he believes he bought, since *caveat emptor* applies and the monuments on the ground control the description.³ Where the coal underlying real estate was sold as a separate estate, it carried the title to all the coal in place, and not only a particular vein.⁴ An administrator who purchases at his own sale by leave of court obtains a clear title;⁵ that is, such title as the decedent had.⁶ Where the purchaser claims title against a person who has had open, notorious and adverse possession for twenty-one years, the claimant under such title is not estopped by a mistaken notice at the sale, nor by the fact that an attorney, who mistakenly receipted for a part of the purchase money, thought he was employed, when he was not, and offered to refund the money.⁷ In the case of an unauthorized sale a remainderwoman, who knew of the sale but not its character, is not estopped, after sixteen years, to contest its validity.⁸ By the confirmation of the sale the title of the heirs is not divested; it is only so when the purchase money is paid and the deed delivered.⁹ The confirmation consummates the sale;¹⁰ but the title is not completed until the delivery of the deed, so that if the purchaser dies in the meantime before payment, it cannot be claimed that so much of his estate as is necessary to complete the title descends as real estate.¹¹

An executor is estopped from asserting his own claim for a part of the land when by his petition, order, advertisement and assurance to the purchaser he included it in the sale.¹² The purchaser is held to his bid and may not hold a string to it, so that he may draw back part of the price on the claim that he should be relieved to the extent of a dower charge on the land.¹³ If the purchaser dies after confirmation and another is substituted before conveyance, the amount necessary to complete the purchase does not descend as real estate.^{13a}

¹ Tomlinson v. Trenton, Etc., R. Co., 31 C. C. 81.

² Frick Coke Co. v. Laughead, 203 Pa. 168.

³ Pringle v. Rogers, 193 Pa. 94.

⁴ King v. N. Y., Etc., Co., 204 Pa. 628.

⁵ McPherran's Est. (No. 1), 212 Pa. 425.

⁶ Bodder's Est. (No. 1), 13 D. R. 470.

⁷ Harrington v. Stivanson, 210 Pa. 10.

⁸ Kiskaddon v. Dodds, 21 Supr. C. 351.

⁹ Behrens v. Mountz, 37 Supr. C. 326.

¹⁰ Crawford's Est., 221 Pa. 131.

¹¹ Brennan's Est., 220 Pa. 232.

¹² Phillips v. Crist, 33 Supr. C. 445.

¹³ Dull v. Slater, 31 Supr. C. 438.

^{13a} Brennan's Est., 220 Pa. 232.

56. Title by estoppel.

Where the purchaser is induced to part with his money on the representations of those who are interested and receive the full benefit, they cannot afterwards defeat his title, by setting up a different and better title. They are estopped.¹⁴ Where a wife, joint owner with her husband, in ignorance of her rights, assents to the sale of her land, rather than decedent's separate estate, for the payment of debts she is not estopped, nor are her heirs, from claiming the land so sold.¹⁵ If the purchase money is regularly accounted for and the heirs have receipted for their distributive shares, those claiming under them are estopped.¹⁶ So of a minor, who received his share on coming to full age.¹⁷ However, if the sale is void for want of jurisdiction, minors are not estopped;¹⁸ as where the petition is presented by an illegitimate child, and the legitimate heir had no knowledge of the proceeding.¹⁹ Where the land of a *cestui que trust* was sold in a proceeding to which the devisee of the former was a party neither the devisee nor his grantee can object to the sale thirty years after.²⁰ So of a participating remainderman,²¹ or heir;²² or an administrator who made the sale and claims under an after-acquired title.²³ When the interest of an heir has been sold under an execution, a subsequent sale of the entire estate for the payment of the ancestor's debts extinguishes the title of the purchaser of the heir's interest;²⁴ nor is the purchaser entitled to actual notice of the proceedings in the Orphans' Court.²⁵ So also of an heir's allotment in partition.²⁶ The paramount claims of creditors must always be recognized.

57. Form of deed.

This indenture, made the — day of —, in the year of our Lord one thousand eight hundred and —, between — — and — —, administrators of all and singular the goods and chattels, rights and credits which were of — —, late of —, who died intestate, of the one part, and — —, of —, of the other part.

Whereas, the said — —, in his lifetime, and at the time of his death, was seized in his demesne, as of fee, of and in a certain tract of land, situated in —, containing — acres.

And whereas, letters of administration of all and singular the goods and chattels, rights and credits which were of the said — —, at the time of his death, were afterwards, in due form of law, committed to the aforesaid — — and — —.

¹⁴ *Maple v. Kussart*, 53 Pa. 348. (See also cases, *supra*, par. 55.)

¹⁵ *Paul v. Squibb*, 12 Pa. 296.

¹⁶ *Fink v. Miller*, 19 Supr. C. 556.

¹⁷ *Wilson v. Bigger*, 7 W. & S. 111.

¹⁸ *Spencer v. Jennings*, 139 Pa. 198.

¹⁹ *Perrine v. Kohr*, 20 Supr. C. 36, affirmed in 205 Pa. 602.

²⁰ *Stewart v. Madden*, 153 Pa. 445.

²¹ *Cameron v. Coy*, 165 Pa. 290.

²² *Sager v. Mead*, 171 Pa. 340.

²³ *Kellerman v. Miller*, 5 Supr. C. 443.

²⁴ *Horner v. Hasbrouck*, 41 Pa. 169.

²⁵ *Smith v. Seaton*, 117 Pa. 382.

²⁶ *Dresher v. Allentown Water Co.*, 52 Pa. 225.

And whereas, by the petition of the said — — and — — to the judges of the Orphans' Court, held in and for the County of —, on the — day of —, A. D. 18—, setting forth that the personal estate of the said — — was not sufficient to pay his just debts, and praying said court to allow them to make sale of so much of the lands therein described, as the said court should judge necessary for the purpose aforesaid; and thereupon it was ordered by the said court that the lands hereafter described should be sold for the purposes aforesaid.

And whereas, in pursuance of the said order, and by force and virtue of the laws of the Commonwealth of Pennsylvania, in such case made and provided, afterwards, to-wit, on the — day of —, A. D. 18—, the said — — and — — did expose to sale at public vendue the hereinafter described land, with the appurtenances, and then and there did sell the same to the said — — for the sum of — dollars, he being the highest bidder, and that the highest and best price bid for the same; which sale on report thereof made, was, on the — day of —, A. D. 18—, confirmed by the said court, and it was then adjudged and decreed by the said court, that the same should be and remain firm and stable forever as appears by the records and proceedings of the said court.

Now this indenture witnesseth, etc. [as in common deeds], and by these presents, in pursuance and by virtue of the said order of court, do grant, bargain, sell, release, and confirm unto the said — — his heirs and assigns, all that certain lot of land, etc., bounded and described as follows:

[Here describe the premises.]

Together with all and singular, etc. [as in common deeds], and also all the estate, right, title, interest, property, claim, and demand whatsoever of the said — —, at and immediately before the time of his decease, in law or equity, or otherwise, howsoever, of, in, to, or out of the same.

To have and to hold, etc. [as in common deeds], unto the said — —, his heirs and assigns, to the only proper use and behoof of the said — —, his heirs and assigns, forever.

(If it is desired to add any warranty say:)

[And the said — — and — —, each for himself alone, doth covenant, promise, and agree to and with said — —, and his heirs and assigns, by these presents, that they, the said administrators as aforesaid, have not done, committed, or knowingly or willingly suffered to be done or committed, any act, matter, or thing whatsoever, whereby the premises hereby granted, or any part thereof, may be impeached, charged, or incumbered.]

— —, [Seal.]
Administrator, etc.
— —, [Seal.]
Administrator, etc.

Signed, sealed and delivered {
in presence of

— —,
— —.

State of Pennsylvania, County of Luzerne, ss.

On the — day of —, A. D. 18—, before me the subscriber,

a — in and for the County of —, and State of Pennsylvania, personally appeared the within named — — and — —, administrators of — —, deceased, and in due form of law acknowledge the within or foregoing indenture to be their act and deed as such administrators, and desired that the same might be recorded as such.

Witness my hand and — seal, the day and year aforesaid.

— —. [Seal.]

58. Execution of deed when legal representative is incapacitated.

Section 47 of the act of March 29, 1832, P. L. 190, provides:

"In all cases where a sale shall be made by an executor, administrator or guardian, under an order of the Orphans' Court, and such executor, administrator or guardian shall be removed by the court, or shall die, or become insane, or otherwise incapable, before a conveyance is made to the purchaser, it shall be lawful for the succeeding administrator of the decedent, or for the successor in the guardianship, as the case may be, such succeeding administrator or guardian having given security, to be approved of by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; but if, within three months after such sale, there shall be no such succeeding administrator or guardian, having given security as aforesaid, it shall be the duty of the Orphans' Court, on petition of the purchaser, to direct the clerk of the court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and delivering to the clerk the securities required by the said terms and conditions, which moneys and securities shall remain subject to the disposition of the court; every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property therein described in the grantee, as fully and effectually as if the same had been made by the persons who may have sold any such estate, circumstanced as aforesaid; the like proceedings may be had where an executor, administrator or guardian shall neglect or refuse to execute and deliver such deed for the space of thirty days, after due notice of an order of the court requiring him to execute the same."

The title derived by Orphans' Court sale vests only by the delivery of the deed.²⁷

59. Deed when fiduciary dies.

Section 1 of the act of May 22, 1878, P. L. 83, provides:

"That whenever any Orphans' Court or Court of Common Pleas, having authority under existing laws to decree a sale of real estate, shall issue an order to any executor, administrator, guardian or trustee, either specially appointed for the purpose or otherwise, to sell

²⁷ *Ferree v. Comth.*, 8 S. & R. 312; *Leshy v. Gardner*, 3 W. & S. 314; *Hise v. Geiger*, 7 W. & S. 273; *Strange v. Austin*, 134 Pa. 96; *Greenough v. Small*, 137 Pa. 132.

such real estate, and shall confirm such sale, and such administrator, executor, guardian or trustee shall die before the execution of a deed to such purchaser, the proper court shall have power, on the petition of the purchaser, to direct the clerk of such court to execute and deliver to the purchaser the necessary deed of conveyance for such real estate, on his full compliance with the terms and conditions of sale, paying into court the moneys payable and delivering to the clerk the securities required by the said terms and conditions, which moneys and securities shall remain subject to the disposition of the court, and said deed shall be valid and available to such purchaser, as fully as if it had been executed and delivered by the proper administrator, executor, guardian or trustee under existing laws."

60. Power of surviving fiduciary.

Section 1 of the act of May 1, 1861, P. L. 431, provides:

"In all cases where a sale of the real estate of a decedent shall be made by executors, administrators, or guardians, under an order of the Orphans' Court, if one or more of such executors or administrators, or guardians, shall die or be discharged before a conveyance is made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale."

61. Rights and liabilities of purchaser.

Where the land is leased on cropping, and the terms specify nothing as to the growing crops, they pass to the purchaser.¹ though they may be reserved out of the sale by parol.² He is liable for the amount of his bid, with interest from the time the deed is tendered and demand made.³ It is immaterial that the order of sale has not been returned to the court⁴ or that there were informalities,⁵ nor can he set up a defect in the title, the rule *caveat emptor* applying.⁶ The court may protect the purchaser where there is a mortgage concerned.⁷ He is not liable for interest accruing on a mortgage between the date of decedent's death and the sale.⁸ A defaulting purchaser is liable only for a deficiency caused by the resale.⁹ The liability of the purchaser for his bid is fixed by the confirmation,¹⁰ which also fixes the rights of creditors to the fund.¹¹ The inchoate title of the purchaser between the sale and confirma-

¹ Burns v. Cooper, 31 Pa. 426.

² Backenstoss v. Stahler, 33 Pa. 251.

³ King v. Gunnison, 4 Pa. 171.

⁴ Beeson v. McKnabb, 2 Watts, 106.

⁵ Unangst v. Kramer, 8 W. & S. 391; Dawson v. Ewing, 16 S. & R. 371.

⁶ Fox v. Mensch, 3 W. & S. 444; Sackett v. Twining, 18 Pa. 199; P. & L. Dig., vol. 14, col. 24980.

⁷ Moorhead v. Wolff, 123 Pa. 365.

⁸ Law's Est., 6 C. C. 647.

⁹ Wilder's Est., 2 Blair Co. 57.

¹⁰ Stewart's Est., 26 Pitts. L. J. 53.

¹¹ Arndt's Ap., 117 Pa. 120; Kier's Est., 27 Pitts. L. J. 129.

PURCHASER NEED NOT SEE TO APPLICATION OF PURCHASE MONEY.

The Act of June 10, 1911, provides.

"Section 1. That whenever any person seized of the title to real estate situate in this Commonwealth has died or shall die hereafter, having first made and published his last will and testament, wherein said real estate is devised to the executors or trustees named therein in trust to make sale thereof; or wherein said executors or trustees are authorized and directed to make sale of such real estate so devised, convert the same into money, and to hold the proceeds of said sale or sales, or any part thereof, in trust for any particular purpose, or for the use of any particular person or persons named in said last will and testament; the person or persons so purchasing said real estate from the executors or trustees named in said last will and testament, under the power of sale contained therein, shall take title thereto free and discharged of any obligation to see to the application of the purchase money."

INSERT, P. 167, VOL. 3, JOHNSON.

tion is such that he may maintain an action against a trespasser for injuring the property,¹² and his interest is insurable, and if a loss occurs the action on the policy is properly brought by the administrator to the use of the vendee.¹³ It is such a title that a judgment entered against him will attach to the legal title when ripened into fullness¹⁴ and will be prior to a judgment entered after the deed is delivered,¹⁵ but not for the purchase money.¹⁶ Notwithstanding, the title does not pass out of the heirs until the purchase money is paid and the deed is delivered.¹⁷ So he may not recover the rents accruing between the confirmation and the delivery of the deed;¹⁸ but the executor must account for them to the heirs.¹⁹

62. Right of purchaser as lien creditor.

Under the act of 1846, *supra*, the purchaser being also a lien creditor must see to it that the act is complied with, if he wishes to receipt for the amount of his lien.²⁰ If he refuses to comply with the terms of the sale, the administrator must so return, and ask for an alias order.²¹ If there are no other creditors he may be permitted to retain the amount of his lien.²² He must be known as a lien creditor on the day of the sale.²³ On a resale of the property, the defaulting bidder will be held for the deficiency.²⁴ This applies as well to the administrator who on his own behalf bids at the sale and then defaults.²⁵

63. Liability for purchase money.

The general rule is that the purchaser is not responsible for the application of the purchase money.²⁶ But this does not apply where a minor is concerned. He must see that the security required is given.²⁷

64. Payment by purchaser into court or by leave to executor.

Section 19 of the act of 1834, *supra*, provides.

"Whenever any sale shall be made of real estate by any executor

¹² Robb v. Mann, 11 Pa. 300.

¹³ Farmers', Etc., Co. v. Graybill, 74 Pa. 17. (See Demmy's Ap., 43 Pa. 155, *supra*.)

¹⁴ Holmes' Ap., 108 Pa. 23.

¹⁵ Addams v. Hoffman, 2 Woodward, 93.

¹⁶ Jacob's Ap., 23 Pa. 477.

¹⁷ Leshey v. Gardner, 3 W. & S. 314; Greenough v. Small (No. 2), 137 Pa. 132.

¹⁸ Strange v. Austin, 134 Pa. 96; Law's Est., 7 C. C. 605.

¹⁹ Gordon's Ap., 18 W. N. C. 23.

²⁰ Singerly v. Swain, 33 Pa. 102.

²¹ Colvin's Est., 27 C. C. 513.

²² Giblin's Est., 2 Kulp, 196. Rhone, P. J.

²³ King's Est., 9 Kulp, 58.

²⁴ Banes v. Gordon, 9 Pa. 426.

²⁵ Meyer's Est., 177 Pa. 450.

²⁶ Graff v. Smith, 1 Dallas, 481; McGinnis v. Davis, 29 Pitts. L. J. 310; Dixey v. Laning, 49 Pa. 143.

²⁷ Kreimendahl v. Neuhauser, 13 Supr. C. 606; Guest's Est., 4 Kulp, 17.

or executors, in pursuance of any authority, power or direction contained in a will, or by force thereof and of this act, either for the payment of debts or of legacies, for the support of children, or for distribution of the proceeds, or other purpose, the purchaser of such estate may pay the purchase money or consideration of such sale, into the Orphans' Court having jurisdiction of the accounts of such executor or executors, or with the leave of such court to such executor or executors, to be disposed of according to the uses and trusts contained in such will; and such payment shall be deemed valid against all persons having or who may have an interest therein."

Having been paid into court the right of a creditor to be paid out of it is within the jurisdiction of the Orphans' Court.²⁸

65. Title not affected by revocation of letters.

Section 16 of the act of April 9, 1849, P. L. 524, provides:

"In all cases of *bona fide* sales under the order of and confirmed by the Orphans' Court, the title of the purchaser shall not be affected by the subsequent revocation of the letters testamentary, or of administration, of the executor or of the administrator making such sales; and that purchasers of real estate sold under the orders of the Orphans' Court shall, after the confirmation of the sale, and the execution and acknowledgment of the deed, have a right to proceed to obtain possession of the purchased premises, in the same manner as is now provided in relation to purchasers at sheriffs' sales."

This act is comprehensive and covers the right of the purchaser to remove tenants²⁹ and have possession delivered to him.³⁰ These proceedings are now regulated by act of 1905, for the practice under which see Vol. II, Johnson's Practice.

66. Defective qualification not to affect title.

Section 1 of the act of April 28, 1876, P. L. 50, provides:

"Wherever in pursuance of proceedings in the Orphans' Court or court of Common Pleas of any county, any person therein described as a trustee, guardian, executor, administrator, or as standing in any other fiduciary relation to the parties interested, shall grant and convey any real or personal, estate, in which proceedings security shall be duly entered by him or her under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee or purchaser, or the securities so entered, but the same shall be as valid in all respects, as if such irregularity or defect had not existed."

The proviso excepts pending actions. The courts have further restricted it to defects in the proceedings when they have jurisdiction of the subject matter.³¹

²⁸ Tilghman's Est., 5 Wharton, 44.

²⁹ Simpson v. Thornton, 54 Pa. 391.

³⁰ Potts v. Wright, 82 Pa. 498; Strange v. Austin, 134 Pa. 96; Merritt v. Whitlock, 200 Pa. 50; Moore v. Moore, 23 Supr. C. 73.

³¹ Halderman v. Young, 107 Pa. 324; Halderman's Ap., 104 Pa. 251.

67. Rights of purchaser when sale is set aside.

When the court sets aside or vacates a sale, the purchaser is entitled to receive back the hand money or any installment he has paid³² and the costs are not to be charged to him.³³

68. Enforcement of sale.

The Orphans' Court has power to enforce a sale confirmed by it³⁴ and this by attachment.³⁵ But it will not do so where the title has failed or is dubious.³⁶ A court of equity will not intermeddle with its jurisdiction.³⁷ Where the purchase money has not all been paid, the purchaser will be given an opportunity to do so and complete his title³⁸ The executor will not be compelled to make a deed where the sale was collusive and the price consequently less than it ought to have been.³⁹ A contract by the agent of an executor who had full power, may be enforced by the Orphans' Court.⁴⁰ Where on account of an irredeemable ground rent, the sale is rescinded, the court will not order specific performance against the vendee.⁴¹

69. Mortgaging real estate.

The forms of practice given herein for the sale of real estate for the payment of debts may be adjusted so as to apply to a case in which the court may deem the mortgaging of it sufficient. The subject, however, will be further considered under The Price Act and Guardian and Ward. The petition in this case must meet the requirements of the acts of assembly.¹ An undivided interest in real estate may not be mortgaged for the relief of other devisees when such interest is devised to a particular person. Such mortgage, when made can only be enforced proportionably.² The court may authorize the mortgaging of lands devised by the trustee to relieve it from a testamentary charge;³ but it cannot authorize a mortgage to repay a loan made to carry on testator's business.⁴ A legal representative can only be ordered to mortgage at the instance of minors or creditors.⁵ It cannot permit the executor to lend the money and order the clerk to execute the mortgage.⁶ The holder of a prior mortgage consenting, his mortgage may be

³² Johnson's Ap., 114 Pa. 132.

³³ Thomas' Est., 4 Kulp, 445; Brown's Ap., 68 Pa. 53; Beeson v. Beeson, 9 Pa. 279.

³⁴ Bell's Ap., 71 Pa. 465.

³⁵ Boyle's Est., 2 Kulp, 229.

³⁶ Kelly's Est., 2 W. N. C. 431; Howe's Est., 3 D. R. 267.

³⁷ Bickley v. Biddle, 33 Pa. 276.

³⁸ Stevenson v. Scott, 188 Pa. 234.

³⁹ Cobleigh's Est., 23 Supr. C. 271.

⁴⁰ Hancock's Est., 9 D. R. 231.

⁴¹ Taylor's Est., 17 D. R. 692.

¹ Hilton's Ap., 19 W. N. C. 541.

² Hemphill v. Pry, 188 Pa. 243.

³ Bile's Est., 8 Phila. 587.

⁴ Hilton's Ap., 19 W. N. C. 541.

⁵ Storey's Est., 16 Phila. 339.

⁶ Wilhelm's Est., 20 C. C. 413.

discharged and paid out of the fund.⁷ Where the personal estate is temporarily insufficient, a mortgage may be resorted to, in order to tide it over until the estate can be collected.⁸ This method has been held to be preferable to an absolute sale.⁹ But while a petition for sale is pending a petition for mortgaging will be refused.¹⁰ However, when the practice has been mixed, with exceptions filed to a return of an alias order, and a mortgage was then allowed, the appellate court, to protect the mortgage will assume that the exceptions were sustained and the proceedings nullified.¹¹ It is such sloppy practice, however, that should be reprehended. A petition to mortgage should be accompanied with a copy of the inventory, a schedule of the debts and contain a statement of the amount to be raised.¹² It need not name the heirs, or state the value of the real estate or that there are no other debts, nor annex an inventory when it states that there is no personal property.¹³

When the petition is for a mortgage and it is so ordered, the legal representative cannot confess judgment in lieu thereof.¹⁴ The order should be comprehensive enough to protect the equities of all parties interested.¹⁵ The court will order a mortgaging to meet a deficiency caused by necessary repairs of a trust estate and to repay the life tenant for such repairs.¹⁶ A judgment creditor is entitled to be paid out of the proceeds of the mortgage.¹⁷ The court may vacate an order for mortgaging decedent's real estate when it appears that the proceeding is collusive and fraudulent.¹⁸ When a mortgage has been executed, it must be confirmed by the court, as though it were a sale.¹⁹ In executing the mortgage the legal representatives should do so in their representative capacity, but if they sign the mortgage as individuals, the trust property will be held bound.²⁰ Where the mortgagee refuses to deliver the money, the court will annul the order, but not direct satisfaction, the mortgagee having incurred expenses in the premises.²¹

70. Form of petition to compel a purchaser to comply with his bid.

To the Hon. ———, Judge, etc.

The petition of John Moss, administrator of the estate of Eusebius Hershey, deceased, respectfully represents:

⁷ Laughlin's Est., 6 C. C. 447.

⁸ Steffy's Ap., 76 Pa. 94.

⁹ Eddy's Est., 12 Phila. 118.

¹⁰ Barnett's Est., 3 W. N. C. 412.

¹¹ West v. Cochran, 104 Pa. 482.

¹² Barnett's Est., 3 W. N. C. 412.

¹³ Corbett's Est., 10 D. R. 59.

¹⁴ Barger v. Cassidy, 4 Phila. 324.

¹⁵ Steffy's Ap., 76 Pa. 94.

¹⁶ Ash's Est., 12 D. R. 72.

¹⁷ Smith's Est., 8 Lack. L. N. 308.

¹⁸ Corbett's Est., 10 D. R. 59. (See this case for numerous points of practice by McIlvaine, J.)

¹⁹ Morgan's Ap., 110 Pa. 271.

²⁰ Lawrence's Est., 169 Pa. 185.

²¹ Kelly's Est., 4 W. N. C. 576.

1. That in pursuance of an order of court dated — day of —, A. D. 19—, to him directed, he did sell the real estate of said decedent to one Samuel Winters, and made return of said sale to this court, whereupon the court did on the — day of —, A. D. 19—, confirm said sale and decreed that the same be and remain firm and stable forever.

2. That your petitioner, in pursuance of the order of said court, did, on the — day of —, A. D. 19—, present to said Samuel Winters, purchaser, a deed for said land, duly executed, and did also then demand of the said purchaser the money and securities then due from him, in accordance with the said order, but that he, the said Samuel Winters, has neglected and refused either to pay the money or to give security as aforesaid required.

Your petitioner therefore prays the court to issue a citation to the said Samuel Winters, commanding him to appear and show why he shall not pay the said moneys and deliver the said securities as it is his duty to do. And he will ever pray, etc.

John Moss.

(Affidavit to truth.)

71. Form of petition to have sale set aside on offer of higher bid.

To the Honorable, etc.

The petition of John Fox, a judgment creditor of the estate of Abram Hewit, deceased, respectfully represents:

1. That Philip Catlin, executor of the estate of said decedent, in pursuance of an order of this court, sold the real estate of said decedent to James Rees for the sum of — dollars, and made return of the same to this court and the same has been confirmed *nisi*.

2. That the sum bidden by the said James Rees is not the real value of the said land, and that if this court will set aside such sale and order a resale of the premises, your petitioner will bid or pay for the same the sum of — dollars, which is at least ten per cent. more than the sum at which the property has been sold, and to secure such a bid he herewith offers his bond, with Jackson Roth as surety, in the sum of — dollars.

3. The reason why your petitioner did not bid said sum or any other on the day of the sale was, that it was there alleged by the said James Rees, purchaser, that the title was defective, in that there was an outstanding heirship due to an unknown heir, whereas your petitioner is now informed that this is not the fact, or, at least if it be so, he is willing to take the risk of any such defect.

He therefore prays the court to set aside the said sale and order a resale. And he will ever pray, etc.

John Fox.

(Affidavit of truth.)

72. Form of order for citation.

Now, — day of —, 19—, citation awarded directed to Philip Catlin, executor, and to James Rees, the purchaser, commanding them to show cause why the prayer of the petitioner shall not be granted.

Returnable on the — day of —, 19—.

By the Court.

73. Form of decree setting sale aside and ordering a resale

Now, —— day of ——, 19—, on due consideration of the case by the court, aided by the report of an auditor, it is ordered, adjudged, and decreed that the sale heretofore made to James Rees be set aside and is declared void, and that Philip Catlin, the executor, forthwith refund to him, the said purchaser, the amount of money paid by him on the purchase. And it is further ordered that the said land be again exposed to public sale, on the terms and conditions set forth in the former order. The costs of this proceeding to be paid out of the estate.

By the Court.

CHAPTER X.

ACTIONS BY AND AGAINST LEGAL REPRESENTATIVES.

1. Legal representatives defined.
2. Substitution in actions.
3. May be compelled to become parties.
4. Service of *sci fa.* on nonresidents.
5. Actions by executors, etc.
6. May sue or distrain for rents due.
7. Executors, etc., of life tenants may sue sub-tenants.
8. Suits upon tax sale bonds.
9. Recovery on bonds for surplus at tax sale.
10. Administrators *d.b.n.* may sue predecessors for assets.
11. No execution, without *sci. fa.* to legal representatives.
12. Widow, heirs and devisees to be made parties.
13. Stay of execution until sale can be made.
14. Legal representative compelled to apply for order of sale.
15. Omissions or errors in pleading not to affect the question of assets.
16. Suits to abate after one year, when.
17. Form of notice.
18. Form of affidavit of service.
19. Abatement of actions.
20. Venue of suits against nonresident legal representatives.
21. Form of substitution, on death of plaintiff.
22. Form of substitution, on death of defendant.
23. Form of substitution, on death of defendant, before issuing execution.
24. Form of substitution on death of plaintiff when executor, etc., is defendant.

1. Legal representative defined.

In common parlance "legal representative" means the executor, administrator, trustee, assignee; or heir when real estate is concerned.¹ But in ordinary use it means administrator or executor, unless there is something to annex a different representative character.² The legal representative by whatever name he may be designated, for the purposes of the law is substituted for the decedent. If there be a will he is called "executor"; if there be no will he is called administrator.

There is a marked distinction between the offices of administrator and executor as to the scope of their powers, as will be seen when we come to treat of executor particularly. The administrator is raised by the law and his powers and duties are defined by the law. An executor is appointed by the testator himself in a testament, or if not by a will, then by the court as administrator with the will annexed, and his duties and powers, in either case are defined by the will, as limited by the law. In both cases they are

¹ Warnecke v. Lembca, 71 Ill. 91; Lodge v. Weld, 139 Mass. 499; Staples v. Lewis, 41 Atl. 815; 71 Conn. 288.

² Weaver v. Roth, 105 Pa. 408; Griffin v. Bower, 21 C. C. 188.

the legal representatives of the rights, interests and properties which were of the decedent, for the benefit of creditors, heirs, legatees and devisees, as shall be unfolded. They take up the business of the decedent where death cut it short. Our acts of assembly have joined them in many duties, and what applies to one, therefore applies to the other, under these acts.

2. Executors and administrators may be substituted for decedent, in actions.

Section 26 of the act of February 24, 1834, P. L. 70, provides:

"The executors or administrators of any person who at the time of his decease was a party, plaintiff, petitioner or defendant, in any action or legal proceeding depending in any court of this commonwealth, shall have full power, if the cause of action doth by law survive to them, to become party thereto and prosecute or defend such suit or proceeding to final judgment or decree, as fully as such decedent might have done if he had lived; and if such plaintiff or petitioner die after judgment or decree in his favor, his executors or administrators may proceed to execution thereupon, as such plaintiff or petitioner might have done if he had lived."

This act gives an executor authority to collect a judgment by suggestion of the death of the plaintiff and substitution of himself as executor upon the record.³ Abatement of a suit by the death of a party is no longer the principle of law.⁴ Without substitution of the personal representative, however, execution cannot proceed.⁵ The personal representative of the deceased father may be substituted in a suit for death of minor daughter.⁶ The suggestion for substitution may be made in any form that indicates the intention.⁷

3. Legal representatives may be compelled to become parties.

Section 27 of the act of 1834, *supra*, provides:

"The court in which any action or legal proceeding may be depending, as aforesaid, shall have power to require by a writ of *scire facias*, such executors or administrators, within twenty days after the service thereof, to become party to such action or proceeding, or to show cause, at the next succeeding term, why they should not be made party thereto, by judgment of the court, and further proceedings be had in such action or proceeding; but in every such case the executors or administrators, who shall become party as aforesaid, shall be entitled to the continuance of such action or proceeding during one term."

Having appeared to the *sci. fa.* they may be ruled to plead in eight days.⁸ Where a *sci. fa.* was served before the testator's death,

³ Gemmill v. Butler, 4 Pa. 232.

⁴ Hazelbaker v. Coal Co., 158 Pa. 393; Bender v. Luckenbach, 162 Pa. 18.

⁵ Freiler v. Freiler, 1 C. C. 265.

⁶ Haggerty v. Pittston, 17 Supr. C. 151.

⁷ Carroll v. Tufts, 9 D. R. 144.

⁸ McCallion v. Lancaster, 2 W. N. C. 262.

it is not necessary to bring in the administratrix.⁹ A *scire facias* on a judgment is not an action pending in the sense that a continuance over the term need be granted.¹⁰ The proper practice to bring the legal representative of a party defendant in and make substitution is not by rule to show cause but by a *sci. fa.*, which is a difference in name alone¹¹ and technical only.

4. Service of *sci. fa.* on nonresident executors, etc.

Section 1 of the act of April 6, 1859, P. L. 384, provides:

"Whenever the executor or administrator of a deceased plaintiff or defendant, in any action or proceeding pending in any court of this commonwealth, resides without the jurisdiction of the said court, the writ of *scire facias* provided by the 27th and 32d sections of the act to which this act is supplementary¹² may be served on such executor or administrator by the sheriff of the county where he is a resident, if in the opinion of the proper court, such service may be reasonably practicable; but if otherwise, and also where the said executors or administrators reside in some other state of the United States, such service may be made by publication in one or more public newspapers, as, in the opinion of the court, will be most likely to give notice to the said executors or administrators; the said manner of service herein provided to have the same force and effect as the manner of service provided by the said act to which this is supplementary.¹³

5. Actions by executors, etc.

Section 28 of the act of 1834, *supra*, provides:

"Executors or administrators shall have power to commence and prosecute all personal actions which the decedent, whom they represent, might have commenced and prosecuted, except actions for slander, for libels and for wrongs done to the person; and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived."

Trespass for mesne profits comes within this section;¹⁴ and an action for deceit;¹⁵ an action for personal injuries may be brought against the legal representative under act of June 24, 1895, P. L. 236.¹⁶

The restriction in the act, *supra*, as to "wrongs done to the person," no longer is the law. Section 18 of the act of April 15, 1851, P. L. 669, abolished abatement of actions for injuries to the person by negligence or default. But an action of deceit in falsely pretending that the party was divorced from his wife, whereby plaintiff was induced to marry him, does not survive against the

⁹ Middleton v. Middleton, 106 Pa. 252.

¹⁰ Wallace v. Holmes, 40 Pa. 427.

¹¹ Bussinger v. Wernwag, 8 D. R. 263.

¹² Act of 1834, *supra*.

¹³ Hoke v. Wentz, 13 York, 101.

¹⁴ Arundel v. Springer, 71 Pa. 398.

¹⁵ Cullingsworth v. Birch, 5 C. C. 74.

¹⁶ Cowell v. Pitcher, 13 C. C. 583.

personal representatives of the recusant man deceased. The seduction was held to be a "wrong done to the person."¹⁷

Section 21 of article 3 of the constitution, it was held, preserves the right of action to the injured party for death caused by unlawful violence or negligence and not against the personal representative of the one who did the wrong.¹⁸

In an action of trespass *sur* slander where the plaintiff dies after judgment, his legal representatives may be substituted; but any irregularity in the entry of judgment in such case is cured by the statute of 17 Charles II, chapter 8, in force in Pennsylvania.¹⁹ Where plaintiff dies after verdict and before judgment, in an action for libel the same rule applies.²⁰

Where the plaintiff dies after suit for damages for the death of his minor child by negligence and violence, his administrator may be substituted.²¹

6. Executors, etc., may sue or distrain for rent due.

Section 29 of the act of 1834, *supra*, provides:

"The executors or administrators of every person who was the proprietor of any rent charge, or other rent or reservation, in nature of a rent, in fee or otherwise, as mentioned in the eighth section of this act, shall and may have an action of debt for the arrearages of such rent due to the decedent, at the time of his decease, against the person who ought to have paid such rent, or his executors or administrators, or they may distrain therefor upon the lands or tenements which were charged with the payment thereof and liable to the distress of such decedent, so long as such lands or tenements remain and are in the seizin or possession of the tenant who ought to have paid such rent, or in the possession of any other person claiming the same, from or under the same tenant, by purchase, gift, or descent, in like manner as such decedent might have done if he had lived."

Ground rent falls within this section²² also a life tenancy.²³ An annuity is held non-apportionable.²⁴ The personal representative of a widow may distrain for arrears of interest due at her death only.²⁵

¹⁷ Grim v. Carr's Admr., 31 Pa. 533.

¹⁸ Moe v. Smiley, 125 Pa. 136. In this case, the plaintiff's husband was murdered by Dr. Lyon, who then murdered himself. In order to cut the widow out of her right of action the Chief Justice, Paxson, drew a distinction between manslaughter by a railroad company under the acts of 1851 and 1855 and a doctor. This distinction was a patent absurdity.

¹⁹ Roberts' Dig., 377. Griffith v. Ogle, 1 Binney, 172; Murray v. Cooper, 6 S. & R. 126; Chase v. Hodges, 2 Pa. 48; Walter v. Erdman, 4 Supr. C. 348.

²⁰ Wood v. Boyle, 177 Pa. 620.

²¹ Haggerty v. Pittston, 17 Supr. C. 151. In this case the Superior Court construed the act of 1851 to cover the case, notwithstanding Moe v. Smiley, *supra*, cited by plaintiff in error.

²² Cobb v. Biddle, 14 Pa. 445; Smith v. Wistar, 5 Phila. 145.

²³ Borie v. Crissman, 82 Pa. 125.

²⁴ Stewart v. Swaim, 7 W. N. C. 407. (But see Bayard's Est., 7 D. R. 279.)

²⁵ Henderson's Ex. v. Boyer, 44 Pa. 220.

7. Executors, etc., of life tenants may sue subtenants.

Section 30 of the act of 1834, *supra*, provides:

"The executors or administrators of any tenant for life, who shall die before or on a day on which any rent was reserved or made payable upon any demise or lease of any real estate which determined on the death of such tenant for life, may have an action in the case, to recover from the lessee or under tenant of such real estate, if such tenant for life die on the day on which the same was made payable, the whole, or, if before the day, a proportion of such rent for the last year, or quarter of a year, or other current period of payment according to the time elapsed at the decease of such tenant for life as aforesaid."

The administrator of a life-tenant is entitled to the rent of a farm to the death of his life-tenant, and the rent for the balance of the term goes to the remainderman.²⁶ For accrued rents of oil land paid to the life-tenant the remainderman cannot recover from the life-tenants' estate any portion of the rental so paid, where under an agreement they were to a certain extent partners in the lease.²⁷

8. Executors, etc., may sue upon tax sale bonds.

Section 4 of the act of April 14, 1840, P. L. 349, provides:

"The executors or administrators of any decedent, whose real estate may have been or hereafter may be sold for taxes, during the lifetime of such decedent, in pursuance of the several laws of this commonwealth, and a bond or bonds, given by the purchaser for the surplus moneys arising from such sale, may proceed to recover and collect the same; as fully and in the same manner as the decedent, if living, could collect the same, and the moneys when collected, after deducting therefrom the expenses of collecting, shall be assets in the hands of said executors or administrators, in the same manner to all intents and purposes as though the same had been collected on a bond due the decedent; but it shall be in the power of the court, in which the same is about to be collected, on application by any heir or heirs, creditors or devisees of such decedent, to make an order to suspend or prevent the collection of said moneys when, in the opinion of said court, such collection may operate injuriously to the interests of said heirs, creditors or devisees."

The owner of a mortgage on the lot is entitled to the surplus.²⁸ When the purchaser accepts the redemption money from a stranger, the title reverts at once to the rightful owner.²⁹

Where the suit is brought on the surplus bond for the use of administrators, it is error to quash the writ, because the interest of the *cestui que use* is not set out in the pleadings.³⁰ Motions to quash are not granted except where the proceedings are clearly irregular, or void.³¹ The legal right to recover on the bond is in

²⁶ *Borie v. Crissman*, 82 Pa. 125.

²⁷ *Agnew's Est.*, 17 Supr. C. 201.

²⁸ *Kelso v. Kelley*, 14 Pa. 204.

²⁹ *Coxe v. Sartwell*, 21 Pa. 480; *Orr v. Cunningham*, 4 W. & S. 294.

³⁰ Quash from French, *Quasser*, to overthrow, annul.

³¹ *Crawford v. Stewart*, 38 Pa. 34.

the treasurer; and the fiduciary interests are, in practice, disregarded in the pleadings, the cases warning a plaintiff how dangerous it is "to be decoyed into an issue on his equitable right to bring the action."⁸²

9. Recovery on bonds for surplus at tax sale.

Section 5 of the act of April 14, 1840, P. L. 349, provides:

"When any person has [died] or shall die seized of unseated land, leaving debts due at the time of his death, which are or shall become liens on his real estate, and said land is now or shall be sold for taxes, and bonds given for the surplus money pursuant to law, it shall be lawful for the executors or administrators of such decedent to collect said bonds, as fully and effectually as though the land had been sold during the lifetime of such decedent, and the moneys when so collected, after deducting out the expenses of such collection shall be paid into the court of Common Pleas where such bond is filed and distributed by order thereof in the same manner as moneys arising from a sale by the sheriff of said property on such lien would have been distributed; and the like remedy by appeal shall be given as in case of sheriff's sales."

10. Administrators de bonis non may sue predecessors for assets, etc.

Section 81 of the act of February 24, 1834, P. L. 70, provides:

"Administrators *de bonis non*, with or without a will annexed, shall have power to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods and assets remaining in their hands, due and belonging to the estate of the decedent, and to commence and prosecute actions upon promises made to such predecessors in their representative character, and to sue forth and defend writs of error, writs of *scire facias*, and writs of execution upon judgments obtained by or in the name of the executors or administrators, into whose place they may have come, and also, to proceed with and perfect all unexecuted executions, which may have been issued thereon at the instance of such predecessors: *Provided*, That when any suit shall have been brought by an administrator *de bonis non*, for the recovery of moneys, goods or assets, remaining in the hands of his predecessors or their legal representatives, before they shall have settled their final administration account, the court, in which such action shall be brought, shall have power to stay the proceedings therein, on the defendant's filing such account in the register's office of the proper county, twenty days previous to the next term succeeding that to which the writ was returnable, until said account shall have been finally settled and adjusted; and on the production of a certified copy of said account, so settled and adjusted, the court, in which such suit shall be pending, is hereby authorized and required to render judgment for the balance which shall thereby appear to be due to either party."

⁸² Ch. J. Gibson in *Irish v. Johnston*, 11 Pa. 483, citing *Armstrong v. Lancaster*, 5 Watts, 67; *Pierce v. McKeehan*, 3 Pa. 136.

The suit by this section authorized is against the predecessor as representative of the deceased and not as a tortfeasor or as an independent debtor.¹ Property which the predecessor has already administered upon; as where he collected a bank deposit and reduced to his own account, must be accounted for by the administrator of the deceased administrator.² He may maintain suit on promises to his predecessor made in his representative capacity³ but a depository of the original administrator, it was held must pay to the executor of the deceased administrator and not to the administrator *d. b. n.*⁴ Stocks of a decedent cannot be transferred to the administrator before he has settled his account and the administrator *d. b. n.* may recover these against the personal representative of the first administrator.⁵ The administrator *d. b. n.* may issue execution on a judgment obtained by his predecessor as representative.⁶ It has been held that the confirmation of the administrator's account in the Orphans' Court is indispensable to render judgment in favor of the administrator *d. b. n.*⁷

An administrator was not allowed to settle an account merely to charge the intestate with a debt due him from the intestate.⁸ Section 32 of the act of 1834, *supra*, provides that no action shall abate on account of the death, dismissal, etc., of a legal representative, but the survivors or successors shall be substituted and continue the action. Where the estate is so far administered, that distribution may be made upon the account of the administrator of a deceased executrix, circuitry of procedure may be avoided by such distribution without the intervention of an administrator *d. b. n. c. t. a.*⁹ In case a will creates an active trust for the distribution of the estate among the children of the testator, the unfinished business on the death of the executor cannot be committed to a trustee, but goes to the administrator *d. b. n. c. t. a.*¹⁰ In case of misappropriation by an administrator who died insolvent, the collection of the bond is the business of the administrator *de bonis non*, and the line should not be broken in upon by the guardian.¹¹ The determination of the Orphans' Court of the amount due from the administrator on his account, is conclusive in the suit by the administrator *de bonis non* on the bond of his predecessor.¹²

Where an executor and trustee is removed by the Orphans' Court,

¹ Comth. v. Strohecker, 9 Watts, 479; Drenkle v. Sharman, 9 Watts, 489; Weld v. McClure, 9 Watts, 495; Carter v. Trueman, 7 Pa. 315; Little v. Walton, 23 Pa. 164; Bowman's Ap., 62 Pa. 170.

² Sibbs v. Phila. Sav. Fund Soc., 153 Pa. 345, distinguishing Stair v. York Natl. Bank, 55 Pa. 364.

³ Stair v. York Natl. Bank, 55 Pa. 364; Parsons' Est., 82 Pa. 465.

⁴ Slaymaker v. Farmers', Etc., Bank, 103 Pa. 616.

⁵ Lewis v. Ewing, 18 Pa. 313.

⁶ Meiser v. Eckhart, 19 Pa. 201.

⁷ Kerr v. Bosler, 62 Pa. 183.

⁸ Clauser's Est., 1 W. & S. 208.

⁹ Garman's Est., 211 Pa. 264, quoting with approval Justice Bell in Carter v. Trueman, 7 Pa. 315.

¹⁰ Sheet's Est., 215 Pa. 164.

¹¹ Hill's Est., 32 Supr. C. 508.

¹² Comth. v. Wood, 14 D. R. 509; Comth. v. Kean, 19 Supr. C. 576.

it remains only for the court to appoint an administrator *de bonis non* who is exclusively entitled to receive from his predecessor the assets of the estate.¹³

II. No execution without *sci. fa.* to legal representatives.

Section 33 of the act of 1834, *supra*, provides:

"No execution for the levy or sale of any real or personal estate of any decedent shall be issued upon any judgment obtained against him in his lifetime, unless his personal representatives have been first warned, by a writ of *scire facias*, to show cause against the issuance thereof, notwithstanding the *teste* of such execution may bear date antecedently to his death; and in all cases where property, real or personal, of a decedent is sold upon an execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution; but before any such payment shall be made, such executor or administrator shall give bond, to the satisfaction of the court, conditioned for the legal distribution of such money: *Provided always*, That such money shall be distributed as the real estate of which it is the proceeds, would have been."

This act does not apply to a mortgagor who dies after judgment,¹ and if defendant dies after execution is issued the sheriff can go on and sell.² But the *sci. fa.* to the personal representatives is required on every judgment entered before the death of the defendant;³ otherwise the process is void and no title passes at the sale.⁴

A nonresident executor cannot give his consent to validate it.⁵ But the widow and executrix may file a paper assenting to such issue, it seems.⁶ The security required by this section must be approved by the court from which the process issued, but in all other cases the Orphans' Court approves the security of the legal representative.⁷ The distribution required is according to the rules governing real estate only, and does not continue the nature of the estate.⁸

It follows the rules of equity with respect to conversion,⁹ in distribution, but does not prevent conversion by a sale under a mortgage.¹⁰ Where a judgment is obtained after the death of the debtor, the fund arising from the sale is payable to the adminis-

¹³ Hart's Est., 28 C. C. 126.

¹ Hunsecker v. Thomas, 6 W. N. C. 570; Fidelity, Etc., Co. v. Sampson, 209 Pa. 214.

² Rosengarten v. Deemer, 1 W. N. C. 63.

³ Bomberger v. Raymond, 12 C. C. 460.

⁴ Cadmus v. Jackson, 52 Pa. 295; Sheetz v. Wynkoop, 74 Pa. 198; Dingman v. Amsink, 77 Pa. 114.

⁵ Sayres' Exs. v. Helme's Exs., 61 Pa. 299.

⁶ Diese v. Fackler, 58 Pa. 109.

⁷ Morris v. Chadon, 4 Phila. 89; Blackner v. Owens, 2 Miles, 365.

⁸ Grider v. McClay, 11 S. & R. 224; Dyer v. Cornell, 4 Pa. 359; Pennell's Ap., 20 Pa. 515; Spangler's Ap., 24 Pa. 424; Hays' Ap., 52 Pa. 449; Matlack v. Roberts, 54 Pa. 148; Large's Ap., 54 Pa. 383; McCune's Ap., 65 Pa. 450; Sayer's Ap., 79 Pa. 428; Eckert's Est., 5 W. N. C. 451.

⁹ Squire's Ap., 10 W. N. C. 118.

¹⁰ Phillip's Est., 13 W. N. C. 355.

trator and the Orphans' Court is the exclusive forum of distribution.¹¹ Upon distribution the Orphans' Court may utilize the record of an issue in the Common Pleas to try disputed facts, the same as if it had directed the issue, although that fell with the proceedings in the Common Pleas.¹²

Under this section no *sci. fa.* is needed to the widow and heirs where a *fi. fa.* was issued in the lifetime of the decedent, although not served until after his death, inquisition having been waived in the note.¹³ A foreign executor, though he have letters from his state cannot maintain an action under them in this state;¹⁴ and so he cannot appear here and waive the law which requires a *sci. fa.* to issue to the personal representative.¹⁵ This act does not apply where the execution issues before the death of the party, though death occurs before levy made.¹⁶

12. Widow, heirs and devisees to be made parties to action.

Section 34 of the act of 1834, *supra*, provides:

"In all actions against the executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debt, the widow and heirs or devisees, and the guardians of such as are minors, shall be made parties thereto and in case such widow and heirs or devisees, and their guardians, reside out of the county, it shall be competent for the court to direct notice of the writ issued therein, to be served by publication or otherwise, as such court shall determine by rule of court; and if notice of such writ shall not be served on such widow and heirs, or devisees, and their guardians, the judgment obtained in such action shall not be levied or paid out of the real estate of such widow, heirs or devisees, as shall not have been served with notice of such writ."

A *sci. fa. sur* mortgage is not governed by this act,¹ which has no reference to liens, but to suits to obtain liens.² So where judgment exists when defendant dies it is not necessary to bring in the widow and heirs on a *sci. fa.* to revive and continue the lien;³ but only the legal representatives of the deceased.⁴

It was stated to be the proper practice in issuing an execution, in such case, to issue it on the original judgment and not the revival;⁵ though the better and more recent practice is to give in the præcipe for the execution, the original number and also the

¹¹ Kelly's Ap., 77 Pa. 232.

¹² Weimar v. Karch, 153 Pa. 385.

¹³ Davey's Est., 9 C. C. 125, citing Cadmus v. Jackson, 52 Pa. 295.

¹⁴ Sayre's Ex. v. Helme's Ex., 61 Pa. 209; McGraw, Admr. v. Irwin, 87 Pa. 139.

¹⁵ Bomberger v. Raymond, 12 C. C. 460.

¹⁶ Deering v. Wisler, 21 C. C. 156.

¹ Chambers v. Carson, 2 Wharton, 365; Tryon v. Munson, 77 Pa. 250; Hare v. Mallock, 1 Miles, 268.

² Sample v. Barr, 25 Pa. 457.

³ Reed v. Reed, 1 W. & S. 237; Riland v. Eckert, 23 Pa. 215; Middleton v. Middleton, 106 Pa. 252.

⁴ Grover v. Boon, 124 Pa. 399.

⁵ Irwin v. Nixon, 11 Pa. 419.

sci. fa. number with relation thereto. If, however, the original number is not given, but the revival number, which refers to the original, the purchaser at sheriff's sale is not affected by the omission.⁶ A prior judgment for the same debt against the executor concludes him also as devisee.⁷

In a case where the widow and heirs were joined with the administrator *c. t. a.* and judgment taken against them, the judgment was not allowed to be attacked in an action of ejectment, because there was no judgment *de bonis*, followed by a *sci. fa.* resulting in a judgment *de terris*. The return of the sheriff showed service on the guardian of the minors.⁸ Upon direct attack on the judgment it might have been declared irregular for the reasons given. A return of *nulla bona* is not a prerequisite to a *venditioni exponas*.⁹ A proceeding to charge the land of a decedent must be commenced within ten years from his death or it will be barred in law.¹⁰

A proceeding on a mechanic's lien does not come within the above section.¹¹

On the trial of the *sci. fa.* to charge land the defendants may make any defense they could have made in the action against the administrator.¹²

Where the widow is one of the administrators it is not sufficient to sustain a judgment unless she be brought in with the heirs as well.¹³

13. Stay of execution until executors, etc., can sell.

Section 35 of the act of 1834, *supra*, provides:

"In every case of an execution against the executors or administrators of a decedent whether founded upon a judgment obtained against such decedent in his lifetime, or upon a judgment obtained against them in their representative character, if it shall be made to appear to the satisfaction of the court issuing such execution, that there is reason to believe that the personal assets are insufficient to pay all just demands upon the estate, such court shall thereupon stay all proceedings upon such execution, until the executors or administrators shall have made application to the proper Orphans' Court for the sale of the real estate of the decedent, or for the apportionment of the assets, or both, as the case may require."

A *lev. fa.* on a mortgage is not within this section.¹ Prior to

⁶ Jones v. Gardiner, 4 Watts, 416; Evans v. Meylert, 19 Pa. 402; Grover v. Boon, 124 Pa. 399; Middleton v. Middleton, 106 Pa. 252.

⁷ Comth. v. Cochran, 146 Pa. 223; Stewart v. Montgomery, 23 Pa. 410.

⁸ Levan v. Millholland, 114 Pa. 49, commenting on the practice stated above as laid down in Atherton v. Atherton, 2 Pa. 112.

⁹ Levan v. Millholland, *supra*.

¹⁰ McMurray v. Hopper, 43 Pa. 468, following Moorehead v. McKinney, 9 Pa. 265; Loomis' Ap., 29 Pa. 237; Corrigan's Est., 82 Pa. 495; Hope v. Marshall, 96 Pa. 395; Phillips v. R. Co., 107 Pa. 480; Allen v. Krips, 119 Pa. 1.

¹¹ Reece v. Haymaker, 164 Pa. 575.

¹² Paul v. Grimm, 183 Pa. 330.

¹³ McCormick v. Skelly, 201 Pa. 184; Roessler's Est., 19 C. C. 161; Walker v. Alexander, 24 C. C. 345.

¹ Dundas v. Leiper, 1 Phila. 569; Linn v. Peters, 2 Pearson, 169; Wallace v. Blair, 1 Grant, 75.

this act the land of decedent could be sold on an execution against the administrator on a judgment against decedent, or an execution tested before his death, and the legal representative could do nothing but pay the judgment.² A sale of the heir's interest passes only what interest he may have after the payment of debts.³ If the personal representative is not warned before the execution issued, no title passes,⁴ the old rule as to the date of the *teste* being annulled by the act of 1834. The policy of the law is to bring the fund into the Orphans' Court where creditors and heirs may have their rights considered and assail the claims of others.⁵

14. Court may order the legal representatives to apply for an order to sell.

Section 36 of the act of 1834, *supra*, provides:

"It shall be competent for the court, in the cases aforesaid, on application of the plaintiff in such judgment, or of any other person interested as heir, devisee, or otherwise, to order the executors or administrators to make application to the Orphans' Court, for the purpose as is herein before mentioned, and to enforce such order by attachment."⁶

A creditor, merely, who has no judgment cannot invoke this order from the Orphans' Court.⁷

15. Omissions or errors in pleading not to affect the question of assets.

Section 37 of the act of 1834, *supra*, provides:

"The omission of an executor or administrator to plead to any action brought against him in his representative character, that he has fully administered the estate of the decedent, or any other matter relative to the assets, shall not be deemed an admission of assets to satisfy the demand made in such action; also the omission of the plaintiff to reply to any such matter when pleaded, shall not be deemed an admission of the want of assets as aforesaid, nor shall such omission otherwise prejudice either party; and no mispleading, or lack of pleading, by executors or administrators, shall make them liable to pay any debt or damages recovered against them, in their representative character, beyond the amount of the assets which in fact have come or may come into their hands."

Unless the statement avers a *devastavit* the pleas of *plene administravit* and no assets are inapplicable and the defendants are not prejudiced by pleading so.⁸ Where the administrators are made garnishees it is error to enter judgment against them *de bonis propriis*, for a legacy, as this is prohibited by above section.⁹ Nor will a rule be granted for judgment on a suit commenced before

² *Meanor v. Hamilton*, 27 Pa. 137.

³ *Horner v. Hasbrouck*, 41 Pa. 169.

⁴ *Cadmus v. Jackson*, 52 Pa. 295.

⁵ *Everman's Ap.*, 67 Pa. 335.

⁶ *Stokes v. Ritter*, 2 Miles, 464.

⁷ *Hutchinson's Est.*, 10 C. C. 592.

⁸ *Sergeant's Ex. v. Ewing*, 30 Pa. 75.

⁹ *Lorenz' Admr. v. King*, 38 Pa. 93.

the death of the party, to be levied *de terris intestatoris* and of assets *quando acciderunt*. The only way to charge the land is by *sci. fa.* to the heirs;¹⁰ after many years of delay it is too late to plead the statute of limitations.¹¹

A mere acknowledgment that the debt is just does not preclude the administrator from pleading the statute of limitations.¹² It is a personal privilege only.¹³

[See Vol. I, Johnson's Practice, Actions at Law.]

16. Suits to abate after one year, if no letters are issued on plaintiff's estate.

Section 1 of the act of May 5, 1854, P. L. 570, provides:

"In suits now pending or hereafter to be brought in the courts of this state, if the plaintiff be dead or shall die during the pendency thereof, and no letters of administration or testamentary have been or shall be taken out in this state within one year after the suggestion of the death of said party upon the record, it shall not be the duty of the defendant to raise an administrator for the purpose of prosecuting the same, but the said suits shall abate and the prothonotary of the proper court shall make an entry accordingly: *Provided*, That the court shall direct a notice to be served on the executors or next of kin of the decedent entitled to administration, one month before such entry shall be made, of which notice affidavit shall be made and filed."

17. Form of notice.

Mark Rex	} In the Court of Common Pleas of Dauphin County.	—Term, 19—.
v.		
James Wall.	} No. —.	

To Ben Rex, next of kin of said Mark Rex:

Sir: Take notice that one year has passed since the death of Mark Rex, plaintiff in above entitled action, and no letters of administration have been taken out upon his estate. You are further notified that after the expiration of month from the service of this notice upon you, the prothonotary of said court will enter the abatement of said suit according to law.

James Wall.

18. Form of affidavit of service.

Dauphin County, ss.

James Wall, being sworn, deposes that he made due service of the within notice upon Ben Rex, oldest son and next of kin of Mark Rex, deceased, by handing him a true copy of the same.

James Wall.

Sworn to, etc.

19. Abatement of actions.

Section 13 of the act of April 9, 1849, P. L. 524, provided that

¹⁰ Knap v. Duncan, 7 W. N. C. 342.

¹¹ Alden's Ap., 93 Pa. 132.

¹² Fritz v. Thomas, 1 Wharton, 66.

¹³ Biddle v. Moore, 3 Pa. 161.

there should be no abatement of action because of the death, resignation or removal of any executor or trustee under a will. Section 5 of the same act provided that there should be no abatement of the action of ejectment to enforce a contract against a vendee who shall die.

Section 18 of the act of April 15, 1851, P. L. 669, provided that an action for damages for injuries to the person by negligence or default should not abate by reason of the death of the plaintiff.

(See Vol. I, Johnson's Practice.)

20. Venue of suits against nonresident legal representatives.

Section 1 of the act of March 27, 1854, P. L. 214, provides:

"In all cases where executors, administrators, assignees or other trustees shall not reside within the jurisdiction of the court having control of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in said estates, in the counties where such accounts are to be settled, and process may be served by the proper officers of said counties or their deputies, on said executors, administrators, assignees or other trustees, beyond the bounds of said counties, as if they resided therein, or upon any surety on their official bonds, with like effect, as if they resided within the jurisdiction of the courts having control of their accounts."

A justice of the peace may gain jurisdiction, thus, of a nonresident executor, by service of the summons on his resident surety.¹⁴ The act applies to process from the Orphans' Court and the Common Pleas.¹⁵ A nonresident administrator who is attending court cannot plead privilege against service, under this act.¹⁶ Such administrator may be served with process by the sheriff of the county in which he resides.¹⁷

21. Form of substitution of executor or administrator on death of plaintiff, either in a pending suit or in a judgment.
Luzerne County.

John Rex } In Common Pleas.
v. }
A. Hewit. } No. —.

November Term, 19—.

The death of the above-named defendant is suggested, and P. Catlin, his administrator, is substituted.

To S. Monroe, Esq.
Prothonotary.

George Smith,
Attorney for Plaintiff.

22. Form of substitution of executor or administrator on death of the defendant in a pending suit.

(Same caption as No. 1.)

The death of the above-named defendant is suggested, and P. Catlin, of the County of —, has been duly appointed his administrator.

¹⁴ McCahan v. Reeder, 25 C. C. 148; Oaks v. Robinson, 1 Yeates, 250.

¹⁵ Byers v. Hay, 9 D. R. 502.

¹⁶ Schroeder v. Reynolds, 17 Lanc. L. R. 300.

¹⁷ Hoke v. Wentz, 13 York, 101.

Issue *scire facias* to the said administrator, to show cause why he shall not be made a party defendant in the above-stated action.

To S. Monroe, Esq.
Prothonotary.

George Smith,
Attorney for Plaintiff.

23. Form of substitution of executor or administrator on death of the defendant in a judgment before issuing an execution.

(Same caption as No. 1.)

The death of the above-named defendant is suggested, and P. Catlin, of the County of —, has been duly appointed his executor.

Issue *scire facias* to the said P. Catlin, to show cause, if any he has, why an execution may not be issued on the above-stated judgment.

To S. Monroe, Esq.
Prothonotary.

George Smith,
Attorney for Plaintiff.

In the form No. 2, substitution is usually made on the præcipe of the defendant's attorney, as in No. 1, or on his motion in court; and in form No. 3, the substitution is usually made on an amicable action of *scire facias*.

24. Form of substitution on death of the plaintiff, where the defendant in the judgment is executor or administrator, and *scire facias*, etc.

Luzerne County.

John Rex } In Common Pleas.
v. }
A. Hewit. } No. —.

November Term, 19—.

The death of the above-named plaintiff is suggested by R. Stone, a legatee under his will (or a creditor, etc.). A. Hewit, the above-named defendant, was appointed by the said testator his executor, and letters testamentary have been duly granted to him.

Issue *scire facias* on above-stated judgment to revive, and continue the lien of the same for the use of the said R. Stone and all other persons interested therein.

To S. Monroe, Esq.,
Prothonotary.

George Smith,
Attorney for Stone.

[The above forms are from Rhone's Orphans' Court, Vol. II, pp. 49, 50.]

CHAPTER XI.

SPECIFIC PERFORMANCE OF CONTRACT OF DECEDENT.

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| 1. Jurisdiction of the Orphans' Court. | 9. Form of citation. |
| 2. Act of 1899 — proceedings and notice. | 10. Form of reference to an auditor. |
| 3. Parol contracts which may be enforced. | 11. Form of approval of report. |
| 4. Requisites of the petition. | 12. Form of decree. |
| 5. Application of the act. | 13. Form on death of joint vendor. |
| 6. Notice of proceeding. | 14. Decree may be recorded. |
| 7. Form of petition on death of vendor. | 15. Duty to execute deed. |
| 8. Form of acceptance of notice by the widow, heirs and vendee. | 16. How deed may be made when executor is purchaser. |
| | 17. Contracts for the sale of real estate held in common. |
| | 18. Form of deed by administrator in pursuance of decree. |

1. Jurisdiction of the Orphans' Court.

Whenever a person dies who has a contract for the purchase of real estate, either in writing or parol, for which the title still remains in the vendor, the 15th section *et seq.* of the act of February 24, 1834, P. L. 70, provided an equitable remedy in the Orphans' Court, which is now superseded by the act of April 28, 1899, P. L. 157, enlarging the scope of the original act so as to embrace in its terms the vendee under articles or by parol. The earlier cases held that the act of 1834 did not oust the jurisdiction of the Common Pleas in a more cumbrous proceeding to probate such contracts and have them recorded as the basis of an action at common law, under the acts of March 31, 1792, 3 Sm. L. 66; March 10, 1818, 7 Sm. L. 79, and February 5, 1821, 7 Sm. L. 355;¹ but regret was expressed by Agnew, J.,² that the jurisdiction of the Common Pleas was not ousted, and in later cases the courts have held that the jurisdiction to declare a specific performance of a contract of a decedent for the sale of real estate is vested exclusively in the Orphans' Court and its decree has a conclusive effect.³ The advantages of the act of 1834 over the prior acts were thus pointed out by Rogers, J.:⁴

"In all cases coming within the provisions of the latter act, the remedy is by bill or petition to the court, setting forth the facts,

¹ Wetherill v. Seitzinger, 9 W. & S. 177; Chess' Ap., 4 Pa. 54; McFarson's Ap., 11 Pa. 503; McKee v. McKee, 14 Pa. 235; P. & L. Dig., vol. 14, col. 24441.

² Musselman's Ap., 65 Pa. 480.

³ Schoonover v. Ralston, 25 Supr. C. 375, citing Cobb v. Burns, 61 Pa. 278; West Hickory Assn. v. Reed, 80 Pa. 38.

⁴ Chess' Ap., 4 Pa. 52.

and after due notice the court has power, if the case be sufficient in equity and no sufficient cause be shown to the contrary, to decree the specific performance of the contract according to its terms, intent and meaning. * * * The Orphans' Court, without the intervention of a jury, have the same power and authority as a court of Chancery, in such cases to decree, and by a necessary implication, to enforce by attachment a specific performance of the contract according to its true intent and meaning. This is a power certainly exercised by a court of Chancery."

2. Act of 1899 — Proceedings and notice.

The first section of the act of April 28, 1899, P. L. 157, slightly varies the language of the first section of the act of 1834, *supra*; and embraces the death of the vendee. It is as follows:

"That where any person shall have, by contract in writing, agreed to sell and convey any real estate in this commonwealth and died seized or possessed thereof, or where any person shall have purchased, in writing, any real estate in this commonwealth and died without paying the purchase money therefor, it shall be lawful in all such cases, for the executor or administrator of the decedent vendor, or for the vendor when the purchaser may have died, or for the purchaser of such real estate, or where he has died, for his executors or administrators, or for any other person interested in such contract, to petition the Orphans' Court having jurisdiction of the accounts of the executor or administrator of the decedent vendor or the decedent purchaser, respectively, setting forth the facts of the case, and after due notice of such petition to the persons interested, according to the nature of the proceeding, to appear in such court on a day certain, and answer the petition; if there be cause such court shall have power, if the facts be sufficient in equity, no sufficient cause being shown to the contrary, to decree specific performance of such contract according to the true intent and meaning thereof."

3. Parol contracts which may be enforced.

Section 16 of the act of February 14, 1834, P. L. 70, provided:

"That the like proceedings may be had in all respects, whenever any parol contract shall have been entered into by any decedent for the conveyance of real estate within this commonwealth of which such decedent shall die seized or possessed, where no sufficient provision for the performance thereof shall have been made by the decedent, in all cases where such parol contract shall have been so far executed that it would be against equity to rescind the same."

This act only met the case of the death of the vendor, and section 4 of the act of April 28, 1899, P. L. 157, provided for a case where the purchaser has died. It is as follows:

"That like proceedings may be had in all respects wherever any parol contract shall have been entered into by any person for the conveyance of real estate within this commonwealth, and the purchaser shall have died without fully executing such contract, or where any person may have made such parol agreement and died seized or possessed of such real estate, and such parol contract may have been so far executed by possession, by improvements or by

partial payments of purchase money, that it would be against equity to rescind the same."

This section extends the remedy to the case of vendee's death, and in favor of the vendor against the heirs and legatees. Whether the contract is taken out of the statute of frauds by part performance is not the only question. In order to obtain relief it must be shown that it would be against equity to rescind it,⁵ and that the party aggrieved could not be compensated in damages.⁶ The requirements are that the vendee shall have gone into possession or occupancy, paid part of the purchase money and improvements and stand ready to pay the balance due.⁷ The precise terms of the contract must be clearly proved;⁸ especially so where the vendee is the son.⁹ Evidence will be sufficient where it is proven that petitioner bought the land, paid for it, took possession and had a deed made to his daughter for part of it, for a nominal consideration.¹⁰

4. Requisites of the petition.

The petition should aver that the petitioner is willing and offers to perform the agreement on his part.^{10a} The parties in interest should be brought into the forum by proper service of notice and the record should show this as well as proof of the contract and all the facts upon which a decree would be justified, including a particular description of the land.^{10b}

An administrator *pendente lite* may petition.¹¹ But one who alleges a parol contract under which no action was taken for three years is not in a position to petition for specific performance.¹² A petition may be amended by inserting in place of the individual name, the name of petitioner as executor and striking out all reference to the contracts which he had made individually with the decedent.¹³ The petition should aver whether the vendor died testate or intestate.^{13a}

5. Application of the act.

These acts cover all contracts of decedent for a valuable consideration.¹⁴ An agreement to devise land is within their scope;¹⁵ but not an executory contract between father and son, where there is evidence that the father was aged and feeble and undue influence

⁵ Fay's Est., 213 Pa. 428, citing Moore v. Small, 19 Pa. 461.

⁶ Derr v. Ackerman, 182 Pa. 591; P. & L. Dig., vol. 14, col. 24456, for earlier cases.

⁷ Simmon's Est., 140 Pa. 567; Baldrige v. George, 216 Pa. 231.

⁸ Sage v. McGuire, 4 W. & S. 228; McFarson's Ap., 11 Pa. 503.

⁹ Shelly's Est., 3 Del. Co. 223; Lee's Ap., 12 W. N. C. 183.

¹⁰ Holt v. McWilliams, 21 Supr. C. 137.

^{10a} Chess' Ap., 4 Pa. 52; Ander's Est., 12 Phila. 28; Parker's Est., 6 D. R. 139.

^{10b} Walsh's Est., 3 Del. Co. 116; Ander's Est., 12 Phila. 28.

¹¹ Logan's Est., 21 C. C. 455.

¹² Keebler's Est., 20 C. C. 428.

¹³ McCracken's Est., 13 Supr. C. 201.

^{13a} Wilson's Est., 7 C. C. 459.

¹⁴ Meanor v. McKowan, 4 W. & S. 302.

¹⁵ Brinker v. Brinker, 7 Pa. 53.

was used.¹⁶ A residuary devisee cannot invoke these acts against the executors.¹⁷ Contracts of a deceased partner in a partnership have been held not subject to this remedy.¹⁸ The land must have been in the seisin of the decedent vendor at his death, under the act of 1834, which facts must be averred and proved.¹⁹ A petition will be refused where it shows default in payments by the petitioner, for three years.²⁰ The Orphans' Court has no jurisdiction where the vendor had parted with the seisin;²¹ nor can it delegate its jurisdiction to the Common Pleas.²² It has no jurisdiction where one received the legal title from the vendor before his death, with notice of the vendee's equity. In such case the remedy is in the Equity side of the Common Pleas, the Orphans' Court not being an Equity court in the proper sense.²³ The "possession" of the vendor meant is actual legal seisin of title and not occupancy, for that is in the vendee under his articles.^{23a}

On petition of the executors, the jurisdiction will not be ousted by an answer that the agreement to sell was a gift in the lifetime of decedent. The Orphans' Court may certify this issue of fact to the Common Pleas for trial. The fact that a deed can be given only after the last installment is paid is immaterial; the executors can make a deed and place it in the hands of the donee in escrow to be delivered to vendee when the last installment is paid.²⁴

6. Notice of proceeding.

The act of 1899, *supra*, requires due notice to be given to the parties interested to appear on a day certain and answer. The rule or citation should have the time fixed in the order of the court awarding it.

Under the old law it was held that without notice of the petition to the heirs the proceedings will be void;²⁵ and if the bill be brought by the purchaser, he must make the heirs and devisees parties.²⁶

But where the administrator brings the bill, no specific notice to the widow and heirs is required, as the proceeds of the sale will be considered personalty as in the case of an order to sell for the payments of debts.²⁷ Where both the vendor and vendee are dead all the persons interested must have notice.²⁸

When a decree has been made on such petition, the only method

¹⁶ Brady's Ap., 66 Pa. 277; Hagerty's Case, 4 Watts, 307; Moore v. Small, 19 Pa. 468.

¹⁷ Lowry v. Lowry, 10 Phila. 105.

¹⁸ Wiley's Ex.'s Ap., 84 Pa. 270.

¹⁹ White v. Patterson, 27 W. N. C. 527.

²⁰ Foster's Est., 6 C. C. 223.

²¹ Brown v. Bailey, 159 Pa. 121.

²² Cobb's Ex. v. Burns, 61 Pa. 278.

²³ White v. Patterson, 139 Pa. 429.

^{23a} Witchey v. Noyes, 17 D. R. 612. (See Dravo v. Carpenter, 17 D. R. 344.)

²⁴ Huggin's Est., 204 Pa. 167.

²⁵ McKee v. McKee, 14 Pa. 231.

²⁶ Hoffner v. Wynkoop, 97 Pa. 130.

²⁷ West, Etc., Assn. v. Reed, 80 Pa. 38.

²⁸ Anshutz' Ap., 34 Pa. 375.

of reviewing it is by a bill of review and not by a bill in Equity.²⁹

7. Form of petition.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne.

The petition of John Adams, administrator of the estate of James Adams, late of the city of Wilkesbarre, deceased, respectfully represents:

1st. That the said James Adams died at the said city of Wilkesbarre (of which he was a resident), on the — day of —, A. D. 19—, intestate, and that letters of administration upon his estate have been duly issued to your petitioner.

2d. That the said decedent left surviving him a widow and the following children and grandchildren (naming all of them).

3d. That the said decedent in his lifetime, to-wit, on the — day of —, A. D. 19—, was seized in fee of a certain lot of land, situate in the said city of —, County of —, bounded and described as follows:

(Here give a description of the real estate.)

And being so thereof seized did, by article of agreement in writing bearing that date (a copy of which is hereunto attached, and the original whereof is to the court herewith produced and shown), agree to sell and convey the said messuage and lot of land unto Henry James, of the said city, in fee simple, for the sum of nine thousand dollars; which sum the said Henry James did thereby agree and covenant to pay in manner as aforesaid:

(Here state the dates and amounts of payments.)

together with interest on all sums unpaid, payable with each installment of principal.

4th. That the said Henry James thereupon entered into possession of the premises, and held, and still holds the same, and has paid all the purchase-money aforesaid, except the installment which became due on the — day of —, and that there is therefore due and unpaid upon said contract, the sum of three thousand dollars, with interest thereon, from the — day of —, A. D. —.

5th. That the said decedent, James Adams, died as aforesaid intestate, and without having made any sufficient provision for the performance of the said contract on his part.

Your petitioner therefore, being willing and desirous that the said contract be complied with on the part of the said decedent, prays your Honor:

1st. To order and decree the specific performance of the said contract according to the true intent and meaning thereof.

2d. To order and decree that the said Henry James pay to your petitioner, as administrator aforesaid, the said sum of three thousand dollars, with interest thereon, from the — day of —, A. D. —, being the balance of purchase-money due and unpaid upon the said contract as aforesaid.

3d. That upon the payment of the said moneys in full, or securing the payment of the same, your Honor will direct the execution

²⁹ Weyand v. Weller, 39 Pa. 443.

by the petitioner to the said Henry James, of such deed as shall be in conformity with the intention of the said contract, and in accordance with the provisions of the 15th and following sections of the act of 24th February, 1834, and its supplements. And he will ever pray, etc.

(Affidavit of truth.)

(Append copy of agreement.)

John Adams,
Administrator.

NOTE.—If all the parties interested join in the petition and admit the facts a decree may be made at once.

8. Acceptance of notice by the widow, heirs, and vendee.

We, the undersigned, being all the heirs and legal representatives of the said James Adams, deceased, with the vendee aforesaid, do hereby severally accept notice of the presentation and filing of the foregoing petition, and do waive all other or further notice, and do say that the facts set forth in the petition are true to the best of our knowledge and belief, and pray that a decree of specific performance be decreed by the court as prayed for by the administrator.

Mary Adams, widow,
Edward Adams, son,
John Lake, guardian of
Maud Adams and
James Adams,
Henry James, purchaser.

If no acceptance of notice, etc., be filed, indorse on petition:

Now, — day of —, A. D. 19—, citation awarded to Henry James.

Returnable — day of next term, at — o'clock.

By the Court.

9. Form of citation.

Estate of James Adams, } In the Orphans' Court of the County of
Deceased. } Luzerne.

In re petition of John Adams, administrator of James Adams, deceased, for specific performance of contract with Henry James.

(Here set out copy of petition.)

— County, ss.

The Commonwealth of Pennsylvania,

To Henry James.

We command you, that, laying aside all business and excuses, you be and appear in your proper person before our judge of the Orphans' Court, to be holden at Wilkesbarre, in and for the county of Luzerne, on —, the — day of —, A. D. 19—, to answer said bill or petition exhibited in our said court, and to do further and receive what our said court shall decree in that behalf. Hereof fail not under penalty of the law.

Witness the Honorable —, Judge of our said court, at Wilkesbarre, this — day of —, A. D. 19—.

A. B.—,
Clerk Orphans' Court.

[Then follows the answer and replication, if any objections are to be made.]

10. Form of reference to an auditor.

In re Estate of James Adams, Deceased. } *Sur* administrator's petition for specific performance of decedent's contract for the sale of certain real estate.

Now, — day of —, A. D. 19—, it appearing to the court that the citation heretofore issued has been duly returned "served," and that the respondent has not appeared in response thereto, nor filed an answer to the said petition (or having made answer, etc., as the case may be), it is ordered and decreed that the matter of said petition be referred to — —, as auditor, to take testimony and report the facts and the law of the case.

By the Court.

On filing auditor's report indorse thereon:

Now, — day of —, A. D. 19—, confirmed *nisi*.

By the Court.

11. Approval of report.

Also thereafter indorse thereon:

Now, — day of —, A. D. 19—, after due consideration of the within report and the evidence submitted, and no sufficient cause being shown to the contrary, we do adjudge the facts to be sufficient in equity, and do order and decree the specific performance of the said contract according to the true intent and meaning thereof. Counsel to submit formal decree.

By the Court.

12. Form of decree.

Estate of James Adams, Deceased. } In Orphans' Court of — County.

In the matter of proceedings for specific performance of contract.

Now, — day of —, A. D. 19—, on the coming in of the auditor's report, and the confirmation of the same, absolutely, and upon motion of counsel for the petitioner, and after due consideration, the court order and direct that the said administrator execute and tender to the said Henry James, a deed in fee simple for the said real estate, so as aforesaid contracted by the said decedent to be sold, and described in the petition, aforesaid, to the said Henry James. And upon the execution and tender of said deed, it is ordered and decreed that the said Henry James shall pay to the said administrator as aforesaid the balance of the purchase-money due and payable by him, the said Henry James, under the said contract of sale, being the sum of three thousand dollars, with interest from the — day of —, A. D. —, and all costs of this proceeding.

By the Court.

NOTE.—The proceedings by a vendee are substantially the same as the foregoing, except that the citation issues to the executors or administrators of the decedent, and to his heirs or legatees.

The proceeding on a parol contract is also substantially the same as above, but see the Act of Assembly for certain specific allegations to be made in the petition.

13. Proceedings for proof of contract, etc., on the death of one of several joint vendors.

To the Honorable, etc.

The petition of P. Catlin, administrator of A. Hewit, late of said county of —, deceased, respectfully represents: That said decedent died intestate on the — day of —, 19—, leaving to survive him a widow, Mary Hewit, and three children, viz., John, Samuel, and Susan, all of whom are of full age.

That said decedent, in his lifetime, was joint owner with R. Stone, of a certain lot of land, situate, etc. [here give description], and on the — day of —, 19—, with said R. Stone, entered into a contract in writing with Henry James, for the sale to him of said land on the following terms, to-wit: [Here give terms.]

That said purchaser is now in possession of the premises, and has made valuable improvements thereon, so that it would be unjust to rescind the same, but still owes on said contract the sum of — dollars, with interest from —, and is desirous of paying the same, one-half of which is due the estate of the said decedent, and the other half to said R. Stone, and that he has made tender thereof.

That the said decedent died without having made any provision for the perfecting of the title of the said purchaser, and that the said R. Stone, being joint owner, is desirous of completing said contract, by making a deed to the purchaser, and accepting the said balance of purchase-money.

That your petitioner being satisfied that the purchaser has complied with his part of the said contract, except as to the payment of the balance of purchase-money as aforesaid, is desirous of making a deed to the purchaser, and, therefore, now presents to the court a bond in the sum of — dollars, with —, and — as sureties conditioned for the faithful application according to law, of the purchase-money to be received by him, which he prays may be approved by the court, and filed as provided by the 1st section of the act of 8th February, 1848, and he will ever pray, etc.

P. Catlin,
Administrator.

(Affidavit of truth.)

Indorse on the petition:

Now, — day of —, 19—, rule is granted on the widow and heirs herein named, to show cause why the bond, as presented, shall not be approved and filed as prayed for.

Returnable on the — day of —, 19—.

By the Court.

If no objections be made indorse on bond:

Now, — the within bond and sureties approved and ordered filed, and specific performance is decreed as provided by act of 8th February, 1848.

By the Court.

The foregoing forms are adapted from Vol. II, Rhone's Orphans' Court.

14. Decree may be recorded.

Section 2 of the act of 1899 follows section 17 of the act of 1834, *supra*:

"The order or decree of the Orphans' Court for the specific performance of any such contract, in the cases hereinbefore mentioned, being certified by the clerk of such court under the seal thereof, may be recorded in the office for recording deeds in the county where such real estate is situate, in like manner as deeds are recorded, and with the same effect."

15. Duty of vendor, executor, etc., to execute deed.

Section 3 of the act of 1899, *supra*, provides:

"When such order or decree for the specific performance of any such contract shall have been made, and the purchase money paid or secured to be paid according to the terms of such contract, it shall be the duty of the vendor, or where deceased, of his executors or administrators, to execute such deeds of conveyance as shall be directed by the court in conformity, with the intention of such contract, and the same, being so made by such executors or administrators shall have the same force and effect to pass and vest the estate intended as if the same had been executed by the decedent in his lifetime."

This amends section 18 of the act of 1834, so as to embrace the vendor, where the vendee is dead.

Accepting a conveyance from administrators pursuant to a decree, is a waiver of the right to take the land free from the widow's dower.³⁰

Where one sells land on articles and does not part with the legal title, and then dies, the money due on the contract converts into personalty—and when all the land of the decedent is sold the purchaser takes it subject to the trust imposed upon it and the right of the vendee to have a title enforced in equity under this act. Said Coulter, J.:³¹

"The doctrine of conversion is favored rather than restrained by modern decisions, because it carries into effect the intent and the contract of the parties, and disencumbers real estate from some of the useless clogs imposed upon its alienation by the strict rules of the common law: and it is a result and consequence of the pervading principle in chancery, that what a party has contracted to do, equity will consider as done."

So, when the administrator petitions specific notice to the widow and heirs has been held not to be requisite, under the act of 1834.³² But the act of 1899 *supra*, provides for due notice. See *supra*. It was held that proceedings in the Common Pleas will not divest the widow's right of dower.³³

16. How deed to be made where executor is purchaser.

Section 2, of April 9, 1849, P. L. 511, provides, that where the party to whom the deed is to be made is executor or administrator it shall be made by the co-executor or co-administrator if there be one, and if there be none, then the deed shall be executed by

³⁰ Shurtz v. Thomas, 8 Pa. 359. (See Drenkle's Est., 3 Pa. 377.)

³¹ Fisher v. Harris, 10 Pa. 457.

³² West, Etc., Assn. v. Reed, 80 Pa. 38.

³³ Riddlesberger v. Mentzer, 7 Watts, 141; Covert v. Hertzog, 4 Pa. 145.

the sheriff, in compliance with the decree of the court, and shall be delivered by the sheriff to the grantee therein named, upon such terms as the court shall see fit to require from the grantee, as executor or administrator of the decedent, for securing the faithful appropriation of the unpaid purchase money."

17. Contracts for the sale of real estate held in common.

Section 1 of the act of February 8, 1848, P. L. 27, provides:

"In all cases where contracts, either in writing or by parol, to sell any lands and tenements within this commonwealth, owned by two or more persons in common, and where such parol contracts shall have been so far in part executed as to render it unjust to rescind the same, have been heretofore made or shall hereafter be made, by such owners, or either of them, by and with the consent of the other or others, with any person or persons whomsoever, and when one of the said vendors shall have died without having made provision by will or otherwise for the perfecting of the title of the purchaser or purchasers, on a performance by him, her or them, of the terms of such contract, and where the surviving vendor or vendors may be desirous to perfect such title, it shall be lawful for the executors or administrators of such decedents, being satisfied with the performance by such purchaser or purchasers, of his, her or their stipulations in such contract, to execute and deliver to such purchaser or purchasers a deed or deeds, with clause of special warranty for his decedent's share of such lands and tenements; which deed, so as aforesaid executed and delivered, shall as effectually vest in such purchaser or purchasers the title of the decedent, as if the same was executed and delivered by such decedent in his lifetime: *Provided*, That the executors or administrators of such decedent shall be chargeable with so much of their decedent's share of the purchase money as shall not have been paid to him during his life: *And provided also*, That before receiving any portion of the said purchase money, the executors or administrators of such decedent shall give bond, with security, to be approved by a judge of the proper county, for a faithful application according to law, of all moneys that may be received by him, under or by virtue of the provisions of this act, which bond shall be filed in the Orphans' Court of the proper county."

18. Form of deed by an administrator after decree of specific performance of contract.

This indenture, made the — day of —, in the year of our Lord one thousand nine hundred and —, between John Adams, of the city of Wilkesbarre, in the County of Luzerne and State of Pennsylvania, administrator of all and singular the goods and chattels, rights and credits which were of James Adams, late of the city of Wilkesbarre aforesaid, deceased, of the one part, and Henry James, of —, of the other part.

Whereas, the said James Adams, by force and virtue of divers good conveyances and assurances became in his lifetime lawfully seized of and in a certain messuage or lot of land situate in said city of —, on Main Street, more fully hereinafter described, and being so thereof seized, did on the — day of —, A.D.

19—, enter into a written contract with one Henry James for the sale of the same for the sum of nine thousand five hundred dollars lawful money of the United States, a part of which sum was paid to the said James Adams in his lifetime and part to John Adams, aforesaid, his administrator, since his decease.

And, whereas, the said James Adams did not comply with the said contract during his lifetime, nor was there any sufficient provision made for the performance of the same; and, whereas, agreeably to the act of General Assembly, in such case made and provided, to enable executors or administrators by leave of court to convey lands and tenements as contracted to be sold by the decedent, the said John Adams did, on the — day of —, A.D. 19—, as administrator as aforesaid present his petition to the Orphans' Court of the said county, praying that the said lot or piece of land should be by him conveyed to the said Henry James, according to the true intent and meaning of the said contract, whereupon the said court, on the — day of —, A.D. 19—, having considered the prayer of the said petition and the evidence of the contract aforesaid, ordered and decreed that the said John Adams, administrator aforesaid, should make, execute, and deliver unto the said Henry James, his heirs and assigns, a good and sufficient deed in fee simple for the said land hereinafter described, according to the true intent and meaning of the said contract, as by the records of the said court reference being thereunto had more fully and at large appears.

Now this indenture witnesseth that the said John Adams, for and in consideration of the sum of three thousand four hundred dollars, lawful money of the United States, to him in hand paid by the said Henry James, in full of the balance of the purchase-money, with interest due on the said contract, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth, by virtue and in pursuance of the said decree and by force of any and every power and authority him thereunto enabling, grant, bargain, sell, alien, release, and confirm unto the said Henry James, his heirs and assigns, all that aforesaid lot, piece, or parcel of land, situate in the city of Wilkesbarre aforesaid, and bounded and described as follows, to-wit: (here give a description of the real estate.)

Together with all and singular, etc. (as in common deeds), and also all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever of the said James Adams at and immediately before the time of his decease, in law, equity, or otherwise howsoever, of, in, to, or out of the same.

To have and to hold, etc. (as in common deeds).

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

Sealed and delivered in
presence of

} John Adams, [Seal.]
Administrator of James Adams,
deceased.

[This form complies with the requirements of the law as it was prior to the new form of warranty deed prescribed by the legislature. Where the new form of deed is used, the above may be adjusted to it.]

CHAPTER XII.

THE COLLATERAL INHERITANCE TAX.

1. Parties liable or exempt.
2. Executors, when to pay on bequests.
3. When tax is due on reversionary interests.
4. Discount and interest.
5. Duty of executors to collect.
6. Tax on legacy, limited, contingent or conditional.
7. Tax when legacy is charged on land.
8. Executors, etc., to notify register.
9. Executor's receipts — duty of auditor general.
10. Foreign executors to pay on stocks or loans assigned.
11. Portion to be repaid when legatees must refund.
12. Appraiser — duties — appeal.
13. Form of appointment of appraiser.
14. Form of inventory and appraisement.
15. Penalty on appraiser for taking fee or reward.
16. Appraiser's return to be recorded, etc.
17. Citation to parties in default, etc.
18. Compensation of register.
19. Register's bond to the commonwealth.
20. County treasurer to collect, when.
21. Register's quarterly returns.
22. Tax a lien — limitation.

I. Collateral tax — Parties exempt or liable.

Section 1 of the act of April 22, 1905, P. L. 258, amending section 1 of the act of May 6, 1887, P. L. 79, provides:

"That all estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of this state, and all such estates situated in another state, territory or country, when the person or persons dying seized thereof shall have their domicile within this commonwealth, passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this state, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain or sale, made or intended to take effect, in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, children of a former husband or wife, or the wife or widow of the son of the person dying seized or possessed thereof, shall be and they are hereby made, subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates, and at and after the same rate for any less amount, to be paid to the use of the commonwealth; and all owners of such estates, and all executors and administrators and their sureties, shall only be discharged from liability for the amount of such taxes or duties, the settlement of

ADOPTED CHILDREN EXEMPT FROM COLLATERAL INHERITANCE TAX

No. 105

Approved—The 5th day of May, A. D. 1911.

AN ACT

Providing that estates passing from an adopting parent to a legally adopted child, or children, shall not be subject to the collateral inheritance tax.

Collateral inheritance tax. Section 1. Be it enacted, &c., That all estates, real, personal and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State; and all such estates situated in another State, territory, or country, when the person or persons dying seized thereof shall have their domicile within this Commonwealth; passing from any adopting parent, who may die seized or possessed of such estates, either by will or under the intestate laws of this State, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain, or sale, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to or for the use of any legally adopted child or any legally adopted children—shall not be subject to the collateral inheritance tax of five dollars on every hundred dollars of the clear value of such estate or estates, to the use of the Commonwealth.

Repeal. Section 2. All acts and parts of acts inconsistent herewith be and the same are hereby repealed.

INSERT, P. 199, VOL. 3.

which they may be charged with, by having paid the same over, for the use aforesaid, as hereinafter directed: *Provided*, That no estate which may be valued at a less sum than two hundred and fifty dollars shall be subject to the duty or tax."

The children of a former husband deceased, come within the exempt classes.¹ Where the tenant in remainder, after a life estate is a collateral heir he must pay the tax on the entire estate less the debts remaining after the personalty is exhausted.² This is a direct tax upon the estate within the jurisdiction, but it does not reach beyond the state.³ Where a child has been adopted but not legitimated under an act of assembly, the tax is payable by such adopted person.⁴ The amount of the tax is to be ascertained not by the amount of the legacy but by the clear value of the estate passing collaterally.⁵ A partnership interest passing collaterally, though the deceased was a nonresident, is liable to the tax, to its full value notwithstanding the legatees paid the widow a share in lieu of what she was given by the will.⁶ The time of valuation of the estate is as of the death of the decedent, unless postponed by a life estate to one exempt.⁷ Where a nonresident owned real estate in Pennsylvania and directed it to be sold and the proceeds to be distributed collaterally, the fund was held not liable to the tax.⁸

A testator who resides in Pennsylvania and owns real estate in Missouri, directing the land to be sold and the proceeds to be paid to resident collateral heirs, thereby makes them liable to the tax. The will in such case works a conversion and the personal property becomes subject to the jurisdiction of this state.⁹ Property claimed by and surrendered to persons adversely to the estate is not subject to the tax.¹⁰ This tax is not such a tax as is meant by the constitution and laws exempting purely public charities. It is a diminution of the amount passing, levied upon the right to succession, and legacies to charities are subject to the claim.¹¹ So subtle is the hook of the sovereign that it will even catch an inheritance in the dead hands of the second collateral by constructive possession, where the original passed from a decedent in another

¹ Lloyd's Est., 15 D. R. 932; Comth. v. Randall, 225 Pa. 197.

² Commonwealth's Ap., 127 Pa. 435.

³ Bittinger's Est., 129 Pa. 338.

⁴ Comth v. Ferguson, 137 Pa. 595; Province's Est., 4 D. R. 591. But illegitimates which have been legitimated are not liable. Comth. v. Gilkeson, 24 C. C. 289; Gilmore's Est., 14 Pitts. L. J. (N. S.) 113. But see act May 5, 1911, exempting adopted children.

⁵ Howell's Est., 147 Pa. 164; Comth. v. Boyle, 2 Del. Co. 335; Mixer's Est., 28 W. N. C. 182. (See comments of Judge Penrose, Leg. Int. January 15, 1892; Howell's Est., 10 C. C. 232.)

⁶ Small's Est., 151 Pa. 1.

⁷ Line's Est., 155 Pa. 378.

⁸ Coleman's Est., 159 Pa. 231 (*quære* — see Small's Est., *supra*), citing Miller v. Comth., 111 Pa. 321; Drayton's Ap., 61 Pa. 172; Orcutt's Ap., 97 Pa. 179.

⁹ Williamson's Est., 153 Pa. 508; 143 Pa. 150; Miller v. Comth., 111 Pa. 321. (See also Hale's Est., 161 Pa. 181.)

¹⁰ Kerr's Est., 159 Pa. 512.

¹¹ Finnen's Est., 196 Pa. 72; Strode v. Comth., 52 Pa. 181; Long's Est., 22 Supr. C. 370.

state to one living in this state, who soon after died, before actual possession was taken.¹² Where a testator directs his executors to give a nephew the use of a farm for ten years and then to give him a deed for it the tax becomes due immediately.¹³ A life insurance policy appearing among the assets of an account, will be presumed by the appellate court, to have been payable to the legal representative in the absence of evidence to the contrary, and liable to the tax.¹⁴

Where a nonresident creates a trust in Pennsylvania securities, to enjoy the income to herself for life and, after her death, the corpus to collaterals, the estate is liable to the tax.¹⁵ A fund left for the care of testator's cemetery lot and tombstone is not subject to this tax.¹⁶ The *situs* of personalty liable to the tax is determined by the domicile of decedent when he died.¹⁷ Lands conveyed by a decedent by deed absolute, in his lifetime, without consideration, to a collateral, are subject to the tax the same as if willed.¹⁸ Debts due a decedent from parties in another state are subject to collateral tax, though secured by mortgages on lands in those states.¹⁹

2. Executors, when to pay on bequests.

Section 2 of the act of 1887, provides:

"Where a testator appoints or names one or more executors and makes a bequest or devise of property to them, in lieu of their commissions or allowances, or appoints them his residuary legatees and said bequests, devises or residuary legacies, exceed what would be a fair compensation for their services, such excess shall be subject to the payment of the collateral inheritance tax; the rate of compensation to be fixed by the proper courts having jurisdiction in the case."

3. When tax is due on reversionary interests.

Section 3 of the same act provides:

"In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers, liable to the collateral inheritance tax, to take effect in possession, or come into actual enjoyment after the expiration of one or more life estates, or a period of years, the tax on such estate shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate, by the termination of the estates for life or years, and the tax shall be assessed upon the value of the estate at the time the right of

¹² Milliken's Est., 206 Pa. 149; Norris' Ap., 64 Pa. 275, on constructive possession.

¹³ Dalrymple's Est., 215 Pa. 367.

¹⁴ Murphy's Est., 21 Supr. C. 384.

¹⁵ Singer v. Guarantee, Etc., Co., 24 Supr. C. 270, following Lewis' Est., 203 Pa. 211; and Small's Est., 151 Pa. 1, distinguishing Orcutt's Ap. and Lines' Est., *supra*.

¹⁶ Middleton's Est., 13 D. R. 811.

¹⁷ Jacob's Est., 15 D. R. 327.

¹⁸ Meyer's Est., 16 D. R. 284.

¹⁹ Stanton's Est., 15 C. C. 17. Penrose, J.

possession accrues to the owner as aforesaid: *Provided*, That the owner shall have the right to pay the tax at any time prior to his coming into possession, and, in such cases, the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years: *And provided further*, That the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. And the owner of any personal estate shall make a full return of the same to the register of wills of the proper county within one year from the death of the decedent, and within that time enter into security for the payment of the tax to the satisfaction of such register; and in case of failure so to do, the tax shall be immediately payable and collectible."

"Owner" means the remainderman and not the executor; the beneficiary is the one liable for the tax²⁰ and he does not become liable until his estate accrues after the termination of the life trust estate, nor can security be required.²¹ Where the will authorizes the trustees to deduct "all necessary expenses," this includes the tax on the estate passing collaterally.²² If the executor pays the taxes, the remainderman cannot afterwards be charged more for the increase of value.²³

4. Discount and interest.

Section 4 of the act, *supra*, provides:

"If the collateral inheritance tax shall be paid within three months after the death of the decedent, a discount of five per centum shall be made and allowed; and if the said tax is not paid at the end of one year from the death of the decedent, interest shall then be charged at the rate of twelve per centum per annum, on such tax; but where from claims made upon the estate, litigation or other unavoidable cause of delay, the estate of any decedent or a part thereof cannot be settled up at the end of the year from his or her decease, six per centum per annum shall be charged upon the collateral inheritance tax arising from the unsettled part thereof, from the end of such year until there is default: *Provided further*, that where real or personal estate withheld by reason of litigation or other cause of delay in manner aforesaid from the parties entitled thereto, subject to said tax has not been, or shall not be productive to the extent of six per centum per annum, they shall not be compelled to pay a greater amount as interest to the commonwealth than they may have realized, or shall realize from such estate during the time the same has been or shall be withheld as aforesaid."

This section does not repeal the provision of the act of May 4, 1855, P. L. 425, in cases where by unavoidable delay the estate is relieved from paying twelve per cent., but shall pay six per cent. interest from one year after the death of the decedent, until

²⁰ Coxe's Est., 181 Pa. 369.

²¹ Coxe's Est., 193 Pa. 100.

²² Brown's Est., 208 Pa. 161. (See Habecker's Est., No. 3, 43 Supr. C. 91, on the meaning of "taxes" in a will.)

²³ De Borbon's Est., 211 Pa. 623.

the cause of delay ceases, when the penalty will be twelve per cent. Estoppel does not apply to the commonwealth.²⁴

5. Duty of executors to deduct and collect.

Section 5 of the same act, *supra*, provides:

"The executor, or administrator or other trustee, paying any legacy or share in the distribution of any estate, subject to the collateral inheritance tax, shall deduct therefrom at the rate of five dollars in every hundred dollars, upon the whole legacy or sum paid; or if not money, he shall demand payment of a sum, to be computed at the same rate, upon the appraised value thereof, for the use of the commonwealth; and no executor or administrator shall be compelled to pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed, as is or may be directed by law; and every sum of money retained by any executor or administrator, or paid into his hands on account of any legacy or distributive share, for the use of the commonwealth, shall be paid by him without delay."

6. Tax on legacy limited, contingent or conditional.

Section 6:

"If the legacy subject to collateral inheritance tax be given to any person for life, or for a term of years, or for any other limited period, upon a condition or contingency, if the same be money, the tax thereon shall be retained upon the whole amount; but if not money, application shall be made to the Orphans' Court having jurisdiction of the accounts of the executors or administrators to make apportionment, if the case requires it of the sum to be paid by such legatees and for such further order relative thereto as equity shall require."

Where a tax is due upon an annuity and no intention is apparent in the will to distinguish it from bequests of round sums of money, the tax is payable out of the residuary estate.²⁵ The above section does not authorize the appointment of an auditor to apportion the estate where an absolute property is given, and the costs will be charged on the collaterals.²⁶

7. Tax when legacy is charged on the land.

Section 7:

"Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee before paying the same, shall deduct therefrom at the rate aforesaid, and pay the amount so deducted

²⁴ Commonwealth's Ap., 128 Pa. 603; Comth's Ap., 34 Pa. 204; Comth. v. Smith, 20 Pa. 100; Reish v. Comth., 106 Pa. 521.

²⁵ Lea's Est., 194 Pa. 525. This was decided before the act of 1905.

²⁶ Burkhardt's Est., 25 Supr. C. 514.

to the executor; and the same shall remain a charge upon such real estate until paid, and the payment thereof shall be enforced by the decree of the Orphans' Court, in the same manner as the payment of such legacy may be enforced."

If the residuary legatee elects to pay out of the rents accrued after the testator's death, a pecuniary legacy charged on the land, it becomes subject to the collateral tax.²⁷

8. Executors, etc., to notify register.

Section 8:

"Whenever any real estate of which any decedent may die seised shall be subject to the collateral inheritance tax, it shall be the duty of executors and administrators to give information thereof to the register of the county, where administration has been granted, within six months after they undertake the execution of their respective duties, or if the fact be not known to them within that period, within one month after the same shall have come to their knowledge; and it shall be the duty of the owners of such estate, immediately upon the vesting of the estate, to give information thereof to the register having jurisdiction of the granting of administration."

Where an executor fails to give notice to the register of an estate, passing collaterally, and the appraiser omits such property, a second appraisement may be ordered, which will be sustained on appeal.²⁸

Section 1, rule 6, Allegheny County, (D. R. C., 149), provides:

"Whenever an administrator, executor, devisee or heir of any decedent who shall die seized of real estate subject to collateral inheritance tax, shall neglect to comply with the provisions of the eighth section of the act of May 6, 1887, relating to collateral inheritance tax, the clerk shall upon petition filed by the register, verified by affidavit averring such fact, issue citation directed to such administrator, executor, devisee or heir, returnable not less than two weeks thereafter, to show cause why they have not filed a statement and description of the real estate of which said decedent died seized, and if such citation is not served, the clerk to issue alias and pluries citations until service is had."

9. Executors' receipts — Duty of auditor-general.

Section 9:

"It shall be the duty of any executor or administrator, on the payment of collateral inheritance tax, to take duplicate receipts from the register, one of which shall be forwarded forthwith to the Auditor General, whose duty it shall be to charge the register receiving the money with the amount, and seal with the seal of his office, and countersign the receipt and transmit it to the executor or administrator, whereupon it shall be a proper voucher in the settlement of the estate; but in no event shall an executor or administrator be entitled to a credit in his account by the register, unless the receipt is so sealed and countersigned by the Auditor General."

²⁷ Clarke's Est., 28 C. C. 270.

²⁸ Meyer's Est., 16 D. R. 284.

10. Foreign executors to pay tax on stocks or loans assigned.**Section 10:**

"Whenever any foreign executor, or administrator, or trustee shall assign or transfer any stocks or loans in this commonwealth, standing in the name of the decedent, or in trust for a decedent, which shall be liable for the collateral inheritance tax, such tax shall be paid, on the transfer thereof, to the register of the county where such transfer is made; otherwise the corporation permitting such transfer shall become liable to pay such tax."

Choses in action belonging to nonresidents are not subject to the tax.²⁹

11. Portion to be repaid when legatees must refund.**Section 11:**

"Whenever debts shall be proven against the estate of a decedent, after distribution of legacies from which the collateral inheritance tax has been deducted, in compliance with this act, and the legatee is required to refund any portion of a legacy, a proportion of the said tax shall be repaid to him by the executor or administrator, if the said tax has not been paid into the state or county treasury, or by the county treasurer, if it has been so paid."

12. Appraiser to be appointed — Duties — Appeal.**Section 12:**

"It shall be the duty of the register of wills of the county in which letters testamentary or of administration are granted, to appoint an appraiser, as often as and whenever occasion may require, to fix the valuation of estates, which are or shall be subject to collateral inheritance tax; and it shall be the duty of such appraiser to make a fair and conscionable appraisement of such estates; and it shall further be the duty of such appraiser to assess and fix the cash value of all annuities and life estates growing out of said estates, upon which annuities and life estates the collateral inheritance tax shall be immediately payable out of the estate at the rate of such valuation: *Provided*, That any person or persons, not satisfied with said appraisement, shall have the right to appeal, within thirty days, to the Orphans' Court of the proper county or city on paying or giving security to pay all costs, together with whatever tax shall be fixed by said court; and, upon such appeal, said courts shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme Court as in other cases."

Such appraiser must be appointed by the register of the county in which the decedent died domiciled or in which is the principal part of his estate. His domicile is where he voted, paid his personal tax and died, although he had a bonanza farm in North Dakota, where he spent much of his time.³⁰

²⁹ Del Busto's Est., 6 C. C. 289.

³⁰ Dalrymple's Est., 215 Pa. 367.

13. Form of appointment of appraiser.

In the estate of — —, late of —, in the county of —, deceased.

— County, ss.

—, register of wills in and for said county, to —, greeting:

You are hereby appointed appraiser of the estate of —, late of the —, in said county, deceased, and are required, after having been duly sworn or affirmed, to put a fair valuation upon the real estate of said decedent, to make a fair and conscionable appraisement of his personal estate, and to assess and fix the cash value at the time of making said appraisement of all annuities and life estates growing out of said estate, as provided by the twelfth section of the act of 6th May, 1887, and its supplements.

Witness my hand and seal of said register's office, at Wilkesbarre, this — day of —, A. D. 19—.

—, Register.

— County, ss.

The above-named appraiser, appointed by —, register of wills in and for said county, being duly — according to law, doth depose and say, that he will put a fair valuation on the real estate of —, late of the —, — County, deceased, and make a fair and conscionable appraisement of the personal estate of said decedent, assess and fix the present cash value of all annuities and life estate growing out of said estate, and that he will well and truly, and without prejudice or partiality, in all respects perform his duty as appraiser to the best of his skill and judgment.

— and subscribed before me }
the — day of —, A. D. 19—.

—,
—.

14. Form of inventory and appraisement.

Valuation of the real estate of —, late of —, in the county of —, deceased, and inventory and appraisement of the personal estate, goods, chattels, and effects of said decedent, and assessment of the cash value of all annuities and life estates growing out of said estate, taken by me this — day of —, A. D. 19—. (Here follows inventory, etc.)

I certify that the foregoing is a correct, just, and true inventory and valuation of all the estate of —, deceased, subject to the collateral inheritance tax of this commonwealth, so far as any has come to my knowledge.

Sworn and subscribed.

1st November, 1910.

—, Appraiser.

NOTE.—The appraiser should notify the executor or administrator and the heirs of his appointment, and consult with them in making the appraisement.

Where there is only personal estate, the register may cite the personal representatives of the estate to file an account and collect

the tax out of the fund on distribution. Obedience to such citation is to be enforced by the Orphans' Court.

[Rhone's Orphans' Court, Vol. II, p. 109.]

15. Penalty on appraiser for taking fee or reward.

Section 13:

"It shall be a misdemeanor in any appraiser, appointed by the register to make any appraisement in behalf of the commonwealth, to take any fee or reward from any executor or administrator, legatee, next of kin, or heir of any decedent; and for any such offense the register shall dismiss him from such service, and, upon conviction in the Quarter Sessions, he shall be fined not exceeding five hundred dollars, and imprisoned not exceeding one year, or both or either, at the discretion of the court."

16. Appraiser's return to be recorded — Monthly statements to auditor-general — Collection by petition.

Section 14:

"It shall be the duty of the register of wills to enter in a book, to be provided at the expense of the commonwealth, to be kept for that purpose and which shall be a public record, the returns made by all appraisers under this act, opening an account in favor of the commonwealth against the decedent's estate, and the register may give certificates of payment of such tax from such record; and it shall be the duty of the register to transmit to the Auditor General, on the first day of each month, a statement of all returns made by appraisers during the preceding month, upon which the taxes remain unpaid, which statement shall be entered by the Auditor General in a book to be kept by him for that purpose. And whenever any such tax shall have remained due and unpaid for one year, it shall be lawful for the register to apply to the Orphans' Court, by bill or petition, to enforce the payment of the same; whereupon said court, having caused due notice to be given to the owner of the real estate charged with the tax and to such other person as may be interested, shall proceed, according to equity, to make such decrees or orders for the payment of the said tax out of such real estates, as shall be just and proper."

17. Citation to parties in default — Service — Costs.

Section 15:

"If the register shall discover that any collateral inheritance tax has not been paid over according to law, the Orphans' Court shall be authorized to cite the executors or administrators of the decedent, whose estate is subject to the tax, to file an account, or to issue a citation to the executors, administrators or heirs, citing them to appear on a certain day and show cause why the said tax should not be paid; and when personal service cannot be had, notice shall be given for four weeks, once a week, in at least one newspaper published in said county; and if the said tax shall be found to be due and unpaid, the said delinquent shall pay said tax and costs. And it shall be the duty of the register or of the auditor general to employ an attorney of the proper county to sue for the recovery and amount of such tax; and the auditor general is author-

ized and empowered, in settlement of accounts of any register, to allow him costs of advertising and other reasonable fees and expenses, incurred in the collection of taxes."

Where no inventory and appraisement is filed and the executor has done nothing to disclose the nature of the estate the register may petition the Orphans' Court, setting forth the facts and ask for a citation to the person in charge of the estate, to show cause why an inventory should not be filed.³¹

18. Compensation of register.

Section 1 of the act of May 14, 1891, P. L. 59, amending section 16 of the act of 1887, provides:

"The register of wills of the several counties of this commonwealth, upon their filing with the auditor general the bond hereinafter required, shall be the agents of the commonwealth for the collection of the collateral inheritance tax; and for services rendered in collecting and paying over the same, the said agents shall be allowed to retain for their own use five per centum upon the collateral inheritance tax collected, if the said tax shall amount to a sum less than two hundred thousand dollars in any year; or four per centum upon the said tax, if the same shall amount to two hundred thousand and less than three hundred thousand dollars in any year; or three per centum upon the said tax, if the tax collected shall amount to three hundred thousand dollars or more in any one year."

The act of March 31, 1876, P. L. 13, was repealed by section 16 of the act of 1887.³²

19. Register's bond to the commonwealth.

Section 17:

"The said register shall give bond to the commonwealth in such penal sum as the Orphans' Court of the county may direct, with two or more sufficient sureties, for the faithful performance of the duties hereby imposed, and for the regular accounting and paying over of the amounts to be collected and received; and said bond, on its execution and approval by the said Orphans' Court, to be forwarded to the auditor general."

20. County treasurer to collect until bond is given.

Section 18:

"Until bond and security be given, as required by the preceding section, the said collateral inheritance tax shall be received and collected by the county treasurer as heretofore; and, in such cases, all the provisions of this act relating to collection and payment by registers shall apply to the county treasurer."

21. Register's quarterly returns.

Section 19:

"It shall be the duty of the register of wills of each county to make returns and payment to the state treasurer of all the collateral

³¹ Maris' Est., 14 C. C. 171.

³² Allegheny County v. Stengel, 213 Pa. 493.

inheritance taxes he shall have received, stating for what estate paid, on the first Mondays of April, July, October and January in each year; and for all taxes collected by him, and not paid over within one month after his quarterly return of the same, he shall pay interest at the rate of twelve per centum per annum until paid."

22. Tax a lien until paid — Limitation five years.

Section 20:

"The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied: *Provided*, That the said lien shall be limited to the property chargeable therewith: *And provided further*, That all collateral inheritance taxes shall be sued for within five years after they are due and legally demandable; otherwise, they shall be presumed to have been paid, and cease to be a lien as against any purchasers of real estate."

This proviso was held not to extinguish the claim against heirs, etc., but to divest the lien as to purchasers.^{ss}

^{ss} Cullen's Est., 142 Pa. 18.

CHAPTER XIII.

GUARDIAN AND WARD.

1. Guardians by nature.
2. Ages of capacity for minors.
3. *Prochein ami* and guardian *ad litem*.
4. Appointment of guardians.
5. Petition for appointment — rules in Philadelphia.
6. Ward's right to choose.
7. Form of petition by next friend.
8. Form of affidavit of responsible person.
9. Form of affidavit of value.
10. Form of petition of minor over fourteen years.
11. Notice to parent.
12. Form of petition where father is profligate.
13. Form of order and rule.
14. Form of bond.
15. Form of order of appointment.
16. Acceptance of guardian.
17. Executor or administrator not to be appointed.
18. Others who will not be appointed.
19. Corporation as guardian.
20. Equitable powers over minors' estates.
21. Revocation of appointment.
22. Foreign guardians.
23. Security — form.
24. Necessity and requisites of security.
25. Liability of the sureties.
26. Extent of liability.
27. Liability for proceeds of land.
28. Discharge from liability.
29. Adjudication of breach of bond.
30. Form of certificate of appointment.
31. Guardian to file inventory.
32. Form of inventory.
33. Affidavit — form.
34. Appointment of guardian for nonresident minor.
35. Appointment of guardians for absent minors.
36. Payments to foreign guardians.
37. Authority to foreign guardians to remove property.
38. Rights and duties of guardian.
39. Care and investment of funds.
40. Relation of guardian to ward.
41. Custody of the person.
42. Guardian to collect funds due his ward.
43. Releases and compromises.
44. Suits by guardians.
45. Suits against guardians.
46. Guardian may appeal without making affidavit.
47. Investments which a guardian may make.
48. Order of maintenance.
49. Allowance when minor resides beyond the state.
50. Form of petition for allowance.
51. Form of decree.
52. Form of petition for repairs — decree.
53. Maintenance of ward.
54. Maintenance without prior order.
55. Allowance by court for maintenance.
56. Allowance to the guardian.
57. Allowance to the father of the ward.
58. Allowance to the mother of the ward.
59. Allowance to step-parents and grandparents.
60. Time of allowance.
61. Services of ward as a set-off.
62. Estate from which allowance may be made.
63. Amount of allowance.
64. Sale of minor's real estate.
65. Sales by guardians or trustees.
66. Day of hearing and notice.
67. Petition and requisites.
68. Bond — title given.

69. Jurisdiction to sell or mortgage.
70. Sales, etc., statutory.
71. Form of petition to sell part of minor's land.
72. Form of affidavit.
73. Form of order of court.
74. Sureties, approval of in Philadelphia.
75. Affidavit with offer of security, Philadelphia.
76. Rules as to trust companies, Philadelphia.
77. Confirmation of sale.
78. Duty of guardian to collect rents.
79. Improvements and repairs.
80. Form of petition for allowance.
81. Form of order of court.
82. Right to reimbursement and subrogation.
83. Liability for ward's assets.
84. Loss of fund by guardian.
85. Liability for loss by predecessor.
86. Liability for interest.
87. Liability for interest on funds mixed with his own.
88. Liability for profits.
89. Effect of guardian's acts on ward.
90. Guardian's acts in partition.
91. Resulting trust by guardian.
92. Guardians must account.
93. Triennial accounts.
94. Power of court to compel accounting.
95. Form of petition for citation to account.
96. Form of citation.
97. Answer to citation.
98. Who may require an account.
99. Who may be cited.
100. Loss by laches.
101. Accounts by administrators of deceased guardians.
102. Accounts of guardian and trustee.
103. Manner of stating accounts.
104. Form of triennial account.
105. Manner of stating final account.
106. Form of final account.
107. Credits and allowances.
108. Necessary payments, insurance, taxes, etc.
109. Credits allowed or disallowed.
110. Exceptions to guardian's account.
111. Balance after decree on account.
112. Costs of filing account.
113. Costs of other proceedings.
114. Counsel fees for guardians.
115. Compensation of guardians.
116. Amount of compensation.
117. Loss of compensation.
118. Discharge of guardian.
119. Discharge of domestic guardian, etc., of nonresident minor.
120. Prerequisites to discharge, Allegheny County.
121. Discharge during minority, in Philadelphia.
122. Application for discharge.
123. Form of petition for discharge.
124. Form of request of wards.
125. Form of order of court.
126. Removal of guardian.
127. Grounds of removal.
128. Manner of removal.
129. Form of petition for removal.
130. Form of order for citation.
131. Mode of procedure.
132. Form of decree of removal.
133. Release of guardian by ward.

1. Guardians by nature.

In Pennsylvania there are none of the old English distinctions of guardianship, though we have derived from the English system guardians by nature, for nurture, *ad litem*, of the person and of the estate, or both person and estate. It boots little, therefore, to burden this book with the dead past. The parents of a child are the natural guardians, and it is a pernicious system to deprive them of their natural rights, under the guise of *parens patriæ*. The mother is the guardian for nurture by common consent until the child is seven years old, and if the child be born out of wedlock and is not legitimated by subsequent marriage, the mother is not

only the guardian for nurture, but by nature,¹ and to the exclusion of the putative father of it.² Under the common law, the father was entitled to be preferred to the mother in the guardianship, until the child arrived at the age of twenty-one years and was entitled to its earnings unless sooner emancipated.³

But where the father has deserted or become profligate, and fails to support and educate the child, the law has substituted the mother, and where there is a contest for the custody of the child, as in cases of separation or divorce, the courts will have regard for the welfare of the child first and commit it to the care of whichever they deem will best subserve that paramount purpose,⁴ or to neither.

Courts will be loath to wrench from the mother the custody of the child before it has attained the age of seven, and will not do so unless it be shown that she is an unfit person to have its custody. Even then, it will require good reasons. The doctrine of *parens patriæ*, which has grown up in our compulsory school laws, has also brought its corollary in the curfew ordinances of cities and towns. The parental control being broken by the state in one case, it is obliged to become a sort of loose, general and indefinite guardian by day and night, with a rising generation lacking manners, culture and common decency and honesty. Good parental and home government alone can implant the seeds of good citizenship.

It has been held that a grandmother who has stood *in loco parentis*, from tender youth, may have the custody as against the mother under circumstances that show it would be for the interest of the child.⁵ And so the father's demand may also be disregarded by the court and the custody be awarded to another,⁶ but this will not be done on the sole ground that he is poor and that a better home could be provided for his children.⁷ An executor not appointed guardian, who takes his minor brother's share, without appointment, is liable to account, *quasi son tort*.⁸

2. Ages of capacity for minors.

A minor in Pennsylvania is a person who has not attained the age of twenty-one years, and applies to male or female; although there is a local custom to emancipate the female at the age of eighteen years, notice of which can only be taken on a question

¹ Comth. v. Lee, 6 S. & R. 255; McGunigal v. Mong, 5 Pa. 269; Bucks v. Phila., 1 S. & R. 387.

² Comth. v. Anderson, 1 Ashmead, 55; Comth. v. Waleiser, 2 Leg. Chron. 305; Groome v. Belt, 171 Pa. 74; Evans' Est., 1 D. R. 453.

³ King v. Thorpe, 5 Modern, 221; Hume's Est., 11 W. N. C. 123; Seff's Est., 9 Atl. 282; Vanartsdalen v. Vanartsdalen, 14 Pa. 384; Comth. v. Hamilton, 1 Pitts. 412.

⁴ Comth. v. Hart, 8 W. N. C. 156; 14 Phila. 352; approved in Brown's Est., 166 Pa. 249. See report of J. E. Carpenter, Esq., master in this case. Comth. v. Gilkeson, 5 Clark, 32; Comth. v. Addicks, 5 Binney, 520; Comth. v. Demott, 7 Phila. 624; Comth. v. Smith, 1 Brewster, 547; Hirsch's Minors, 33 C. C. 650.

⁵ Comth. v. Barney, 4 Brewster, 408.

⁶ Moorhead's Apln., 30 Pitts. L. J. 130; Heinemann's Ap., 96 Pa. 112.

⁷ Steven's Guardian, 4 Montg. 70.

⁸ Munn's Est., 49 Pitts. L. J. 234.

of emancipation, as to the right of the minor to his earnings and to make binding contracts. However, the law has enabled a minor wife to join her husband in making a valid deed for his real estate, evidently passed to meet the case of *Shrader v. Decker*, 9 Pa. 14, holding that her deed was void.⁹

At the common law, a male might at twelve take the oath of allegiance; at fourteen he was at the age of discretion and might marry, choose his guardian or will his personal estate; at seventeen he could act as executor, but he might be appointed executor before he was born. At twenty-one he was of full age and could alien in his own name and right realty as well as personalty. The age of *capax doli* was fourteen at the common law, but this was modified to a minimum of seven. The female could be betrothed at seven; was entitled to widow's dower at nine; could marry at twelve; choose a guardian at fourteen, be an executrix at seventeen, and be appointed one *in ventre sa mere*. Her full age was twenty-one; though she was free from the bans of chivalry at sixteen.

A female by the act of September 29, 1700, 1 Sm. L. 309, was freed from service or apprenticeship at eighteen, and hence the custom that she might then marry at will. But the marriage license laws prohibit one under the age of twenty-one from obtaining a license to marry without the consent of his or her parent or guardian.¹⁰ But this does not prevent their being married without a license, the person marrying them being liable to the penalty. The marriage is not invalid for that reason. Besides, in Pennsylvania a common law marriage is still recognized.

The marriage of a minor creates a new relation of person and dissolves the guardianship of the person,¹¹ though not of the estate.¹²

A minor is responsible for his torts.¹³

By the act of May 19, 1887, P. L. 128, the age of consent of a female was raised to sixteen years, the date of her emancipation from chivalry.

3. *Prochein ami* and guardian *ad litem*.

Since an infant cannot appear as a plaintiff in court by himself, he must do so by his next friend, called in Law French, *prochein ami*. In order to have a guardian appointed when under the age of fourteen, the petition must be signed in his name by his next friend thus: Florence Bartley by her next friend George H. Smull. The next friend may be a relative or a stranger, being responsible for the costs, and he or she must be of full age. The *prochein ami* is not a guardian, but stands as curator for an infant plaintiff.¹⁴ An infant defendant cannot appear by next friend, but must have a guardian *ad litem*,¹⁵ if it have no guardian, or having one, he is

⁹ March 22, 1865, P. L. 30.

¹⁰ Acts June 23, 1885, P. L. 146; May 23, 1887, P. L. 170; 1893, P. L. 27; 1895, P. L. 202; 1903, P. L. 80.

¹¹ *Cumming's Ap.*, 11 Pa. 272.

¹² *Reeves' Domestic Relations*, 328.

¹³ *McGhee v. Williams*, 31 Leg. Int. 37.

¹⁴ *Gibson, J.*, in *Turner v. Patridge*, 3 P. & W. 173; Ch. 15, 13th, Edward I, *Roberts' Dig.* 317; *Heft v. McGill*, 3 Pa. 256.

¹⁵ *Swain v. Fidelity Ins. Co.*, 54 Pa. 455.

absent.¹⁶ And under section 83 of the act of June 13, 1836, P. L. 587, notice must be given the minor or his next friend before such appointment can be made. Without such notice a judgment would not be binding.¹⁷ When notice or process is served on a minor who has no guardian it should also be served upon next of kin of such minor, and this appearing in the return, a guardian *ad litem* will be appointed, if there is no application for a guardian.

4. Appointment of guardians.

Section 5 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court of each county shall have the care of the persons of minors resident within such county, and of their estates, and shall have power to admit such minors when and as often as there shall be occasion to make choice of guardians, and to appoint guardians for such as they shall judge too young or otherwise incompetent to make choice for themselves: *Provided*, That persons of the same religious persuasion as the parents of the minors shall, in all cases, be preferred by the court in their appointment, and such appointment or admission of a guardian by the Orphans' Court of the county in which the minor resides shall have the like effect in every other county of this commonwealth, as in that by the Orphans' Court of which he shall have been so admitted or appointed."

The place of residence of the minor determines the jurisdiction of the court to appoint;¹ as distinguished from mere domicile, which is that of the father while he lives;² though an appointment in a different county is not void, but binding upon the guardians and their sureties.³ The right of a minor when over fourteen years of age to select his own guardian is absolute.⁴ One person may be appointed guardian for several wards, but his responsibility is several to each and not joint.⁵ The provision in the act that persons of the same religious belief as the parents shall be preferred is founded in wisdom, when it is possible to obtain such persons; but where one of a different religious belief has been appointed, he will not be removed for that feature alone.⁶ Since the passage of the act authorizing trust companies to act as guardians this clause is a dead letter, for a corporation, having no soul, cannot be asserted to have any religious belief. A surviving parent should in all cases be notified of the appointment, and where the minor is under fourteen the petition should be by the parent and not a *prochein ami*;⁷ except where the parent has abandoned it and neglects to provide

¹⁶ Mercer v. Watson, 1 Watts, 330.

¹⁷ Swain v. Fidelity Ins. Co., 54 Pa. 455.

¹ Mintzer's Est., 2 D. R. 584; Reitmeyer v. Wolfe, 2 D. R. 810; Reitmeyer's Pet., 14 D. R. 761; Cannon's Est., 10 Montg. 179.

² Taylor Minors' Est., 26 W. N. C. 576; 9 C. C. 122; Connor's Est., 31 C. C. 278; Cochran's Est., 28 C. C. 33.

³ McClure v. Comth., 80 Pa. 167; Ralston's Est., 3 W. N. C. 392.

⁴ Lowry's Est., 5 W. N. C. 475; Wilson's Est., 1 W. N. C. 346; Lee's Ap., 27 Pa. 229.

⁵ Weyand's Ap., 62 Pa. 198.

⁶ Nicholson's Ap., 20 Pa. 50.

⁷ Senseman's Ap., 21 Pa. 331.

for it,⁸ or is under disability of some kind. A guardian *ad litem* should not be appointed without notice to the minors or next of kin.⁹

A husband will not be appointed guardian of his minor wife's estate.¹⁰ The policy of the common law, coming down to us from the feudal system, is that "the guardianship of no person shall of right remain or be in him of whom a suspicion may be had that he either can or wills to claim any right in the inheritance." This is directly contrary to the Civil law, which we follow in respect to inheritance, for this law considered it the height of providence to commit the guardianship to one interested in preserving the inheritance for his ward.¹¹

"At any time during minority," says Judge Allison,¹² "the court will make such disposition of a minor child, whose custody is in dispute, as the circumstances of the case demand, having always in view, first and last, and controlled mainly by the consideration which will best promote the welfare of the infant." The common law, in force in Pennsylvania, recognized fully the right of parental control, but a new and dangerous feature of the doctrine of *parens patriæ*¹³ has virtually usurped the parental authority, if not liability, until parents no longer know where their rights begin or end. An outgrowth of this is the laxity of parental control, the need of curfew ordinances and the added machinery of the truant officer and the Juvenile Court, all evidences of moral laxity and degeneration.

The appointment rests in the sound discretion of the court, and is not subject to an appeal.¹⁴ The record of the appointment, and not the certificate, is evidence. Any act by the appointee, in the premises, is an assumption of the trust.¹⁵ Having once been appointed in one county the removal of the ward into another county does not change the jurisdiction of the court.¹⁶ A guardian of the person cannot change the domicile of the ward without an order of the court. But he may change the residence and a guardian of the person may then be appointed in that county.¹⁷ In order to appoint a guardian it is not essential that the minor shall have an estate,¹⁸ but no appointment can be made pending a guardianship under a will.¹⁹ An appointment is in the discretion of the court and will not be

⁸ Heineman's Ap., 96 Pa. 112.

⁹ Graham's Est., 14 W. N. C. 31.

¹⁰ Hughes' Est., 4 Luz. L. R. 109.

¹¹ Bierly on Administrators and Guardians, p. 62.

¹² Comth. v. Hart, 14 Phila. 352; approved in Brown's Est., 166 Pa. 249.

¹³ Commented upon by J. E. Carpenter, Esq., in Brown's Est., 166 Pa. 249.

¹⁴ McCann's Ap., 49 Pa. 304; Gray's Ap., 38 Leg. Int. 278.

¹⁵ Eyster's Ap., 16 Pa. 372.

¹⁶ Crawford's Est., 4 C. C. 507; Braining's Est., 7 W. N. C. 34.

¹⁷ Wilkins' Guardian, 146 Pa. 585.

¹⁸ Seff's Ap., 9 Atl. 282; Cochran's Est., 28 C. C. 33.

¹⁹ Robinson v. Zollinger, 9 Watts, 169; Sheetz's Est., 6 D. R. 367; Estler v. Estler, 1 Browne, 322; Palumbo's Est., 15 D. R. 188; Scully's Est., 10 D. R. 731.

reviewed,²⁰ unless some positive rule of law is disregarded.²¹ Where the minor daughter wished to marry, having her mother's consent, but the father refusing, the court appointed a guardian for the purpose of giving the consent required by the acts of assembly.²²

5. Petition for appointment.

Primarily the father if alive is the one to petition for the appointment,²³ and if made on the petition of another, without notice to him, will be revoked on his protest.²⁴ Under the rules of court the time of such notice is fixed. In Dauphin County, for example, it is ten days.²⁵ If the father neglects to petition, another may.²⁶ If the father has consented to another's petition, he may not revoke it.²⁷ The father being dead, the mother is the next person in right,²⁸ unless she be a dissolute person.²⁹ The father and mother being both dead, the grandparents come in,³⁰ the paternal being preferred, all things being equal.³¹ If the mother of a bastard is dead, the putative father stands next.³²

Section 1 of rule 9, Philadelphia, provides:

"Petitions for the appointment of guardians shall set forth the date of birth or age as near as may be and the present place of residence of the minor; the relationship of the next friend of the minor, and his residence, if the petition be made by such, as well as his interest in the proceeding, if any; the relationship of the person whose appointment is asked; and said petition shall be accompanied with statements, on oath or affirmation, of the amount of personal property and rents of real estate which may probably come into the guardian's hands, as well as the source from which the money is to be obtained, whether from an estate, from a sale, or from a settlement; and if the latter, the nature of the case and whether an amicable settlement or verdict. An affidavit by some person known to the court personally or by character, stating that the person recommended is of respectability and property, to whom such a trust can be safely intrusted, or to that effect, and that such person is neither executor nor administrator of any estate in which the minor has an interest, shall be attached to said petition."

The above detailed requirements are not generally exacted throughout the state. Examine your rules of court.

Section 2 of rule 9, Philadelphia, provides:

"When the clerk of the court or other person shall be appointed

²⁰ *Graham's Ap.*, 1 Dallas, 147; *McCann's Ap.*, 49 Pa. 304; *Gray's Ap.*, 96 Pa. 243; *Pote's Ap.*, 106 Pa. 574; *Phillips' Est.*, 16 Supr. C. 330.

²¹ *Sensaman's Ap.*, 21 Pa. 331; *Benscoter's Est.*, 2 Kulp, 53.

²² *Leber's Pet.*, 20 Lanc. L. R. 324.

²³ *Senseman's Ap.*, 21 Pa. 331.

²⁴ *McCleary's Ap.*, 1 Atl. 586.

²⁵ *Hirsch's Minors*, 33 C. C. 650. (Compare rules.)

²⁶ *Seff's Ap.*, 9 Atl. 282.

²⁷ *Voorhees' Est.*, 6 D. R. 290.

²⁸ *Corwin's Ap.*, 126 Pa. 326; *Schenk's Est.*, 17 Lanc. L. R. 369.

²⁹ *Comth. v. Bigelow*, 1 Foster, 291.

³⁰ *Carey's Est.*, 5 Kulp, 171.

³¹ *Mintzer's Est.*, 2 D. R. 584.

³² *Pote's Ap.*, 106 Pa. 574.

guardian *ad litem*, it shall be his duty to represent the interests of his ward before the court, master or auditor, and, upon cause shown, he may employ counsel, whose compensation shall be fixed and paid as the court may direct."

Section 2 of rule 15, Allegheny County, provides:

"Petitions for the appointment of guardians shall set forth the name, age and place of residence of the minor, and the amount of personal property and income of every kind that may come into the hands of the guardian; and the appointment shall not be recorded or certificate issued until the bond is approved and filed."

6. Ward's right to choose.

The minor being fourteen years old, has a right to choose his own guardian and therefore to petition in his own name.³³ This right should not be denied, though it means the discharge of a former guardian,³⁴ unless it would clearly prejudice his interests,³⁵ or if the chosen one is incompetent to sign a bond,³⁶ or is a nonresident of the county,³⁷ or of a diverse religious belief.³⁸ The approval of his choice, is therefore discretionary with the court.³⁹ Having once chosen, he cannot revoke it for fancied causes.⁴⁰ The affidavit as to amount of property that will likely come into the hands of the guardian should not be made by the minor.⁴¹

7. Form of petition by next friend.

If the minor be under fourteen, the petition will be by next friend in the following form:

In the Orphans' Court of Lancaster County.

To the Honorable Eugene Smith, President Judge of said Court.

The petition of Inez Telford, by her next friend James Adams, her uncle, who resides at Mannheim, Pa., respectfully represents: That your petitioner is a minor child of Richard Telford, late of Mannheim, said county, deceased, and is under the age of fourteen years, resident within said county, and has no guardian to take care of her estate and person, and that there is — personal estate and income [describe it]. Said Inez Telford was born on the — day of —, A. D. 19—.

Therefore she prays the court to appoint a guardian for the purposes aforesaid and suggests the appointment of Louis N. Spencer, Esq., as said guardian.

Dated — — —, — — —.

Inez Telford,
By her next friend,
James Adams.

Sworn to, etc.

³³ Lee's Ap., 27 Pa. 229; Benz's Est., 1 W. N. C. 486; Berryman's Est., 18 Phila. 108; Arthur's Ap., 1 Grant, 55; Crawford's Est., 4 C. C. 507.

³⁴ Wilson's Est., 1 W. N. C. 346; Lewry's Est., 5 W. N. C. 475.

³⁵ Berryman's Est., 16 W. N. C. 303.

³⁶ Fry's Est., 1 W. N. C. 270.

³⁷ Hanbest's Est., 11 Phila. 63.

³⁸ McCann's Ap., 49 Pa. 304.

³⁹ Gray's Ap., 96 Pa. 243; Filer's Est., 7 Lack. L. N. 318; McNally's Est., 13 D. R. 193.

⁴⁰ Lee's Ap., 27 Pa. 229.

⁴¹ Zuecker's Est., 2 W. N. C. 68.

[A number of children under fourteen may be embraced in the same petition and have the same guardian.]

8. Affidavit of responsible person.

Under the rules of court in some counties an affidavit is required by some responsible person, which may be as follows:

Rhys Welsh, of Pittston, in Luzerne County, being duly sworn, says he is well acquainted with Lloyd Jones, who is the person named in the petition for the appointment of guardian for Sara Somers, and that he is of respectability and property, and one to whom said trust may be safely committed, and further that the said proposed guardian is of the same religious persuasion as that of said minor's parents, and neither administrator nor executor of any estate in which said minor is interested.

Sworn to, etc.

9. Form of affidavit of value.

In order to determine the amount of the bond, an affidavit of the proposed guardian or some other person may be accepted, which may be as follows:

Luzerne County, ss.

Lloyd Jones, the person named in the petition, being duly sworn, deposes and says that he has made inquiry concerning the character of the estate of said Sara Somers and to the best of his judgment the amount of money and personal property which will come into his hands will not exceed two thousand five hundred dollars.

Sworn to, etc.

10. Form of petition of minor over fourteen years.

The form of petition of a minor over the age of fourteen will be the same as above, omitting the next friend, and stating the age of the petitioner, who will sign for himself. In case the minor, over fourteen years, cannot appear in court, personally, he may state in his petition the reasons why.

11. Notice to parent.

Where the minor has a parent living, notice of the intended application should be given to such parent, if not the petitioner. Hence the petition should be accompanied with either the assent in writing of such parent, which may be attached to the petition or an affidavit of service of notice upon such relict of the time, place and purpose to apply. The rules of court should be examined.

12. Form of petition, where father is profligate.

Juniata County, ss.

To the Honorable the Judges of the Orphans' Court for said County.

The petition of John Jacques respectfully represents: That he is the paternal uncle of Madeleine Gerard, a minor child of William Gerard, which said minor is over the age of seven years, that her mother is dead, who was Belle Gerard, and that her father, William

Gerard, is a common drunkard and profligate, neglecting said child and thus exposing her to want and beggary, and that there is no estate, either personal or real, but that said child requires a guardian of her person.

Your petitioner therefore prays the court to appoint some suitable person as guardian of said minor and would suggest Belle Shively, spinster, of the town of Mifflin, in said county, as a suitable and willing person to accept such trust; who is neither administrator nor executor of the decedent. And he will ever pray.

John Jacques.

13. Order and rule.

Upon such petition the court may make an order in form as follows:

"Now, — day of —, A. D. 19—, petition above considered, and a rule is granted on William Gerard, the father of Madeleine Gerard, said minor to appear and show cause why said Belle Shively should not be appointed guardian, as prayed for.

Per Cur.

Returnable — day of —, A. D. 19—.

14. Form of bond.

Know all Men by these Presents,

That we, —, —, —, —, in the County of Lancaster, are held and firmly bound unto the Commonwealth of Pennsylvania, for the use of [names of wards], minor children of — —, deceased, in the sum of — dollars, lawful money of the United States, to be paid to the said commonwealth for the use of said Minor —, Heirs, Executors and Administrators, for which payment well and truly to be made and done, we bind ourselves, jointly and severally, our and each of our Heirs, Executors and Administrators, firmly by these presents.

Sealed with our Seals, dated the — day of —, Anno Domini One Thousand Nine Hundred and —.

The Condition of this Obligation is such,

That if the above bounden — —, Guardian —, —, —, Minor child— of — —, late of —, deceased, shall at least once in every three years, and at every other time, when required by the Orphans' Court for the county aforesaid, render a just and true account of the management of the property and estate of the minor under — care, and shall deliver up the said property agreeably to the order and decree of said Court, or the directions of law, and shall, in all respects, faithfully perform the duties of Guardian of the said —, —, —, then the above Obligation shall be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of

}	— —,	[Seal.]
	— —,	[Seal.]
	— —,	[Seal.]
	— —.	[Seal.]

Approved — day of —, A. D. 19—.

Per Cur.

15. Form of order of appointment.

Now, to-wit, — day of —, A. D. 19—, the court appoints Lloyd Jones as guardian of Sara Somers, as prayed for. Bond required in the sum of five thousand dollars, with security, to be approved by the court.

By the Court.

Same day the foregoing bond in the sum of five thousand dollars, with — — and — — sureties [or a surety company] approved.

By the Court.

16. Acceptance.

The appointment is effective only from acceptance by the appointee, but any act in performance of a duty of the trust will be construed as an acceptance of it.¹ The appointee cannot be compelled to serve.² He can act without a certificate of appointment;³ but it is better that he should have it and also some handbook to instruct him in his duties. Section 4 of rule 9, Philadelphia, provides that no certificate of appointment shall issue unless security, where required, has been entered.

17. Executor or administrator not to be appointed.

Section 6 of the act of March 29, 1832, P. L. 190, provides:

“No executor or administrator shall be admitted or appointed by the Orphans’ Court, guardian of a minor, having an interest in the estate under the care of such executor or administrator: *Provided*, That nothing herein contained shall be construed to extend to the case of a testamentary guardian.” (See Rule 9, Philadelphia, *supra*.)

Although such appointment is illegal, having been made and acted upon, his sureties cannot interpose it as a defense against a suit on the bond.⁴ Such appointment, though irregular, is not void;⁵ and after the lapse of years, there being no fraud alleged or proved, in his acts, the ward could not question the appointment.⁶

18. Others who will not be appointed.

Following the rule of the common law, above referred to, the courts in Philadelphia and many other counties, will not appoint the father as guardian of the estate of his minor children.⁷ This is usually prohibited in the rules of court. In some cases the courts have followed the rule of the civil law as stated, *supra*.⁸ The same

¹ Eyster’s Ap., 16 Pa. 372; McHenry’s Est., 14 D. R. 421; Nutz v. Reuter, 1 Watts, 229.

² Arthur’s Ap., 1 Grant, 55; Munn’s Est., 49 Pitts. L. J. 234.

³ Long’s Est., 7 Lanc. L. R. 323; Fink’s Ap., 101 Pa. 74.

⁴ Doner’s Est., 156 Pa. 301.

⁵ Dull’s Ap., 108 Pa. 604.

⁶ Kramer v. Mugele, 153 Pa. 493.

⁷ Voorhees’ Est., 6 D. R. 290; Lambkey’s Est., 1 W. N. C. 203; Senseman’s Ap., 21 Pa. 331; Hughes’ Est., 4 Luz. L. R. 109; Collins’ Est., 11 D. R. 455.

⁸ Hawkins’ Ap., 32 Pa. 263; Eberts v. Eberts, 55 Pa. 110; Fink’s Ap., 101 Pa. 74.

rule that applies to the exclusion of the father has also been applied to the mother.⁹ The provision excluding persons of different religious faith from the guardianship was enforced at one time in this state when religion meant something to the pious people who carved it out of the wilderness,¹⁰ but now, since trust companies have absorbed the business largely, it has no significance, and little or no attention is paid to it.¹¹

Section 6 of the act of 1832, *supra*, prohibits the appointment of an administrator or executor to be also guardian. This was also enforced for some time, so far as to revoke appointments made under lack of knowledge,¹² and section 1 of rule 9, Philadelphia, provided that the appended affidavit must show that the person nominated is neither executor nor administrator. But a laxity has grown up which excuses the violation of the law as a mere irregularity and lets it go at that.¹³

19. Corporation as guardian.

In Philadelphia, where the practice of appointing corporations as guardians originated, the courts laid down these rules:

(a.) Such corporation shall not invest any of the trust funds in coupon bonds or other securities that pass by delivery.

(b.) Every such corporation shall be required to invest all trust funds in its name as trustee or guardian, as the case may be, and keep the same separate and apart from its own funds.

(c.) When securities are transferred to any corporation as trustee or guardian, they shall not be thereafter transferred without the order of the court, which must be stamped on the face of said securities.¹⁴

20. Equitable powers over minor's estates.

The Orphans' Court having been originally designed, more especially for the protection of the persons and estates of orphans, has full equitable power in each case to afford that special relief necessary to the preservation of the minor's interests. Hence, when it appears that the father procured the appointment of a guardian to absorb and dissipate the child's estate the court will disregard the appointment.¹⁵ If the guardianship was irregular, but the action just, the guardian may be treated as next friend.¹⁶

21. Revocation of appointment.

For causes which appear to have existed prior to the appointment, the court may revoke it.¹⁷ If the guardian should be removed 'un-

⁹ Finger's Est., 21 Lanc. L. R. 182.

¹⁰ Graham's Ap., 1 Dallas, 136; McCann's Ap., 49 Pa. 304; Park's Est., 7 D. R. 700.

¹¹ Goenner's Est., 18 Phila. 203.

¹² Sensaman's Ap., 21 Pa. 331; Humes' Est., 11 W. N. C. 123; Voorhees' Est., 6 D. R. 290; Burgholz's Est., 2 W. N. C. 52.

¹³ Kramer v. Mugele, 153 Pa. 493; Dull's Ap., 108 Pa. 604.

¹⁴ Order of court, 7 Phila. 517. (See Rules of Court.)

¹⁵ Vanartsdalen v. Vanartsdalen, 14 Pa. 384.

¹⁶ Johnson v. Blair, 126 Pa. 426; Gilfillen's Est., 170 Pa. 185.

¹⁷ McCleary's Ap., 1 Atl. 586; P. & L. Dig., vol. 8, cols. 13225-6-7; Corwin's Ap., 126 Pa. 326; Luccareni's Est., 14 D. R. 296.

conditionally, it is error for the court to affix conditions, in its order.¹⁸ The appointment has been revoked where it appeared to be for the best interest of the ward.¹⁹ In a proceeding to revoke an appointment it is necessary to name the guardian in the citation and demand that he answer and show cause why the appointment should not be revoked.²⁰

22. Foreign guardians have no powers as such, in this state.

Section 7 of the act of March 29, 1832, *supra*, provides:

"No appointment of a guardian, made or granted by any authority out of this state, shall authorize the person so appointed, to interfere with the estate, or control the person of a minor in this state: *Provided*, That such foreign guardian may, at the discretion of the court, be appointed by the Orphans' Court having jurisdiction, on giving security for the due performance of his trust."

A testamentary guardian appointed by a will in another state does not come within the terms of this act.²¹ The appointment of a guardian by the Probate Court of Michigan for a Pennsylvania minor temporarily domiciled there comes within the prohibition, although the guardian is a resident of Pennsylvania.²² But a guardian of the persons appointed in Wisconsin may change their residence to Pennsylvania, where their estates lie, although he could not change their domicile without that State court's consent.²³ A non-resident guardian being appointed by the Orphans' Court of one county, has power as such throughout the State of Pennsylvania.²⁴ Generally, in the first instance, a guardian should not be appointed who is not a resident of the county in which appointed.²⁵

23. Guardians required to give security — Form.

Section 8 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court having jurisdiction, whenever they may deem it proper, may require a bond, with good and sufficient security, from every guardian of a minor, whether admitted or appointed by the court, or created by will, which bond shall be filed in the office of the clerk of the court, and be considered in trust for all persons interested. The bonds shall be taken to the commonwealth, in such penalties as the court shall direct and the condition shall be in the following form:

"The condition of this obligation is such, that if the above bounden A. B., guardian of C. D., a minor child of E. F., late of —, deceased, shall, at least once in every three years, and at any other time when required by the Orphans' Court for the County of —, render a just and true account of the management of the property and estate of the said minor, under his care, and shall also

¹⁸ Mintzer's Est., 163 Pa. 484.

¹⁹ Hall's Est., 17 D. R. 529.

²⁰ Moore's Est., 13 D. R. 410.

²¹ Mayer's Est., 10 W. N. C. 261.

²² Taney's Ap., 97 Pa. 74.

²³ Wilkins' Guardian, 146 Pa. 585.

²⁴ Braining Minors' Est., 7 W. N. C. 34.

²⁵ Hanbest's Est., 32 Leg. Int. 135; Rice's Est., 9 W. N. C. 255.

deliver up the said property, agreeably to the order and decree of the said court or the directions of law, and shall, in all respects, faithfully perform the duties of guardian of the said C. D., then the above obligation shall be void, otherwise it shall be and remain in full force and virtue:’

“*Provided*, That nothing in this act contained shall be construed to deprive a minor of any action or remedy to which he may be entitled at the common law against his guardian, for any cause whatever.”

(See full form, *supra*.)

24. Necessity and requisites of security.

Where the ward has no estate a bond is not necessary;¹ and if there are irregularities in a bond, in such case, they are not fatal.² But if there is an estate, it is different.³ The approval of the bond by the court is an adjudication that it is validly executed and all presumptions will be in its favor.⁴ A bond having been given the court cannot cancel it, when the duties remain unperformed.⁵ A guardian may be required by his sureties to give counter security against loss where he has become insolvent and funds of his ward are likely to be lost.⁶

25. Liability of the sureties.

The sureties in a guardian's bond are liable to the extent of the penalty in it, for so much as may have come into the guardian's hands belonging to the ward, no matter when;⁷ but they are only liable, as appears by its condition,⁸ and where this agreement is made with the counsel of the ward and sanctioned by the court, it is binding on the ward.⁹ The liability of the sureties cannot be fixed by a master. It can only be determined in an action on the bond in the Common Pleas.¹⁰ Where property of the ward is in the hands of the surety the court may require it to be surrendered to the guardian on his giving additional security.¹¹

26. Extent of liability.

Sureties are liable for all the property of the ward which comes into the guardian's hands,¹² but not for funds which he receives in another capacity than that of guardian;¹³ such as the widow's

¹ Portuondo's Est., 10 W. N. C. 174.

² Arthur's Ap., 1 Grant, 55.

³ Stanton's Est., 13 Phila. 213.

⁴ Xander v. Comth., 102 Pa. 434.

⁵ Newcomer's Ap., 43 Pa. 43; Geise's Est., 1 Foster, 282; Comth. v. Brinton, 1 Del. Co. 310; Styer's Est., 17 Lanc. L. R. 52.

⁶ Minnich's Est., 6 Lanc. L. R. 161.

⁷ Hartman v. Comth., 13 Atl. 780.

⁸ Comth. v. Simonton, 1 Watts, 310.

⁹ Spath's Est., 144 Pa. 383.

¹⁰ Boyer's Est., 18 Phila. 218.

¹¹ Brooke's Ap., 102 Pa. 150.

¹² Hughes' Account, 22 Pitts. L. J. 121.

¹³ Fish's Ap., 7 Atl. 222; Marck's Est., 3 Northam. 29.

third.¹⁴ They are not liable for an estate in remainder limited on an indefinite contingency.¹⁵ The sureties in a second bond though erroneously substituted when the first bond is cancelled are liable, nevertheless.¹⁶

27. Liability for proceeds of land.

When a guardian is authorized to sell land he is required to give special security in that connection, for the faithful application of the proceeds of the sale; for this the sureties on the original bond are not liable.¹⁷ But where the guardian receives the share of the ward in partition the original sureties are liable.¹⁸ A surety on a bond to sell is liable for a partial sale as well as a sale of the residue.¹⁹ He is liable on a resale.²⁰

Where additional security is required it is not in the nature of indemnity to the sureties on the first bond. But if they have paid the whole amount the latter may be required to pay their just proportion.²¹ The surety on the original bond is liable for a bequest coming into the hands of the guardian even after additional security is given.²² The surety on the second bond is liable with the first, except as above stated.²³

28. Discharge from liability.

A surety will not be discharged because the guardian was at the time administrator also.²⁴ He may be discharged, however, by the laches of the ward, who, after coming of age, voluntarily permits her guardian to retain the funds, being then solvent, but subsequently fails; or where the ward leads the surety to think she has been paid. The relation then becomes a new one between guardian and ward, that of debtor and creditor, and the trust relation is dissolved.²⁵ The guardian having become insolvent, however, the sureties cannot relieve themselves by notice to the ward of foreclosure on a mortgage assigned to them as indemnity.²⁶ The surety of a guardian will not be relieved from liability for his acts, because a second guardian has made default²⁷ or an illegal agreement.²⁸ Where the administratrix has charged herself in her account with funds that went into the hands of the guardian, who settled the estate for

¹⁴ Thatcher's Est., 1 Del. Co. 321; Broomall's Est., 27 Supr. C. 475.

¹⁵ Thatcher's Est., *supra*.

¹⁶ Rosenbach v. Comth., 24 Pitts. L. J. 193.

¹⁷ Blauser v. Diehl, 90 Pa. 350; Comth. v. Pray, 125 Pa. 542; Comth. v. American, Etc., Co., 16 Supr. C. 570; Comth. v. American, Etc., Co., 25 Supr. C. 145; 212 Pa. 365.

¹⁸ Lloyd v. Comth., 35 Leg. Int. 171.

¹⁹ Rutherford v. Comth., 7 W. N. C. 534.

²⁰ Schur's Ap., 17 W. N. C. 140.

²¹ Comth. v. Cox, 36 Pa. 442; Geise's Est., 1 Foster, 282.

²² Hartman v. Comth., 13 Atl. 780.

²³ Comth. v. Transue, 2 Northam. 313.

²⁴ Doner's Est., 156 Pa. 301.

²⁵ McDonald's Est., 35 Pitts. L. J. 386.

²⁶ Barton's Est., 3 Del. Co. 338.

²⁷ Comth. v. Julius, 173 Pa. 322; Neel's Ap., 11 Atl. 636.

²⁸ Neel v. Comth., 7 Atl. 74.

her, this does not conclude her, though the surety of the guardian objects.²⁹

29. Adjudication of breach of bond.

Although the suit upon a guardian's bond must be brought in the Common Pleas,³⁰ the breach of its condition must be adjudicated in the Orphans' Court.³¹ The account being settled and the balance due ascertained and finally confirmed, no further order, as to pay over, is requisite to fix the liability.³²

30. Form of certificate of appointment.

Union County, ss.

I certify that at an Orphans' Court held at Lewisburg, in said county, on the — day of —, A. D. 19—, before the Hon. Harold M. McClure, President Judge of said court, William W. Gross, of the town of New Berlin, in said county, was, on the petition of Alice Kleckner, appointed guardian of the person and estate of the said Alice Kleckner, a minor over the age of fourteen years, bond being required in the sum of one thousand dollars, which bond, with security, was on the same day filed and approved by the court.

Witness my hand and the seal of the court, etc.

_____,
Clerk of the Orphans' Court.

By section 4 of rule 9, Philadelphia, security must first be given, before the clerk may issue a certificate to the guardian.

31. Guardian to file inventory.

Section 9 of the act of March 29, 1832, P. L. 190, provides:

"Every such guardian shall, within thirty days after any property of his ward shall have come into his hands or possession, or into the hands and possession of any person for him, file in the office of the clerk of the court a just and true inventory and statement on oath or affirmation of all such property or estate."

"The inventory thus to be filed is intended to exhibit in detail, as nearly as may be, the value of the minor's estate, real and personal, which comes into the custody and control of the guardian; it forms the basis of his liability to account, and is the *prima facie* limit of his responsibility. It furnishes proof and protection to the ward in the event of the guardian's negligence, or other maladministration of the estate."¹ This is one of the important safeguards placed around the ward's estate.²

32. Form of inventory.

A Just and True Inventory and Statement of all the property or estate of — —, minor — child—, of — —, late of the —, in the county of Lancaster, and State of Pennsylvania, de-

²⁹ McIntosh's Est., 158 Pa. 525.

³⁰ See vol. 2, Assumpsit.

³¹ Comth. v. Raser, 62 Pa. 436; Watson v. Monroe, 12 D. R. 570.

³² Comth. v. Dechart, 4 Kulp, 213; Comth. v. Hoobaugh, 5 D. R. 502.

¹ Clark, J., in Wall's Ap., 104 Pa. 14.

² Stanton's Est., 7 W. N. C. 18.

ceased, which has come into the hands or possession of — —, guardian of said minor—.

[Set out in detail all the items.]

33. Affidavit to statement.

Lancaster County, ss.

Before me a —, in and for said county, personally came — —, guardian aforesaid, who being by me duly —, deposes and says that the foregoing is a just and true inventory and statement of all the property and estate of the minor— aforesaid, which has come into — hands and possession.

— and subscribed this — day of —, A. D. 19—. Coram:

— —,
— —.
— —,
Guardian.

34. Appointment of guardian for nonresident minor.

Section 44 of the act of April 25, 1850, P. L. 569, provides:

"The Orphans' Court of each county in this commonwealth shall have power to appoint guardians of the estates of minors residing out of the commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of said court, upon the petition of the minors, or any of their relatives or friends, or any person interested in such estates, without requiring the said minors to appear in court to make choice of such guardians."

35. Appointment of guardians for absent minors.

Section 1 of the act of August 25, 1864, P. L. 1029, provides:

"The Orphans' Court of each county shall have power to appoint guardians of the persons and estates of minors, who may be absent in the service of the United States, or who may be physically unable to appear and choose for themselves, or who may be so distant from the seat of justice of the county, as to make it unnecessarily expensive for them to appear, upon the petition of the minors, without requiring the minors to appear in court, to make choice: *Provided*, That when the appointment shall be made on petition of relatives or friends, the minor may subsequently appear and choose his guardian, as in case of one attaining the age of fourteen."

36. Payments to foreign guardian.

Section 1 of the act of May 25, 1871, P. L. 279, provides:

"Whenever it shall happen that a devisee, legatee or distributee, being in his or her minority, shall reside out of this state, and the Orphans' Court in this state, having jurisdiction of the accounts of the executor, administrator or guardian, shall deem it advisable and proper, upon the petition of such executor, administrator or guardian having such estate, legacy or share of said minor in his or her possession, or on petition of said minor, or his or her guardian duly appointed in that state where such minor resides, said court may make an order authorizing the executor, administrator or guardian in this state, to pay over to the guardian in the state where said minor may reside, such legacy, devise or distributive share as afore-

said; and upon such payment the said executor, administrator or guardian shall be entitled to a credit for the same in his, her or their accounts: *Provided*, Said court shall not grant said order until they shall be satisfied by the certificate of the register, probate judge or other officer having jurisdiction of the accounts, *et cetera*, of said foreign guardian or otherwise, that the bond or other security given by said guardian is sufficient to secure the faithful appropriation of the money or other funds so to be paid over." This act also applies to trustees.³

37. Authority to foreign guardian to remove property.

Section 1 of the act of May 13, 1889, P. L. 190, provides:

"In all cases where any guardian and his ward, *cestui que trust* and his trustee, may both be nonresidents of this state, and such ward or *cestui que trust* may be entitled to property of any description in this state, such guardian or trustee, on producing satisfactory proof to the Orphans' Court of the proper county, by certificates, according to the acts of Congress in such cases, that he has given bond and security in the state in which he and his ward or *cestui que trust* reside, in double the amount of the value of the property, as guardian or trustee, and it is found that a removal of the property will not conflict with the terms or limitations attending the right by which the ward or *cestui que trust* owns the same, then any such guardian or trustee may demand or sue for and remove any such property to the place of residence of himself and ward or *cestui que trust*."

A petition for removal will be refused when it is not shown to be for the interest of the minor.⁴

When a foreign guardian seeks permission to take his ward's money out of this jurisdiction, he must give bond approved by the Orphans' Court. Following is a form:

Know all men by these presents that we, John W. Dryden, as principal, and Samuel Sloan and S. J. Tilden as sureties, are held and firmly bound unto the State of Missouri in the full and just sum of four hundred dollars, lawful money of the United States, to which payment well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, to and for the use of William H. Bennett, a minor hereinafter named.

Whereas, the Probate Court of the City of St. Louis at the June Term thereof, in the year 19—, appointed John W. Dryden guardian of the above-named William H. Bennett, a minor child of John Bennett, late of St. Louis, State of Missouri, deceased, aged 17 years and — months, and then and there gave a bond for the faithful execution of his trust in regard to the estate of said minor in the State aforesaid.

And, whereas, under the provisions of the will of Ziba Bennett, late of the city of Wilkesbarre, State of Pennsylvania, deceased, it now appears from the records in the Orphans' Court of Luzerne County, State of Pennsylvania, that William H. Bennett, aforesaid, minor child of said John Bennett, deceased, is entitled to the sum

³ Bonneville's Petition, 16 D. R. 125.

⁴ McGlinchey's Est., 11 D. R. 302.

of two hundred dollars; and that the same should be paid to the legal guardian of said William H. Bennett, residing in the State of Missouri, on condition that he give a bond in the sum of four hundred dollars with security, to be approved by the Probate Court of St. Louis, conditioned for the faithful discharge of his trust concerning the fund to be paid him as aforesaid, by the executor of the will of Ziba Bennett, deceased.

Now, the condition of this obligation is such, that if the above bounden John W. Dryden shall well and truly and faithfully discharge the duties of said trust touching the legacy to be distributed to him by the Orphans' Court of Luzerne County, State of Pennsylvania, as guardian of said minor, and shall otherwise perform his duties therein according to law, then this obligation to be void, otherwise to remain in full force and virtue.

Dated and sealed at St. Louis this — day of —, A. D. 19—.

— —, [Seal.]
 — —, [Seal.]
 — —. [Seal.]

In presence of
 — —.

[A similar bond must be given before the court will decree money to be paid to a foreign executor, administrator, or trustee.]

38. Rights and duties of guardian.

The guardian of the person is concerned only with the care of the ward, whose domicile may be in one state and his residence for the purposes of guardianship of the person in another state.⁵ But if, by the will of his father he has been removed into another state, his domicile will be in that state. As to testamentary guardians the will is their appointment and they need no other.⁶

The guardian of a ward's estate, having given bond, approved by the court, has the complete control and management of his ward's estate and a bill will not lie to oust him.⁷ One person may act for a number of wards.⁸ The law requires of him to exercise common prudence and skill in the management of the estate.⁹ Sharswood, J., said:¹⁰ "Guardians are regarded with great liberality by the courts. Common skill, common prudence and common caution are all that are required of them in the administration of their trust. Ordinary men are to be compared with and judged by the standards of ordinary men."¹¹ So, guardians, like other trustees, are not answerable for the acts of agents necessarily employed by them, where proper care has been taken in their selection, unless there is an omission of ordinary diligence on their part in compelling their agents to perform their duty."¹²

⁵ Wilkins' Guardian, 146 Pa. 585.

⁶ Mayer's Est., 10 W. N. C. 261.

⁷ Northrup v. First Natl. Bank, Etc., 3 Luz. L. R. 178.

⁸ Totten's Ap., 46 Pa. 301.

⁹ Thomas' Est., 2 Kulp, 213.

¹⁰ Note in Blackstone's Com., p. 463, vol. 1.

¹¹ Konigmacher v. Kimmel, 1 Pa. 207.

¹² Hennessy v. The Western Bank, 6 W. & S. 300.

39. Care and investment of funds.

The guardian is required, as soon as possible, to invest the ward's funds and see to its security and prudent use. He may invest in government or other securities, with leave of court, but not in corporate stocks. He will be held to a strict accountability and responsibility for any losses.¹³ If he uses his ward's money himself, he will be charged legal interest thereon, leaving a reasonable amount in his hands to pay expenses.¹⁴ Quoting Sharswood again: "A guardian should keep his ward's property separate from his own; otherwise he will make it his own so far as to be accountable for it if lost. If he takes notes or other securities for money belonging to his ward in his own name, he converts the property to his own use and is *prima facie* accountable for it. He cannot trade with himself on account of his ward, nor buy or use his ward's property for his own benefit. If he attempts to do so, and the business is unsuccessful, all the loss shall be his own, and he shall be liable to his ward for the capital with interest; if, on the other hand, it turns out to be profitable, all the profit shall belong to the ward. The guardian cannot convert the personal estate of his ward into real. If he buys land with the ward's money, the ward, at full age, may, at his election, take the land with its rents and profits, or the money with interest."¹⁵ The guardian who mixes his ward's funds with his own in business may be surcharged with interest and lose his commissions besides.¹⁶ Or he may be charged with compound interest and have his commissions cut.¹⁷ If he tried to invest it and failed the first year, he will not be charged interest on the fund.¹⁸

40. Relation of guardian to ward.

A guardian of a child stands virtually *in loco parentis* except as to the duty of maintaining his ward out of his own estate.¹⁹ "The law has no higher aim than to place the property of the infant on the same footing of security as the property of an adult" and the guardian is "bound to deal with the estate of his wards only as it may be supposed they themselves would have done, had they been of age."²⁰ He cannot plead ignorance of duty against a charge of misconduct; for the Orphans' Court will guide and control him; keep the ward within its jurisdiction; fix the place, allowance for and mode of its education; regulate its choice of trade or profession and generally guard its welfare.²¹ He cannot set up the ward in business at the ward's own risk.²² If he commits the management to the ward's relative, however, and it is well done and properly accounted for, there is no good reason why he should not have a

¹³ Will's Ap., 22 Pa. 330.

¹⁴ Day v. Barnes, 4 S. & R. 112.

¹⁵ Sharswood, J., Blackstone's Com., vol. 1, p. 463, citing White v. Parker, 8 Barbour, 48.

¹⁶ Mulholland's Est., 175 Pa. 411.

¹⁷ Noble's Est., 178 Pa. 460.

¹⁸ Spath's Est., 144 Pa. 383.

¹⁹ Sergeant, J. Fernsler v. Moyer, 3 W. & S. 416.

²⁰ Gibson, C. J., in Jones' Ap., 8 W. & S. 143.

²¹ Schaefer's Est., 1 Brewster, 528.

²² Eichelberger's Ap., 4 Watts, 84.

reasonable allowance for maintenance.²³ If he neglects to prefer the minor's claim for exemption in time, so that it is lost, his own claim will be disallowed.²⁴

41. Custody of the person.

A guardian of the person of the ward is entitled to the custody of it as against the mother, if she is a person of notoriously bad character;²⁵ or either of the parents, under the same circumstances;²⁶ or the putative father.²⁷ When he is appointed guardian of the person in the father's will, he is entitled to the custody as against all, even the mother.²⁸ His right is superior to that of the step-parents and may be enforced by writ of habeas corpus, unless the interests of the child would suffer thereby.²⁹ He does not abandon his right by suffering the child to remain a while with its grandfather, after an order of court to deliver it into his custody.³⁰ But he may not raise the question upon exceptions to a report of an auditor of his account.³¹ A guardian cannot require his ward to reside with him beyond the jurisdiction of the court, without leave of such court,³² but the domicile of the guardian need not necessarily be that of the ward and the personalty of the ward is taxable only in the locality of his domicile.³³ Under the apprentice and service law of September 29, 1770, which was repealed by act of April 17, 1907, P. L. 93, it was held that a guardian could not bind out his ward as a servant until he is sixteen years old.³⁴ Where the custody of a child was determined by a family council under a will by the father in Cuba, the court declined to disrupt the arrangement.³⁵

42. Guardian to collect funds due ward.

A guardian of his ward's estate is entitled to recover possession of all his personal property and debts and funds coming to him, whether inventoried or not, or whether belonging to that particular estate or another;³⁶ or from whatever source it arises.³⁷ He cannot claim the ward's share in a fund in the hands of the legal representatives until a final account has been filed showing the payment of debts.³⁸ Securities belonging to his ward he may demand and receive from the executors.³⁹ But where a testator creates a trust by his will for minors, the guardian appointed by the court cannot demand the trust

²³ Keenan's Est., 6 Kulp, 67. Rhone, P. J.

²⁴ Deemer's Est., 18 C. C. 496.

²⁵ Comth. v. Bigelow, 1 Foster, 291.

²⁶ Comth. v. Klemsen, 23 C. C. 207.

²⁷ Comth. v. Waleisa, 2 Foster, 305.

²⁸ Comth. v. Hamilton, 1 Pitts. 412.

²⁹ Comth. v. Dugan, 2 D. R. 772.

³⁰ Comth. v. Reed, 59 Pa. 425.

³¹ Killion's Ap., 3 Brewster, 235.

³² Fulton's Est., 13 Lanc. Bar, 48.

³³ School Directors v. James, 2 W. & S. 568.

³⁴ Resp. v. Keppele, 1 Yeates, 233.

³⁵ Comth. v. Sisters of Mercy, 23 Montg. 9.

³⁶ King's Est., 2 Lehigh V. R. 242.

³⁷ Comth. v. Watmough, 12 Pa. 316.

³⁸ Taylor's Est., 179 Pa. 54.

³⁹ Reed's Est., 82 Pa. 428.

fund;⁴⁰ though he may recover the interest of his ward in a vested legacy, where no accumulation is involved.⁴¹ An executor who is also trustee of a fund of which his ward is legatee may retain the amount due.⁴² An executor may pay to the guardian sums provided as advancements to the minors in case of marriage.⁴³ As to the interest of a ward in the stock of a corporation still under administration, the court will be deliberate about turning it over to the guardian.⁴⁴ Stocks and bonds may be ordered delivered to the guardian in kind and he will be held to ordinary prudence in disposing of them.⁴⁵

43. Releases and compromises.

A release of a guardian for the ward's share, when it is for less than is due from the executor, although it reads in full, is only effective for the amount actually paid.⁴⁶ After the lapse of many years and when the estate has passed to *bona fide* purchasers, the guardian's release will not be disturbed, for a small mistake in the consideration.⁴⁷ But a release is not binding on the ward, when without consideration or when it diminishes the security of the ward.⁴⁸ The administrator of a guardian has no authority to release the lien of a judgment obtained by the guardian for his ward.⁴⁹ Nor can he release a claim.⁵⁰ Where a suit has been brought by a next friend and an offer has been made to settle, on which the guardian and next friend differ, the court will leave the matter to the judgment of the guardian.⁵¹

Form of Release of Guardian by Ward.

Know all men by these presents that I, Florence Miriam Bierly, of the township of Miles, county of Centre, State of Pennsylvania, having arrived at the age of twenty-one years, having this day in company with my uncle, Calvin Bierly, examined the account of Harvey Bailey, my guardian, filed [or to be filed] in the office of the register of wills of Centre County, and I am satisfied that he is indebted to me in the sum of ten thousand dollars and no more, including interest, from all sources whatever, which sum he has this day paid me in full in cash, the receipt of which I hereby acknowledge:

Now, therefore, in consideration of the premises, I do hereby release and forever discharge my said guardian and his sureties from any and all liability for or on account of his guardianship.

Witness my hand and seal, this — day of —, A. D. 19—. Florence Miriam Bierly.

In presence of
Anna E. Frank,
Willis Frank Bierly.

⁴⁰ Young's Est., 17 Phila. 511; Peale's Est., 17 D. R. 339.

⁴¹ Bannar's Est., 6 W. N. C. 148.

⁴² Peckham's Est., 1 Kulp, 353.

⁴³ Nolt's Est., 1 Lanc. L. R. 358.

⁴⁴ Schlegel's Est., 13 D. R. 764.

⁴⁵ Forster's Est., 55 Pitts. 198.

⁴⁶ Witman's Ap., 28 Pa. 376.

⁴⁷ Galbraith v. Galbraith, 6 Watts, 112.

⁴⁸ Comth. v. Hautz, 2 P. & W. 333.

⁴⁹ Brown v. Thompson, 156 Pa. 297.

⁵⁰ Comth. v. Luphold, 2 Pearson, 124.

⁵¹ Lowery's Est., 9 C. C. 88.

Acknowledgment.

Centre County, ss.

Before me, Henry Meyer, a justice of the peace in and for said county and the State of Pennsylvania, personally came Florence Miriam Bierly, well known to me to be the person who executed the foregoing instrument, and acknowledged to me in due form of law that she executed it of her free will and accord and that it is her act and deed and desired that the same should be recorded as such.

_____, [Seal.]
Justice of the Peace.

Date ____.

If the account be stated and not filed, the receipt and release should accompany it.

Recording of Releases.

Section 1 of the act of May 17, 1866, P. L. 1085, provides:

"Any release, or other instrument of writing, being evidence of payment, or satisfaction, of any legacy, dower, or recognizance charged upon lands, tenements, or hereditaments; and also any release, or other instrument of writing, given to any executor, administrator, assignee, trustee or guardian, whether relating to real or personal estate, or any power of attorney given to make and execute such release, or other instrument of writing, made and executed, as required by the laws of this state, in any of the United States, may be recorded in the same manner and with the same effect, as releases, duly executed and acknowledged within this state, may be recorded: *Provided*, That the acknowledgment thereof be taken in due form, and according to the provisions of the third section of the act to which this is a supplement, and that it be certified as therein directed."

44. Suits by guardians.

It is the duty of the guardian to collect what is due his ward, but before he expends any money of his own, he should be reasonably satisfied that the suit may be successful.¹ He is not held to the same rule of promptness in collection as an administrator or executor.² But, when he has invested his ward's money, he will be sustained in acting promptly to save it.³ When the ward obtains title to the real estate upon which the guardian holds a mortgage for him, he should not foreclose but tender the ward the mortgage as part of his estate.⁴ The suit of a guardian should be in the name of his ward by his guardian, naming him, as plaintiff,⁵ and this is so, no matter in what form the promise is made.⁶ But when a petition is presented by the guardian, he may name himself as guardian for his ward or wards, also naming them as the minor children of the dece-

¹ Heck's Est., 11 Montg. 66.

² Charlton's Ap., 34 Pa. 473; Chambersburg, Etc., Assn.'s Ap., 76 Pa. 203.

³ Slingluff's Case, 7 Montg. 118.

⁴ Dougherty's Est., 3 Lanc. L. R. 88.

⁵ Mumma v. Harrisburg, Etc., R., 1 Pearson, 65.

⁶ Carskadden v. M'Ghee, 7 W. & S. 140.

dent.⁷ Where the ward, after coming of age, sues for investments made by the guardian and payable to him, he must sue in the name of the guardian.⁸ On a *sci. fa. sur* mortgage given to a guardian the defendant cannot ask for a continuance of the trial on the ground that the wards are of age and the right of action is in them.⁹ The costs of litigation cannot be put on the guardian for the reason that he refused an offer of compromise and that the wards received less in the end.¹⁰ A guardian may maintain an action for seduction of his ward.¹¹ When he sues, he must allege his appointment and show his authority as guardian.¹² If the money is due and payable to the ward, the guardian need not show privity of contract between him and the defendant.¹³ In a suit by the guardian for the use of his wards, separate claims against them cannot be set off.¹⁴ The guardian cannot sue his ward. If he has any claims as such against his ward, the Orphans' Court is the proper forum.¹⁵

45. Suits against guardians.

A guardian cannot be sued for necessities sold to his ward without his consent.¹⁶ Nor can a suit be brought against him to charge the ward's estate for necessities. The Orphans' Court has exclusive jurisdiction.¹⁷ Nor can the ward sue his guardian before there is a settlement of accounts and a balance found due;¹⁸ and when he has attained full age he cannot sue his guardian for work done during minority.¹⁹ Where there has been a guardianship for the minor son of one presumed to be dead and the account is settled, the son at majority should petition the court for an order on the guardian to pay over to him all funds without demanding security for their return.²⁰ An attachment will not lie against the guardian on motion of the ward, where there has been no fraud or misappropriation,²¹ nor for the embezzlement by his agent.²² Where the guardian was a female, on a rule to show cause why an attachment as for contempt should not issue, it was held that the obligation to pay over was contractual and the attachment would not lie, since she could not be imprisoned for debt.²³

⁷ *Mumma v. Harrisburg, Etc., R.*, 1 Pearson, 65; *Fidelity, Etc., Co. v. Norris*, 14 W. N. C. 225.

⁸ *Lewis v. Browning*, 111 Pa. 493.

⁹ *Young v. Malone*, 218 Pa. 222; *Welker v. Welker*, 3 P. & W. 21.

¹⁰ *Shadle's Est.* (No. 2), 30 Supr. C. 160.

¹¹ *Fernsler v. Moyer*, 3 W. & S. 416.

¹² *Comth. v. Pray*, 1 Phila. 58.

¹³ *Seidel v. Guckert*, 2 Mona. 45.

¹⁴ *Watson v. Hensel*, 7 Watts, 344.

¹⁵ *Carl v. Wonder*, 5 Watts, 97; *McCormick v. Joyce*, 7 Pa. 248.

¹⁶ *Call v. Ward*, 4 W. & S. 118.

¹⁷ *Johnstone v. Fritz*, 159 Pa. 378; *Gravenstine v. Feger*, 17 Phila. 212.

¹⁸ *Bowman v. Herr*, 1 P. & W. 282; *Fournier v. Ingraham*, 7 W. & S. 27.

¹⁹ *Denison v. Cornwell*, 17 S. & R. 374.

²⁰ *Morrison's Est.*, 183 Pa. 155.

²¹ *Scherer's Est.*, 1 Lanc. L. R. 229.

²² *Lazarus' Est.*, 4 Kulp, 24. Rhone, P. J.

²³ *Nagley's Ac.*, 1 Ashmead, 373. *Contra*, *Klein's Est.*, 11 Phila. 75, as to an administratrix.

46. Guardian may appeal without making affidavit, etc.

Section 1 of the act of March 27, 1833, P. L. 99, provides:

"In all cases where the guardian of any minor is or shall be a party to a suit, either before a justice of the peace, or in the Common Pleas, such guardian shall be allowed to appeal from the judgment of said justice, and from the award of arbitrators, without making the usual affidavit, and without giving surety or paying costs." [See "Appeals," Vol. II.]

47. Investments which a guardian may make.

It has been seen that it is the duty of the guardian to invest his ward's money safely so that it may be productive. Under section 14 of the act of March 29, 1832, P. L. 190, it is provided that the guardian (or other fiduciary) may present his petition to the Orphans' Court of the proper county "stating the circumstances of the case and the amount or sum of money which he is desirous of investing; whereupon it shall be lawful for the court, upon due proof, to make an order directing the investment of such moneys in the stocks or public debt of the United States, or in the public debt of this commonwealth, or in the public debt of the city of Philadelphia, or on real securities, at such prices or on such rates of interest and terms of payment respectively as the court shall think fit; and in case the said moneys shall be invested conformably to such directions, the said executor, administrator, guardian or trustee, shall be exempted from all liability for loss on the same in like manner as if such investments had been made in pursuance of directions in the will or other instrument creating the trust: *Provided*, That nothing herein contained shall authorize the court to make an order contrary to the direction contained in any will or other instrument in regard to the investment of such moneys."

Section 2 of the act of April 13, 1854, P. L. 368, authorized the investment of such funds in ground rents, by leave of the proper court, if it deemed it for the advantage of the estate and that no change in the course of succession be made as regards the heirs or next of kin of the *cestui que trust*.

The act of May 8, 1876, P. L. 133, added to the act of 1832, *supra*, these securities: "All bonds or certificates of debt now or hereafter to be created and issued according to law by any of the counties, cities, school districts or municipal corporations of this commonwealth."

In such securities, the guardian should invest under the direction of the court,¹ when the amount in his hands is sufficient to make it worth while;² and if the interest is greater than the ward's needs, the surplus should be invested.³ Courts are loth to permit investment in the stocks and bonds of private corporations,⁴ although some special acts of the legislature permitted it. If the guardian cannot find a safe investment at six per cent. interest the court may authorize its deposit at a less rate; however, the

¹ Stanton's Est., 13 Phila. 213.

² Widdoe's Est., 17 Phila. 469.

³ Huffer's Ap., 2 Grant, 341.

⁴ Hoyt's Est., 2 Kulp, 286. Rhone, P. J.

ward may show that it could have been invested at a higher rate.⁵ The court will ratify a prudent investment made by the guardian.⁶ See rules of court in Philadelphia, *supra*.

48. Order of maintenance.

Section 13 of the act of March 29, 1832, P. L. 190, provides:

"When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the Orphans' Court may direct a suitable periodical allowance, out of the minor's estate, for the support and education of such minor according to the circumstances of each case, which order may, from time to time, be varied by the court, according to the age of the minor and the circumstances of the case."

Such allowance cannot be ordered out of a fund as to which it is uncertain whether it belongs to the ward or the creditors.⁷ The application should be made by the guardian, but the mother may apply for an order upon the guardian to devote a certain interest to the support of her child.⁸ An order may be obtained for past maintenance, but it should be accompanied with a full statement of the expenditures in detail.⁹

49. Allowance when minor resides beyond the state.

Section 2 of the act of April 13, 1840, P. L. 319, provides:

"Whenever it shall happen that a devisee, legatee, or distributee, being in his or her minority, shall reside out of this state, and the whole or any portion of his or her devise, legacy or share, shall be necessary for the support, maintenance or education of such minor, resident in another state, the Orphans' Court having jurisdiction of the accounts of the executor, administrator or guardian, shall have power, upon the petition of such executor, administrator, or guardian, having the estate or legacy, or share of the said minor in his, her or their hands, possession or control, or such minor, his or her guardian, duly appointed by the court of that state where the said minor resides, to make such order touching the payment of such legacy, distributive share or proceeds of a devise, or such part thereof, for the use and benefit of such minor, as to the said court shall appear to be necessary and proper; and such payment shall be made to such person or persons as shall be designated by the court, and when thus made, the said executor, administrator or guardian shall be entitled to a credit for the same in the settlement of his, her or their account."

This act made the requirement of a bond discretionary with the court.¹¹ Having required a bond, the court may not order it revoked and canceled while the duties remain unperformed.¹² Where

⁵ Wherry's Est., 19 C. C. 664.

⁶ Falconer's Est., 1 D. R. 672; Nagle's Est., 8 Luz. L. R. 269.

⁷ Hanbest's Est., 4 W. N. C. 403.

⁸ Leiby's Ap., 49 Pa. 182; Seitz's Ap., 87 Pa. 159.

⁹ Seibert's Ap., 19 Pa. 49; Strawbridge's Ap., 5 Wharton, 568; Pennock Minors' Est., 32 Leg. Int. 169; Sharpe's Est., 2 Phila. 280.

¹¹ Eyster's Ap., 16 Pa. 372.

¹² Newcomer's Ap., 43 Pa. 43.

a debt is due from the ward to his guardian the latter may have a *fi. fa.* to collect it out of his ward's estate.¹³

50. Form of petition of guardian for allowance to wards for past and future support, etc.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne.

The petition of James Wood respectfully represents:

1st. That he is the guardian of Annie Lee and William Lee, minor children of Martha Lee, deceased, who, as legatees under their mother's will, are each entitled to the sum of three thousand dollars, which has been paid to your petitioner, the income from which has been one hundred and eighty dollars per year, since the 14th day of June, 1910, which he has also received, and that they have no other estate, real or personal (or if they have any other estate say so, and give the income therefrom).

2d. That said Annie Lee is of the age of fourteen years, and the said William Lee is of the age of ten years.

3d. That the residence of said minors is with their father, James Lee, in the County of Saratoga, in the State of New York, although one of them, to-wit, William Lee, is at present living with Mrs. Mary Grace, of the City of Wilkesbarre, County of Luzerne, and State of Pennsylvania.

4th. That their said father has not been, and now is not of sufficient ability to support and educate his said children according to their future expectations in life, regard being had to the value of their estates and the circumstances of each case, he being a carpenter by trade, and the value of his property not exceeding the sum of three thousand dollars, and having also the care of three other older children.

5th. That he has, since the date of the death of the mother of said minors, and the receipt of the legacies aforesaid, to-wit, since the 14th day of June, 1910, paid to the father of said minors, the income from their said legacies for their support and education, which sums have been expended for their use and benefit, as will appear by bills rendered by him to me and hereto attached.

6th. That in the opinion of your petitioner, the income and a portion of the principal of the legacies belonging to the estates of his said wards is necessary for their proper support, maintenance, and education in the future, and that the sum of three hundred dollars per year for each would be a reasonable allowance for such purpose.

Wherefore he prays the said court to approve the expenditures heretofore made by him for his wards as aforesaid, and to make such order touching the allowance for future expenditures for the use and benefit of said minors, as to the said court shall appear to be necessary and proper, in accordance with the provisions of the 13th section of Act of 29th March, 1832, and the supplements thereto. And he will ever pray, etc.

James Wood.

(Affidavit of truth.)

¹³ Shollenberger's Ap., 21 Pa. 337, overruling McCormick v. Joyce, 7 Pa. 248.

Now, — day of —, A. D. 19—, referred to John Sharp, Esq., auditor, to investigate the facts and make report thereon. Notice to be given to Mrs. Mary Grace as next friend.

By the Court.

(The auditor's report having been filed.)

Now, — day of —, A. D. 19—, confirmed *nisi*.

By the Court.

Now, — day of —, A. D. 19—, confirmed absolutely, counsel to submit formal decree.

By the Court.

51. Form of decree.

Estate of Edward Green, Deceased. { In the Orphans' Court of Luzerne County.

In re petition of James Wood, guardian of the estates of William and Annie Lee, for allowance for their support and education.

Now, — day of —, A. D. 19—, the report of John Sharp, auditor, having been filed and confirmed, it is on motion of counsel for petitioner, ordered, adjudged, and decreed, that the said James Wood be authorized to expend for each of his wards, out of the income and principal of the legacies in his hands, belonging to them, the sum of three hundred dollars annually, for their future support, maintenance, and education, until otherwise ordered. And it is further adjudged that the sum heretofore expended by James Wood, guardian as aforesaid, for the purposes aforesaid, to-wit, the sum of — dollars for each of his said wards, since the 14th day of June, 1910, to this date, was reasonable, and under the circumstances necessary, and the same is therefore approved and directed to be allowed as a credit in his final account.

By the Court.

52. Form of petition of guardian for allowance for repairs to real estate.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne.

The petition of John Jay, guardian of Ann Jay, a minor child of George Jay, deceased, respectfully represents:

I. That the said minor is of the age of fourteen years, and is the sole owner of a tract of land in Hanover Township, known and called the "Park Hill" property.

II. That the mansion and barn upon said property are in such a state of dilapidation as to require the expenditure of money to make them tenantable—that is to say, there should be a new roof on both buildings, and the kitchen to the house should be rebuilt throughout, which repairs and improvements your petitioner is informed by careful estimates will cost about one thousand dollars.

III. That said minor has personal estate, consisting of money in the hands of your petitioner, to the amount of three thousand dollars, but no other, and the income therefrom is one hundred and eighty dollars per annum.

Your petitioner therefore prays your Honor for an order authorizing him to expend for the purposes aforesaid, the sum of one thousand dollars, or so much thereof as may be necessary to make the repairs and improvements aforesaid. And he will ever pray, etc.

John Jay,
Guardian.

(Affidavit of truth.)

(Indorse on petition.)

Now, — day of —, 19—, referred to John B. Reynolds, Esq., as auditor, to investigate the facts and make report thereon.

By the Court.

Form of Decree after Confirmation of Report of Auditor.

Now, — day of —, 19—, the court approve the expenditure of a sum not exceeding one thousand dollars, for the repair and improvement of the real estate of Ann Jay, as set forth in the petition filed in this case, and that the said sum be taken from the cash in the hands of her guardian. It is further ordered that the said guardian have credit in his final account for the sum actually expended for the purposes aforesaid.

By the Court.

NOTE.—For improvement of a trust estate, where a minor is interested with others, see Trustees.

[The above forms are from Vol. II, Rhone's O. C.]

53. Maintenance of ward.

Whilst a guardian is under no duty to maintain his ward out of his own means,¹⁴ it is his particular duty to maintain and educate his ward out of the ward's estate according to its character and circumstances. Of this the Orphans' Court has exclusive jurisdiction.¹⁵ And this power extends to a testamentary guardianship, where the guardian has made no adequate arrangements.¹⁶ If the guardian's claims for maintenance are palpably padded he will be allowed only what the ward acknowledges having received.¹⁷ But having in good faith paid boarding for his ward he will not be surcharged, although he did not first apply for an order of court.¹⁸ An order of weekly allowance having been made for the ward, it must be paid. But if it is larger than necessary, the guardian should apply to court to have it reduced.¹⁹ An order may be made on the executors to pay over to the guardian the income of a fund in their hands for the maintenance of the ward.²⁰ The minors having an estate of their own, the mother is not obliged to maintain them, as long as such estate is sufficient.²¹ The court may make an allowance for past as well as future support.²² An

¹⁴ Fernsler v. Moyer, 3 W. & S. 416; Comth. v. Dugan, 13 C. C. 83.

¹⁵ Bryson's Est., 13 Lanc. Bar, 45; Morris v. Garrison, 27 Pa. 226; Kumberger's Est., 37 Pitts. L. J. 383; McCreery's Ap., 31 Pitts. L. J. 230.

¹⁶ Bentel's Est., 33 Pitts. L. J. 177.

¹⁷ Haviland's Ap., 8 Atl. 858.

¹⁸ Burdick's Est., 6 Lack. Jur. 361.

¹⁹ Ervien's Est., 15 D. R. 191.

²⁰ Crowley's Est., 22 Montg. 9; Polumbo's Est., 17 D. R. 412.

²¹ Keough's Est., 16 D. R. 225.

²² Heery's Est., 10 Kulp, 134.

allowance for servants for the ward will not be justified unless the necessity be shown.²³ If the ward sees fit to give his mother a part of his earnings, it will not be deducted from her weekly stipend for board out of his estate.²⁴ But allowance should not be made to an adult.²⁵ An allowance for support may be made on the minor's petition.²⁶ The amount should square with the necessities of the minor and the condition of his estate.²⁷ When a guardian is appointed for the person as well as estate of the minor an order to pay a sum to the aunt previously made will be rescinded.²⁸

54. Maintenance without a prior order.

Whilst section 13 of the act of 1832, *supra*, contemplates a periodical allowance by the Orphans' Court, it is not essential, in the first instance, except for the absolute protection of the guardian. He may use his judgment, subject to the risks, and the court will subsequently allow or disallow, as it appears he acted prudently and for the welfare of his ward.¹ The present necessities of the ward forbid that he should wait for an order of court before he attends to and relieves them.² If it appear that the circumstances were such that the court would have been moved to grant an order, the court will ratify what has been so done³ even though he must encroach upon the principal of the estate;⁴ but the facts must appear on which he is justified.⁵ It is best to have an order before expending any of the principal.⁶ For advances made to support the child, even before he was appointed guardian, he is entitled to allowance, notwithstanding he forfeits his compensation for neglect of duty otherwise.⁷

Having spent part of the principal he cannot accumulate the income to make it up, unless by authority of the court.⁸

55. Allowance by court for maintenance.

The guardian himself should present the petition to the court for allowance for maintenance.⁹ Where he is a testamentary guardian he should not expend the income, even, without an order of court.¹⁰ And this is particularly true where the guardian

²³ Watson's Est., 8 Kulp, 280.

²⁴ Malin's Est., 11 D. R. 213.

²⁵ Gissel's Est., 5 Kulp, 206.

²⁶ Mayer's Est., 14 Phil. 303.

²⁷ Klinefelter's Est., 16 York, 110.

²⁸ Fest's Est., 13 D. R. 193.

¹ Flade's Est., 16 Phila. 227; Harland's Ac., 5 Rawle, 323; Selleck's Ap., 16 W. N. C. 370; Borntraeger's Est., 50 Pitts. L. J. 336.

² Flade's Est., *supra*.

³ Gracey's Ap., 3 Walker, 298.

⁴ Longaker's Ap., 36 Leg. Int. 73.

⁵ Sharpe's Est., 2 Phila. 280.

⁶ Lewis' Est., 9 Kulp, 397.

⁷ Albert's Ap., 128 Pa. 613; Burdick's Est., 6 Lack. Jur. 361.

⁸ Stanton's Est., 13 Phila. 213.

⁹ Eddy's Est., 4 W. N. C. 172; Flade's Est., 16 Phila. 227.

¹⁰ Bentel's Est., 33 Pitts. L. J. 177.

wishes to expend part of the principal,¹¹ or a large sum of the income.¹² In case he applies for an order, which is referred to a master, if he abandons it, the costs will be put upon him. He should apply to have the reference vacated and leave to withdraw the petition.¹³ When the court makes the allowance the order is final, and upon exceptions to the guardian's account, if the amount allowed appears to have been honestly expended, the court will not inquire into the necessity for it.¹⁴

56. Allowance to the guardian.

Generally the guardian will not be allowed for maintenance of the ward as a member of his own family.¹⁵ But where the ward was distantly related to his wife and there was no family relation, the guardian's reasonable charges were allowed.¹⁶ This is a matter in the discretion of the court determinable by the circumstances of the case, and whether or not the presence and aid of the ward were fairly equivalent to boarding and clothing.¹⁷ If the ward be a near relative and no account of expenditures is kept, the presumption of gratuity will arise.¹⁸ But where the wards live with their relatives, who took care of them, the rule does not apply.¹⁹ Where the guardian did not intend to charge the ward with school tuition and expenses, but the ward by capriciousness deprived his guardian of his commissions, the court allowed his claim for maintenance.²⁰ If the claim is a mere afterthought, it will not be allowed.²¹ The guardian was allowed a small balance where it was apparent that the estate was not sufficient even to pay for maintenance.²²

57. Allowance to the father of the ward.

Primarily the father is liable to maintain his children during minority²³ but if he be unable to raise them in keeping with their estates, he may be assisted out of them.²⁴ Such inability should appear in the petition.²⁵ If it appears that the father has

¹¹ Lewis' Est., 9 Kulp, 397; Longaker's Ap., *supra*.

¹² Tubb's Est., 3 Kulp, 418. Rhone, P. J.

¹³ Wertz's Est., 18 Phila. 204.

¹⁴ Fell's Est., 4 Kulp, 185. Rhone, P. J.

¹⁵ Horton's Ap., 94 Pa. 62; Beam's Ap., 96 Pa. 75; Gramlich's Ap., 3 Walker, 371; Bright's Ap., 30 Pitts. L. J. 146; Albert's Ap., 128 Pa. 613; Shuey's Est., 1 Supr. C. 405; Tubb's Est., 3 Kulp, 418; Quinn's Est., 16 Phila. 223.

¹⁶ Wauhoup's Est., 29 Pitts. L. J. 256; Dunkel's Ac., 1 Woodward, 58.

¹⁷ Smith's Est., 8 Luz. L. R. 33.

¹⁸ Miller's Est., 6 Kulp, 63. Rhone, P. J. Souder's Est., 2 Woodward, 235.

¹⁹ Scott's Est., 9 D. R. 416.

²⁰ Moore's Est., 8 C. C. 262.

²¹ Silver's Est., 6 D. R. 267.

²² Carr's Est., 14 Phila. 265.

²³ Harland's Accounts, 5 Rawle, 323; Sober's Est., 15 Phila. 546.

²⁴ Flade's Est., 16 Phila. 227; Groome's Est., 14 Phila. 264; Edward's Est., 1 Lanc. L. R. 177; Hall's Est., 30 Pitts. L. J. 450.

²⁵ Wood's Est., 37 Leg. Int. 465.

a fair income, a petition to relieve him of the support of his children will be refused.²⁶ Even where the inability of the father is averred the matter is discretionary with the court.²⁷

58. Allowance to mother of the ward.

The rule as to the mother of a ward is different, for the law does not hold her primarily liable for the support of her child nor entitle her to its earnings,²⁸ but the petition on her behalf must aver sufficient facts to show what would be a reasonable allowance.²⁹ An arrangement between the guardian and the ward's mother, if reasonable, will be ratified.³⁰ Where a ward is married but lives with her mother the duty of maintenance is upon the ward's husband, and the mother, in the absence of an express contract, cannot recover from the ward's estate for boarding and nursing.³¹ It seems that a contract between the guardian and the mother is essential,³² the presumption of gratuity being invoked against her;³³ but the mother being herself poor and the case a necessitous one, the courts will not in conscience enforce so unfilial a rule.³⁴

59. Allowance to step-parents and grandparents.

Whilst a step-parent to a child is not legally bound to maintain it, yet if it lives in his family and he clothes, educates and supports it, he must prove a contract before he can recover.³⁵ The guardian may make a binding contract with him to that effect.³⁶ The grandfather, under our law, is liable for the maintenance of his indigent grandchildren, being himself able, but the courts have held that he is entitled to compensation out of the grandchild's estate, without proving a contract,³⁷ except where the child lives with him against the guardian's wish.³⁸

60. Time of allowance.

A wholesome rule was laid down by Judge Rhone in a number of cases,³⁹ which it would be well and sensible for all courts to

²⁶ *Lizsman's Est.*, 4 *Lanc. L. R.* 38.

²⁷ *Seaver's Est.*, 11 *Phila.* 1; *Leichthamer's Case*, 7 *Montg.* 165.

²⁸ *Pennock's Est.*, 1 *W. N. C.* 196; *McDaid's Est.*, 14 *Phila.* 253.

²⁹ *Stanton's Est.*, 13 *Phila.* 213.

³⁰ *Bryson's Est.*, 13 *Lanc. Bar*, 45; *Tubbs' Est.*, 3 *Kulp*, 418; *Selleck's Ap.*, 16 *W. N. C.* 370; *Albert's Ap.*, 128 *Pa.* 613.

³¹ *Bellas' Est.*, 6 *Kulp*, 189. *Rhone*, *P. J.*

³² *Brown's Ap.*, 112 *Pa.* 18; *McDaid's Est.*, 14 *Phila.* 253.

³³ *Sherer's Est.*, 16 *Phila.* 348; *Seitz's Ap.*, 87 *Pa.* 159; *Cummings v. Cummings*, 8 *Watts*, 366.

³⁴ *Pennock's Est.*, 11 *Phila.* 75; *Meixell's Ap.*, 1 *Pitts.* 235. *Lowrie*, *J.*

³⁵ *Douglas' Ap.*, 82 *Pa.* 169.

³⁶ *Brown's Ap.*, 112 *Pa.* 18; *Ruckman's Ap.*, 61 *Pa.* 251.

³⁷ *Walls' Est.*, 13 *C. C.* 413; *Wildoner's Ap.*, 9 *Atl.* 272; *Lafferty's Est.*, 147 *Pa.* 283; *Tubbs' Est.*, 3 *Kulp*, 418; *Norris' Est.*, 19 *Phila.* 195.

³⁸ *Soley's Est.*, 5 *Leg. Gaz.* 93.

³⁹ *Fessenden's Est.*, 1 *Kulp*, 139; *Tubbs' Est.*, 3 *Kulp*, 418; *Bellas' Est.*, 6 *Kulp*, 189; *Keenan's Est.*, 6 *Kulp*, 67; *Davenport's Est.*, 2 *Kulp*, 168; *Gissel's Est.*, 5 *Kulp*, 206.

adopt, if the doctrine of *parens patriæ* will permit. It is that when a child is over fourteen it should be sent to school or learn a trade and be kept from growing up in idleness, vice and profligacy. The duty of the guardian standing *in loco parentis*, is to see to it that the child above fourteen does something to earn its living and become a useful member of society.

61. Services of ward as a set-off.

Where the ward has attained an age of earning ability and the guardian lays claim to support, it is a question for the court to consider whether or not such services as the ward rendered should not be valued and set off against his claim for maintenance.⁴⁰ But if the ward was attending school and her assistance was immaterial no account will be taken of it.⁴¹ However, if her services appear to have been worth her boarding, that equivalent will be deducted from the guardian's charges.⁴² Guardians are expected to promote industry and thrift in their wards, but not to profit thereby and they will be charged for such services according to the circumstances.⁴³ At least his services should be worth his keep.⁴⁴ The question is one exclusively for the Orphans' Court and the ward on attaining majority cannot sue his guardian for wages.⁴⁵

62. Estate from which allowance may be made.

Where the minor has two estates, allowance should be made for his immediate necessities out of that which is less certain, less productively invested and not secured by bond.⁴⁶ Where the father bequeathed a fund the income of which alone was set apart for maintenance the guardian will be confined to the interest;⁴⁷ but where the legacy is given absolutely, the principal may be used.⁴⁸ No allowance can be decreed from a contingent legacy.⁴⁹ After a year, the interest on a vested legacy may be applied to support of the minor,⁵⁰ although not due until he arrives at full age.⁵¹ The guardian is the proper party to make application.⁵² As a rule the court will not order payment out of the estate of minor, until the legal representative has filed an account or distribution has been awarded.⁵³ Where the testator has directed in

⁴⁰ Simon's Est., 35 Pitts. L. J. 21; Wauhoup's Est., 29 Pitts. L. J. 256; Kumberger's Est., 37 Pitts. L. J. 383.

⁴¹ Scott's Est., 15 C. C. 316.

⁴² Hughes' Est., 3 Law Times (O. S.), 109. Rhone, P. J.

⁴³ Beam's Ap., 96 Pa. 74.

⁴⁴ Scott's Est., 9 D. R. 416; McCuen's Est., 11 D. R. 315.

⁴⁵ Denison v. Cornwell, 17 S. & R. 374; Deturk's Ac., 1 Woodward, 267.

⁴⁶ Bentley's Est., 33 Pitts. L. J. 177.

⁴⁷ Hughes' Ac., 22 Pitts. L. J. 121; Seitz's Ap., 87 Pa. 159.

⁴⁸ Corbin v. Wilson, 2 Ashmead, 178.

⁴⁹ Robinson's Est., 6 Lanc. L. R. 153.

⁵⁰ Friedlinger's Est., 5 W. N. C. 405.

⁵¹ Clark v. Wallace, 48 Pa. 80; Seitz's Ap., 87 Pa. 159; Seibert's Ap., 19 Pa. 49; Leiby's Ap., 49 Pa. 182.

⁵² Fox's Est., 6 Montg. 14; Boyd's Est., 18 Phila. 112.

⁵³ Hanbest's Est., 4 W. N. C. 403; Friedlinger's Est., 5 W. N. C. 405.

his will how the money shall be expended and for what specific purposes, the rule is to follow his directions.⁵⁴

63. Amount of allowance.

Where the character of maintenance was plain, according to the circumstances of the people, a guardian was allowed at the rate of five dollars a month to the time the ward arrived at the age of fourteen years.⁵⁵ But where the child was young, in delicate health and needed a nurse, an allowance of ten dollars was held reasonable.⁵⁶ The estate being ample an expenditure of a suitable sum for the ward's medical education will be allowed.⁵⁷ The will of the father usually sets the limit, but where the accumulations of income are greater than anticipated, the court may increase the allowance so as to make it adequate.⁵⁸

64. Sale of minor's real estate.

The third clause of section 31 of the act of March 29, 1832, P. L. 190, provides that the Orphans' Court possesses jurisdiction and has power to authorize the sale or mortgaging of real estate, "On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate, or that the estate of said minor is in such a state of dilapidation and decay, or so unproductive and expensive, that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold, and the Orphans' Court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case, as in the cases particularly mentioned in the thirty-second section of this act."

The 32nd section is given in the chapter relating to the sale of real estate for the payment of debts, with the practice under it, *supra*.

Prior to the acts of 1851 and 1853, the law looked with disfavor upon sale and conversion of the real estate of minors and distributees.⁵⁹ A widow's dower was held not to be discharged by the sale.⁶⁰

65. Sales by guardians or trustees.

Section 1 of the act of April 3, 1851, P. L. 305, enlarging the act of 1832, *supra*, provides:

"The Orphans' Court of the several counties of this commonwealth shall have power to authorize by decree the sale of real estate within their respective counties in the following cases, in addition to those specified in the acts to which this is supplementary:

⁵⁴ Haddock's Est., 28 Pa. 63; Lightner v. Lightner, 127 Pa. 468.

⁵⁵ Bellas' Est., 6 Kulp, 189. Rhone, P. J.

⁵⁶ Killion's Ap., 3 Brewster, 235.

⁵⁷ Smith's Ap., 30 Pa. 397.

⁵⁸ Washington's Est., 8 Phila. 182.

⁵⁹ Davis' Ap., 14 Pa. 372.

⁶⁰ Brown v. Adams, 2 Wharton, 190.

I. Where lands and tenements, or any interest in possession, belong to a minor, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of such minor that the same should be sold, in every such case, upon the application of the guardian of such minor, the said court shall authorize the said guardian to make sale of said lands or interest; and upon the confirmation of said sale, the said guardian shall receive and hold the proceeds thereof as and for the estate of said minor.

II. Where lands and tenements are held by will or otherwise for life, or *pur autre vie*, by any person or persons, with remainder to any minor or minors, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of such minor or minors that the same should be sold, in every such case, upon the application of the tenant or tenants for life or *pur autre vie*, as the case may be, the said court shall appoint a trustee to make sale of said lands; and upon the confirmation of such sale, the said trustee shall receive and hold the proceeds thereof in trust for the parties in interest therein, and shall loan the same upon good real estate security, upon bond and mortgage, and shall pay the interest thereof, as it shall accrue, to the tenants for life, or *pur autre vie*, until the estate for life or *pur autre vie* shall have terminated, and shall then pay over the principal sum to the person or persons entitled to such remainder.

III. Where lands and tenements are held in trust, under the provisions of any last will or testament, for any corporation or corporations, person or persons whomsoever, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of the *cestuis que trusts* that the same should be sold, in every such case, upon the application of the trustee or trustees holding the same, the said court shall authorize the said trustee or trustees to make sale of said land; and upon the confirmation of such sale, the said trustee or trustees shall receive and hold the proceeds thereof upon such trusts as he, she, or they held the said lands."

66. Day of hearing and notice.

Section 2 of said act provides:

"In any case where an application shall be made to any Orphans' Court for a decree authorizing the sale of real estate under any of the provisions hereof, the court shall appoint a day for the hearing and investigating of the facts of the case, and shall cause notice of such day and of such application to be given to all parties legally or beneficially interested in said real estate, and to the guardian of all such parties as are minors; and if such application be made by a guardian, then to the minors themselves, or to their next of kin residing in the county, if such there be, at least thirty days prior to such day of hearing; and upon the hearing of all parties who shall attend, by themselves, their guardians, next of kin, committee or trustees, as the case may be, the said court shall make such decree in the premises as the facts and circumstances shall require."

Section 3. "The notice required by the second section hereof shall

be given in the manner prescribed by the fifty-second and fifty-third sections of the act to which this is supplementary."

67. Petition and requisites.

Section 4 of said act provides:

"Every application for the sale of lands under any of the provisions hereof shall be in the form of a petition, and shall set forth a sufficient description of such lands, and the names of the persons interested in the same; and where any of them shall be minors, having no guardian residing within the county in which the lands lie, it shall be the duty of the court to appoint some suitable person or persons to guard the interests of said minors: *Provided*, That if such minors shall appear upon the day of hearing before mentioned by guardian, *prochein ami*, or next of kin, such appointment shall be null and void."

68. Bond by petitioner — Title given.

Section 5 of the said act provides:

"Before any sale of lands under any of the provisions hereof shall be confirmed by the court, the person or persons to whom the order of sale shall be granted shall file in the office of the clerk of said court a bond, with two or more sureties, to be approved of by the said court, in double the amount of the proceeds of such sale, conditioned for the faithful appropriation of said proceeds; and no sale duly made and confirmed by the proper court shall be held to be void by reason of any misapplication of the proceeds thereof, or on account of any error of judgment which the said court may have made in deciding that such sale was to the interest of the minors or *cestuis que trusts* interested in the land sold."

69. Jurisdiction to sell or mortgage the real estate of minors.

The sale or mortgaging of minor's real estate must be based upon a petition by one who is actually a guardian, and not one who merely claims to be.¹ Being the actual guardian a mortgage cannot be subsequently attacked on the ground that such guardian was at the time insane, since the act becomes that of the court.² Nor can the mortgage be attacked because some of the money raised by it was used by the guardian for expenses of administration.³

The act of 1832 does not authorize mortgaging of a ward's land to discharge a trust created by will.⁴ The act of April 3, 1851, P. L. 305, is an enlargement of the act of 1832, so that the minor's real estate may be sold or mortgaged whenever it is for the benefit of the minor.⁵ But if the title is in question a sale will not be ordered, lest the minor's interest be sacrificed.⁶ If the

¹ Grier's Ap., 101 Pa. 412.

² Grier's Ap., 101 Pa. 412.

³ Chase v. Brown, 22 C. C. 598.

⁴ Biles' Est., 8 Phila. 587.

⁵ Drayton's Est., 6 Phila. 157.

⁶ Moore's Est., 9 Phila. 326.

petition and answer be referred to a master and he reports favorably to the sale, a question as to the title will be dismissed.⁷ When two sales have been made for the payment of debts, still another sale of remaining land may be made to maintain a minor child.⁸

A guardian should not be joined with an administrator for the mortgage, alleging on one hand necessity to pay debts and on the other repairs of the estate and maintenance of a minor.⁹ If the parties sell for reasons allowed by the act of 1851, and ask for the appointment of a trustee to receive the purchase money, such an appointment is equivalent to a ratification of the sale.¹⁰

70. Sales, etc., statutory.

The sale, mortgaging or leasing of a minor's real estate can only be authorized by statute, and the method therein prescribed must be pursued. If the guardian takes a circuitous mode, as by a tax sale, and the purchaser was aware of the purpose, no title is thereby conferred.¹¹ A minor's consent to a transfer of the estate from the guardian to such minor's husband will not be accepted by the court.¹² A lease of mining property in which the minors and widow were tenants in common, was authorized by the Orphans' Court, without the widow's consent when her delay was vexatious and it was manifestly to the interest of all, the petition being presented on behalf of the minors.¹³ "A guardian has, ordinarily, power to lease any of his ward's property that is of such character as makes it the subject of a lease, but without the approval of the Orphans' Court, he cannot dispose of any of the realty. Oil, however, is a part of the realty. In this it is like coal or any other natural product, which, *in situ*, forms part of the land."¹⁴

71. Form of petition to sell part of minor's real estate.

In the Matter of the Estate

of Ellery Best, Deceased.

In the Orphans' Court of Clinton County.

To the Honorables the judges of said court, the petition of Cline G. Furst, who was on the — day of —, A.D. 19—, appointed by your Honorable Court guardian of the person and estate of Mary Best, a minor child of said Ellery Best, deceased, she being of the age of twelve years, respectfully represents:

That the said minor is seized in fee of [describe the land]; that the personal estate of said minor is insufficient for her maintenance and education; and that there is no adequate income from said real estate for the purposes aforesaid, and it would be for the interest and advantage of said minor that said real estate be

⁷ Burke's Est., 3 D. R. 384.

⁸ Huckle v. Phillips, 2 S. & R. 4.

⁹ Barnett's Est., 3 W. N. C. 412.

¹⁰ Hubley's Est., 16 Phila. 327.

¹¹ Johns v. Tiers, 114 Pa. 611.

¹² Cumming's Ap., 11 Pa. 272.

¹³ Neel's Ap., 3 Penny. 66.

¹⁴ Gordon, J., in Stoughton's Ap., 88 Pa. 198; De Armit v. Milnor, 20 Supr. C. 369; Sayers v. Pollock, 219 Pa. 274.

sold. Your petitioner herewith exhibits, attached to his petition, a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of said minor, together with a full and correct statement and description of all the real estate of the said minor wheresoever situated, which has come to his knowledge. Your petitioner therefore prays your Honors to grant him an order to make sale of the above described real estate, with the appurtenances; and he will ever pray.

Cline G. Furst,
Guardian.

72. Form of affidavit.

Clinton County, ss.

Cline G. Furst, the above-named petitioner, being duly sworn, doth depose and say that the facts set forth in the foregoing petition are just and true and that the inventory and appraisement of the personal estate of the said minor and the statement of the said minor's real estate, which are thereunto annexed, are just and true to the best of his knowledge and belief.

Sworn to, etc.

[Appended hereto will be first, the inventory and appraisement; second a schedule of all the real estate of the minor describing each parcel.]

73. Order of court.

Upon said petition, if the court is satisfied without referring it to an auditor, an order will be endorsed thereon as follows:

Now, — day of —, A. D. 19—, the foregoing petition being read and considered and it appearing to the court that it would be for the interest and benefit of said minor that his real estate be sold as prayed for, it is ordered, adjudged and decreed that Cline G. Furst his said guardian is hereby authorized to make sale of [or to mortgage] the real estate of said minor Mary Best, at public [or private] sale, he first giving bond to be approved by the court in the sum of five thousand dollars.

By the Court.

The act of May 21, 1901, P. L. 272 (see *infra*, "Testamentary Guardians"), provides that when the land lies in different counties, notice shall be given in all, and certified copies of the proceedings be recorded in each county.

74. Sureties, approval of in Philadelphia.

Section 1 of rule 16, Philadelphia, provides:

"In every case where the amount of security required to be given by an executor, administrator, trustee or guardian shall be two thousand (2000) dollars, or in excess thereof, the surety or sureties shall be approved by the court; but when less than that amount, they may be approved by the clerk in pursuance of an order of the court previously made."

75. Affidavit with offer of security, Philadelphia.

Section 2 of rule 16, Philadelphia, is as follows:

"All applications for approval of sureties shall be accompanied by an affidavit of the party or parties offered as security, setting forth:

- I. His or their name, residence and occupation.
- II. The location of real estate owned by him or them, or so much as may be sufficient, and a memorandum of the record thereof.
- III. That the title thereto is in his or their name.
- IV. The nature and amount of incumbrance, if any, upon the real estate.
- V. The assessed value of the real estate described.
- VI. That after payment of his [or their] debts, engagements and liabilities deponent believes that he [or they] is worth not less than — dollars.

Said affidavit shall be filed with the clerk of the court."

76. Trust and surety companies.

The rules of court in Philadelphia and Allegheny County elaborately deal with trust and surety companies and their acting in a fiduciary capacity, which will be considered more fully under trusts and trustees, *infra*.

77. Confirmation of sale.

A confirmation of a sale of real estate in the Orphans' Court is not complete until the purchase money be paid and a deed delivered. A sale and confirmation alone is not such a parting from the title as would defeat a pending action of ejectment by the executor.¹⁵ It is an abuse of discretion to confirm a sale where the power is based on no established fact or recognized principle, as where the validity of a codicil was passed upon before the issue *devisavit vel non* was decided.¹⁶ As an Orphans' Court sale depends upon approval and confirmation¹⁷ and is not complete until the purchase money is paid and the deed delivered, *quare*, whose is the loss, if the buildings are destroyed between the sale and confirmation?¹⁸ If now, the Orphans' Court were a court of Equity (chancery), the sale would be as if by a master, and the loss of the property after confirmation, *nisi*, would fall upon the purchaser.¹⁹ But, the Orphans' Court, on the highest authorities, being a statutory court, it would seem, that the loss should fall upon the estate.²⁰

78. Duty of guardian to collect rents.

The ward being possessed of real estate from which an income may be derived the guardian is bound to rent it and collect and account for the rents.²¹ If he himself lives on the land he must ac-

¹⁵ *Leshy v. Gardner*, 3 W. & S. 314.

¹⁶ *Smith's Est.*, 177 Pa. 17.

¹⁷ *Demmy's Ap.*, 43 Pa. 155.

¹⁸ *Leshy v. Gardner*, 3 W. & S. 314.

¹⁹ *Minor, ex parte*, 11 Vesey, 559; *Twigg v. Fifield*, 13 Vesey, 517.

²⁰ *Demmy's Ap.*, 43 Pa. 155.

²¹ *Keenan's Est.*, 6 Kulp, 67; *Crowell's Ap.*, 2 Watts, 295; *McElhenny's*

count for a reasonable rental.²² Where he rents it to another he is not surchargeable except for fraud or gross negligence.²³ But it will be held to be such negligence where he does not require part in advance or security, as ordinary prudent men do;²⁴ or where he permits an insolvent lessee who is in default, to remain on the premises,²⁵ or allows another to collect the rent and spend it or lose it,²⁶ or where he refuses to rent it on a reasonable offer.²⁷ But he is not chargeable for rents he allows to go to the mother of the ward for its support, this being in the course of his duty.²⁸ The ward as tenant in common with the guardian can require an account for the rents.²⁹ When the ward lived with its mother, the guardian becomes liable for the rent after the mother's death.³⁰ As to the amount of rent, he cannot be surcharged if he shows ordinary business prudence in realizing upon it.³¹ Two successive guardians becoming liable for rents in arrear, the one who first gets execution against the lessee has the preference.³² When a guardian is also tenant in common with her children she need not charge herself rent for her own occupancy.³³ But if a tenant in common does account for the rent, it is subject to be raised.³⁴ Where the guardian has rents in his hands he may apply them to the debts of the decedent to prevent a sale and thus save the property for his wards.³⁵

79. Improvements and repairs.

In order to be safe in improving and adding to his ward's dwelling house the guardian should present his petition to the Orphans' Court and get an allowance.³⁶ If the petition is defective he may have leave to withdraw and present a new petition in which the necessary averments are contained.³⁷ When a guardian makes repairs on his ward's property the workmen must look to him personally, if he has no order of court.³⁸ When he obtains an order of court to improve his ward's estate out of the surplus of the income, it gives him no authority to pledge the personalty to a bank and it will be required to return the property, on petition.³⁹ A guardian has not

Ap., 46 Pa. 347; Weltner's Ap., 63 Pa. 302; Slingluff's Case, 7 Montg. Co. 118; Thackray's Ap., 75 Pa. 132.

²² Laney's Est., 2 D. R. 800.

²³ Sherer's Est., 16 Phila. 348.

²⁴ Landis' Ac., 1 Pearson, 401.

²⁵ Hughes' Ap., 53 Pa. 500; Emanuel's Est., 13 Supr. C. 43.

²⁶ Will's Ap., 22 Pa. 325; Emanuel's Est., *supra*.

²⁷ Hughes' Ap., 53 Pa. 500.

²⁸ Eyster's Ap., 16 Pa. 372.

²⁹ Burdick's Est., 6 Lack. Jur. 361.

³⁰ Stewart's Est., 14 D. R. 314.

³¹ Savage's Est., 27 Supr. C. 292.

³² Weltner's Ap., 63 Pa. 302.

³³ Borschell's Est., 16 Phila. 234.

³⁴ Laney's Est., 2 D. R. 800.

³⁵ Hart's Est., 4 Kulp, 14. Rhone, P. J.

³⁶ Kearn's Ac., 1 Pa. 326.

³⁷ Hellerman's Est., 3 W. N. C. 391.

³⁸ Clark's Ac., 2 Pearson, 489.

³⁹ Hind's Est., 183 Pa. 260.

authority to make improvements *ad libitum* and beyond what is clearly necessary.⁴⁰

80. Form of petition for allowance.

To the Honorables the Judges of the Orphans' Court of Mifflin County.

The petition of Willis Mann, guardian of John M. Divens, Helen Vivian Divens and Pearl Irene Divens, minor children of John Divens, late of the borough of Lewistown, Pa., deceased, respectfully represents: That the said minors are respectively of the ages of eighteen, sixteen and fourteen years and that their personal estate in the hands of your petitioner amounts to three thousand dollars, which is invested at six per cent., bringing an annual income of one hundred and eighty dollars; that they are the owners of a house and lot in Lewistown, Pa., which is in a state of dilapidation and decay, to such an extent that it is dangerous as well as unproductive and that it will require the expenditure of three hundred dollars, as your petitioner has been informed by a competent builder and as he verily believes to render it tenantable and productive. Your petitioner therefore prays your honorable court to make an order authorizing him to expend out of the funds in his hands said sum of three hundred dollars, or as much thereof as may be necessary to repair and improve the said estate; and he will ever pray.

Willis Mann.

Sworn to, etc.

81. Form of order of court.

Now, — day of —, A. D. 19—, the above petition having been read and considered, and it appearing to be for the interest and advantage of the minors therein named, it is ordered, adjudged and decreed that the said Willis Mann, guardian, be authorized to expend the sum of three hundred dollars of the said minors' funds in his hands, for the improvement and repair of their estate as prayed for and that he have credit in his account for the actual amount expended by him in the premises, for which he shall file sufficient vouchers.

By the Court.

82. Guardian's rights to reimbursement and subrogation.

A guardian who advances his own money to pay off liens on his ward's real estate is entitled to reimbursement out of a fund raised by the sale of the same, although the time has expired when debts would remain liens upon the real estate of the decedent, this becoming a debt of the wards and not of the decedent.¹ So where a guardian gives time to his ward's debtor and settles for the debt in his account, he may then sue the debtor in his own right.² Having advanced funds on behalf of his ward and accounted for them, he is entitled to subrogation to the rights and remedies of his ward in the premises.³

⁴⁰ Huston, J., in *Bonsall's Ap.*, 1 Rawle, 266.

¹ Merkel's Est., 154 Pa. 285.

² Breneman's Ap., 121 Pa. 641.

³ Kelchner v. Forney, 29 Pa. 47; Calhoun's Est., 44 Pits. L. J. 414; Gallup's Est., 4 Kulp. 475.

83. Liability of guardian for ward's assets.

A guardian is not only liable for assets which have actually come into his hands, but also such rights and property of his ward as by reasonable care and diligence he might have secured, but by his neglect lost.⁴ It has even been held that when he sells his ward's property, including good will, he must account for the latter.⁵ He will be accountable for earnings of his ward which he failed to set off against a charge for maintenance.⁶ But he is not liable for such funds as under the law belong to the widow;⁷ or are directed under the Price Act to the use of the widow during her life, his wards attaining majority in her lifetime;⁸ or for property he received as his ward's, which, however, belonged to himself.⁹ A guardian should not be charged for funds placed at interest as though they were cash.¹⁰ Where a second guardian receives securities from the first, which have been unrealized, he is only liable for their value when they came into his hands.¹¹ A guardian is not liable for funds in the hands of the administrator which were lost by the latter's neglect;¹² nor for moneys received after the ward is of full age,¹³ holding the funds as agent.¹⁴ Since the act of April 11, 1848, a husband cannot act as guardian for his minor wife. For funds in the hands of the executor, which the guardian had no right to demand, he is not liable;¹⁵ and, where the trustee erroneously pays him part of the fund, he is liable only for so much as came into his hands.¹⁶ Where funds do not come into his hands, he is only liable for their loss, if he is neglectful or acts in bad faith.¹⁷ Where a second guardian has money of the ward in his hands, the first guardian need not collect it from him in order to pay it over to him.¹⁸

84. Loss of fund by guardian.

A guardian is held to a reasonable degree of care and prudence in handling his ward's estate and is not liable for loss in the absence of negligence.¹⁹ So where he deposits the money in a bank with two weeks' notice of withdrawal, as a separate trust fund, and the

⁴ Wilson's Est., 12 Phila. 24; Waile's Est., 10 D. R. 548.

⁵ McNickle's Est., 1 W. N. C. 614.

⁶ Carr's Est., 14 Phila. 265.

⁷ Watt's Ac., 24 Pitts. L. J. 117.

⁸ Carr's Est., 17 D. R. 297.

⁹ Spangler's Ap., 24 Pa. 424.

¹⁰ Baskin's Ap., 34 Pa. 272.

¹¹ Jack's Ap., 94 Pa. 367; Patton's Ap., 62 Pa. 143.

¹² Bull v. Towson, 4 W. & S. 557.

¹³ Leonard's Ap., 95 Pa. 196; Evans' Est., 1 D. R. 453.

¹⁴ Marck's Est., 3 Northam. 29.

¹⁵ Johnson's Ap., 12 S. & R. 317; Milligan's Est., 3 Leg. Gaz. 202; Crowell's Ap., 2 Watts, 295.

¹⁶ Scott's Est., 22 Pitts. L. J. 58.

¹⁷ Konigmacher v. Kimmel, 1 P. & W. 207; Stem's Ap., 5 Wharton, 472; Huffer's Ap., 2 Grant, 341; Jack's Ap., 94 Pa. 367; Neff's Ap., 57 Pa. 91; Landmesser's Ap., 126 Pa. 115.

¹⁸ Neville's Pet., 23 Pitts. L. J. 129.

¹⁹ Jack's Ap., 94 Pa. 367; Chambersburg, Etc., Ap., 76 Pa. 203; P. & L. Dig., vol. 8, cols. 13288-9.

bank becomes insolvent, he is not responsible for the loss.²⁰ He will be held, however, for any loss caused by supine negligence.²¹ So, if he leaves money uninvested in a bank, for a long time without any effort to invest it, he will be surcharged for the loss by the bank's failure.²² He is also liable for loss occasioned by his neglect to pay the taxes on and repair his ward's real estate.²³ If he invests the money of his ward in the stock of a bank, without authorization, he will be held for the loss of it,²⁴ or other private corporations.²⁵ The court may ratify a safe investment in securities,²⁶ but any other course than that pointed out herein, will subject the guardian to risks which he can avoid by obtaining the sanction of the court, in advance of his investment.²⁷ Where he makes the investment more for his own benefit than for his ward's, he will be held to a strict account.²⁸ If he improperly pays over money of his ward to a third person, though under a mistake of law, he is liable for his mistake.²⁹ But after a lapse of many years, and the death of the guardian, his estate will not be charged on weak evidence of negligence or mistaken judgment.³⁰ If by his connivance with the administrator the ward's money is lost in stock speculation, the guardian becomes liable;³¹ also if by his covinous acts the fund disappears.³² If he is surcharged with some items erroneously the appellate court may eliminate them.^{32a}

85. Liability for loss by predecessor.

Where a successor is appointed to a guardian the successor is not held liable for funds in the hands of the first, until an account is filed and settled showing the amount due.³³ Nor is it his duty when the first guardian has filed an account and been improvidently discharged, to require him to file another account.³⁴ But, it has also been held that it is his duty to scan his predecessor's account and object to errors in it, or he may himself be surcharged.³⁵ And if he loses a balance found due from his predecessor, it will be supine negligence.³⁶

²⁰ Law's Est., 144 Pa. 499.

²¹ Webber's Est., 133 Pa. 338; Stem's Ap., 5 Wharton, 472; Rogers' Ap., 11 Pa. 36; Wills' Ap., 22 Pa. 325; Dietterich v. Heft, 5 Pa. 87.

²² Evans' Est., 7 Supr. C. 142.

²³ Hall's Est., 30 Pitts. L. J. 450.

²⁴ Luken's Ap., 7 W. & S. 48.

²⁵ Worrell's Ap., 9 Pa. 508; 23 Pa. 44.

²⁶ Slingluff's Case, 7 Montg. Co. 118.

²⁷ Smith's Est., 16 Phila. 308; Lechler's Ap., 21 W. N. C. 505; Twaddell's Ap., 5 Pa. 15.

²⁸ Williams' Ap., 23 W. N. C. 12; Royer's Ap., 11 Pa. 36; P. & L. Dig., vol. 8, col. 13300.

²⁹ Mulholland's Est., 154 Pa. 491.

³⁰ Roth's Est., 150 Pa. 261.

³¹ McCahan's Ap., 7 Pa. 56.

³² Lamb's Ap., 58 Pa. 142.

^{32a} O'Brien's Est., 43 Supr. C. 546, 549.

³³ Watson's Est., 8 Kulp, 132.

³⁴ Wonder's Est., 6 York, 91.

³⁵ Groff's Ac., 1 Lanc. Bar, No. 29; Packer's Est., 6 York, 143.

³⁶ Stone's Ap., 23 W. N. C. 283.

86. Liability for interest.

If the guardian has funds in his hands and does not use reasonable diligence to invest them so as to produce interest, he will be charged with interest.³⁷ He need not invest all of the money, but may retain a reasonable sum for his commissions and the necessary current expenses.³⁸ But if he mixes up the ward's money with his own in business and files no accounts for a number of years, he will be charged interest on the whole of it and be deprived of his commissions besides, for his malfeasance.³⁹ In calculating interest the mercantile method has been approved, viz., to charge the accountant upon each item received until the time of accounting, and to claim credit with interest upon each disbursement from the time it was made until the time of filing the account.⁴⁰ Where the guardian uses the money, the practice has been to strike a balance against him every six months and charge interest at six per cent. thereon.⁴¹ Formerly, it was the rule to give him six months in which to invest the money,⁴² but this is not inflexible; for, if the money comes into his hands when it may be invested at once, if he fails to do so, he is negligent.⁴³

If the sum, however, be so small that its investment would be trifling, he ought not to be surcharged.⁴⁴ In one case it was held that three months' time to invest was not too long to give the guardian.⁴⁵ But if he has made no effort to invest at all, he will be charged from the time he receives the money.⁴⁶ A testamentary trustee has been held to the same rules as a guardian in respect to investment.⁴⁷ If the guardian has become liable for a debt due his ward which he failed to collect, he is also liable for interest upon it.⁴⁸ As to amount retained by the guardian after the ward has come of age, with his consent, no interest is collectible on the balance of his account.⁴⁹ Where the guardian has acted in entire good faith, he will not be charged with more interest than he received;⁵⁰ and if he has made reasonable efforts to invest and failed, he will not be surcharged.⁵¹ Otherwise, where he has made no effort.⁵² The period of three years at the end of which a guardian must file a statement for the information of everybody concerned is not intended to form a basis for the calculation and compounding of in-

³⁷ McCahan's Ap., 7 Pa. 56; Pennypacker's Ap., 41 Pa. 494; Hughes' Ap., 53 Pa. 500; P. & L. Dig., vol. 8, col. 13312.

³⁸ Mendenhall's Est., 1 Leg. Gaz. 53.

³⁹ Watson's Est., 8 Kulp, 280; Gissel's Est., 5 Kulp, 207; Noble's Est., 178 Pa. 460.

⁴⁰ Sando, P. J., in Burdick's Est., 6 Lack. Jur. 361.

⁴¹ Say v. Barnes, 4 S. & R. 112.

⁴² Worrell's Ap., 23 Pa. 44; Hickman's Ap., 7 Pa. 464.

⁴³ Landis' Ac., 1 Pearson, 401.

⁴⁴ Moore's Est., 8 C. C. 262.

⁴⁵ Luken's Ap., 47 Pa. 356; Gissel's Est., 5 Kulp, 208.

⁴⁶ Aten's Est., 2 Kulp, 463.

⁴⁷ Cooper v. Scott, 62 Pa. 139.

⁴⁸ Royer's Ap., 11 Pa. 36.

⁴⁹ Martin's Est., 15 Phila. 514. (See Hickman's Ap., 7 Pa. 464.)

⁵⁰ Harland's Ac., 5 Rawle, 323; Baker's Ap., 8 S. & R. 12.

⁵¹ Spath's Est., 144 Pa. 383.

⁵² Hampton's Case, 17 S. & R. 144.

terest. Each case presents its facts which will guide the court in reckoning interest.⁵³

87. Liability for interest on funds mixed with his own, etc.

The intent of the law is that a guardian shall invest his ward's funds separately and not use them in his own business. If he violates this rule he will be charged interest at the legal rate.⁵⁴ He may be so surcharged on a bill of review.⁵⁵ Whilst exceptions are pending against his account, adversely, interest will be suspended;⁵⁶ but if the delay is due to the guardian's exceptions to the adjudication, it is otherwise.⁵⁷

88. Liability of guardian for profits.

Said Burnside, J.:⁵⁸ "All the money of the ward and all the money made out of the ward's money, belongs to the ward." Said Kennedy, J.: "A guardian or trustee shall not be permitted to make profit or gain of his ward's money or estate or of the trust fund, and to put gain or profit into his own pocket."⁵⁹ And what he cannot do directly, he cannot do by indirection.⁶⁰ Whatever form it takes, the guardian has it on a trust and must account for it.⁶¹ If he speculates with the ward's money and loses, all the loss shall be his; and if he gains all the profits are the ward's and justly so.⁶² If the guardian invests the money in his own business the ward may elect to take interest or the profits.⁶³ But if the guardian has settled his account and charged himself therein with interest and paid the balance to his successor, the matter will be considered closed.⁶⁴ The election of a ward to take the profits of the business has been held to be an adoption of it as his own and he cannot be heard to dispute it.⁶⁵ Where the guardian lends the money of his ward to his firm, his partners will not be affected, but he himself must account for the share of profits he receives.⁶⁶

⁵³ Foltz's Ap., 55 Pa. 428; Noble's Est., 178 Pa. 460. (See *contra*, Bachman's Est., 1 Clark, 253.)

⁵⁴ Oliver's Est., 30 Pitts. L. J. 385; Widdoe's Est., 17 Phila. 469; Mulholland's Est., 175 Pa. 411; Milligan's Ap., 82 Pa. 389; P. & L. Dig., vol. 8, col. 13319.

⁵⁵ Emery's Est., 1 Leg. Gaz. 166; Copenheffer's Ap., 3 Penny. 243.

⁵⁶ Dietterich v. Heft, 5 Pa. 87; Yoder's Ap., 45 Pa. 394; McElhenny's Ap., 46 Pa. 347; Hoshour's Est., 11 York, 159.

⁵⁷ Noble's Est., 178 Pa. 460; Maurer's Est., 18 Phila. 241.

⁵⁸ Bachman's Est., 1 Clark, 253.

⁵⁹ Wolf v. Eichelberger, 2 P. & W. 346.

⁶⁰ Kepler v. Davis, 80 Pa. 153.

⁶¹ Slingluff's Case, 7 Montg. 118; Tanner's Est., 218 Pa. 361.

⁶² Jones' Est., 179 Pa. 36; Hayman's Ap., 65 Pa. 433.

⁶³ Seguin's Ap., 103 Pa. 139; Watts' Ac., 24 Pitts. L. J. 117; Small's Est., 24 W. N. C. 92; 144 Pa. 293.

⁶⁴ McAvoy's Est., 2 D. R. 609.

⁶⁵ Small's Est., 144 Pa. 293.

⁶⁶ Seguin's Ap., 103 Pa. 139; Richardson's Est., 15 Phila. 600; Rau v. Small, 144 Pa. 304. (See Clark's Est., 39 Supr. C. 445; Glassburners' Est., 40 Supr. C. 134, on surcharge.)

89. Effect of guardian's acts on his ward.

The laches of a guardian will not be imputed to a minor;⁶⁷ but when the minor comes of age, laches may bar the remedy.⁶⁸ A guardian may, on behalf of his ward, enter into a family agreement for his benefit, which will bind him, unless he promptly disavows it on coming of age.⁶⁹ The same is true of adoption of a consentable line between the tracts of the ward and another.⁷⁰ So, when he comes of age, he may by his acts ratify his guardian's acts, although invalid.⁷¹

90. Guardian's acts in partition.

The law has placed the guardian in lieu of the ward in proceedings to partition the land of a decedent, and if he accepts a purpart allotted to his ward it will be binding and the ward cannot afterwards reject it.⁷² So, if he accepts the land after coming of age, he takes it subject to the recognizance for owelty given by the guardian.⁷³ If the land is refused at the valuation and is sold, the guardian may purchase it for his ward and he is bound.⁷⁴ But if the minor has no funds, the guardian need not take the land at the valuation, charged with owelty.⁷⁵ Where notice has been given to the minor, he is bound by the proceedings although he has no guardian to represent him.⁷⁶ But if the minor had no notice, he cannot be bound, even by his guardian's act of acceptance.⁷⁷

91. Resulting trust by guardian.

When a guardian uses his ward's money in the purchase of real estate in his own name and assigns for the benefit of creditors, the land passes with a trust and a purchaser who has notice takes it subject to it;¹ and so of an investment by the attorney of the ward's estate.² But if the guardian uses the money in improving his land, the ward will not be preferred to lien creditors on the distribution of the fund arising from its sale.³ A guardian of several minors cannot give their money to one, or invest it in real estate for the benefit of one. They will all have an equal share in the property.⁴ Bank stock purchased by the guardian in the name of his ward

⁶⁷ Graham's Est., 14 D. R. 5.

⁶⁸ Magoffin's Est., 10 D. R. 473.

⁶⁹ Hume v. Hume, 3 Pa. 144.

⁷⁰ Brown v. Caldwell, 10 S. & R. 114; Hill v. Roderick, 2 Clark, 161.

⁷¹ Myers' Ap., 16 W. N. C. 137; Groome v. Belt, 171 Pa. 74; Wilson v. Bigger, 7 W. & S. 111; Jacoby v. McMahon, 174 Pa. 133; 189 Pa. 1; Sterr's Est., 7 W. N. C. 35.

⁷² Gelbach's Ap., 8 S. & R. 205.

⁷³ P. & R. R. Co. v. Comth., 2 Penny. 76.

⁷⁴ Bowman's Ap., 3 Watts, 369; Bonsall's Ap., 1 Rawle, 266.

⁷⁵ Milligan's Ap., 82 Pa. 389.

⁷⁶ Elliott v. Elliott, 5 Binney, 1.

⁷⁷ Stewart v. Miller, 4 W. N. C. 552.

¹ Sheetz v. Marks, 2 Pearson, 302; Wolf v. Eichelberger, 2 P. & W. 346.

² MacReynold's Est., 6 C. C. 424.

³ Cross' Ap., 97 Pa. 471.

⁴ Hampton's Case, 17 S. & R. 144.

GUARDIANS' ACCOUNTS.

By Act approved June 9, 1911, Section 10 of the Act of March 29, 1833, is amended to read, after "All parties concerned," as follows:

"After filing such account or accounts, such guardian may petition the Orphans' Court of the respective county for leave to have said account or accounts examined or audited and confirmed, with the same force and effect as executors', administrators' and trustees' accounts are examined or audited and confirmed. Such petition shall set forth the reason why such account or accounts should be examined or audited and confirmed, and shall contain full information as to who may be the next of kin or nearest relative of age to such minor or minors, and all others interested in the minor's estate, together with their addresses if it be possible to give them; and the court may thereupon direct to whom, and what, notice, if any, shall be given to such next of kin, or nearest relative of age, or the parties interested in said minor's estate, including the minor or minors if fourteen years of age or over, of the filing of said account or accounts and presentation of said petition; after filing due proof of the service of said notice, if any be required by the court, the court may, if it be satisfied any reasonable necessity exists for the examination or audit and confirmation of such account or accounts, asked by said petition, thereupon appoint some suitable person to act as guardian ad litem for the minor or minors interested in said account or accounts; and the same shall be thoroughly examined by said guardian ad litem, who shall make report to the court of the result of his examination; or the court may examine and audit said account itself; and, after said examination or audit is completed, a final decree of confirmation as to the matters contained in said account or accounts, and said report or reports, and said audit or audits, shall be made by the court, which decree of confirmation shall be final and conclusive as to the matters contained in said accounts, reports, or audits and decrees, with the same force and effect as such decrees now have in respect to the accounts and audits of executors, administrators, and trustees. The cost of said audits or examinations, including a fee for said guardian ad litem to be fixed by the court, shall be allowed as part of the administration expenses, and be paid by such guardians out of the property of the ward in their hands, and allowed as a credit in said decrees. Appeals from such decrees, and rehearings of such decrees, shall be allowed, in the same manner and form, and with the same force and effect, as are now allowed in the cases of decrees made in executors', administrators', and trustees' accounts. And every such guardian, unless previously discharged or removed, shall, on the arrival of his ward at full age, settle in the register's office a full and complete account of his management of the minor's property under his care, including all the items embraced in each partial settlement; except where an examination or audit, and final decree of confirmation, has taken place, as hereinbefore provided; in which case said final account shall include only such items and matters as were not included in such former accounts and decrees aforesaid. And the decree of the orphans' court upon such final accounts shall, like other decrees of the court, be conclusive upon all parties, unless reversed, modified, or altered on appeal."

INSERT, P. 255, PAR. 92, VOL. 3, JOHNSON.

is affected with a similar trust, and when the ward arrives at age he can recover it.⁵ A guardian who has no funds of his ward in his hands may purchase for his own use the land of his ward at sheriff's sale by a creditor of decedent.⁶ If he purchases land of his ward at his own sale without leave of court to bid, the sale is not void but voidable.⁷ When the guardian agrees with the tenant in common of his ward to partition the land, he may become a purchaser of a purpart sold, subject to the ward's election to take the land when he arrives of age.⁸

92. Guardians required to account.

Section 10 of the act of March 21, 1832, P. L. 190, provides:

"Every such guardian, whether required by the court to give security or not, shall, at least once in every three years, and at any other time, when so required by the court, render an account of the management of the minor's property under his care, which accounts shall be filed in the office of the clerk of the Orphans' Court, for the information of the court, and the inspection of all parties concerned; and every such guardian, unless previously discharged or removed, shall, on the arrival of his ward at full age, settle in the register's office a full and complete account of his management of the minor's property under his care, including all the items embraced in each partial settlement; and the decree of the Orphans' Court upon such final accounts shall, like other decrees of the court, be conclusive upon all parties, unless reversed, modified or altered on appeal."

The court has exclusive jurisdiction of accounts of a guardian with his ward.⁹

The duty a guardian owes to the law to settle an account is not satisfied with a private settlement with his ward;¹⁰ though if such settlement be full, fair and deliberate, accompanied with a release, executed without mistake or misapprehension, it will operate as a waiver by the ward, and the contract is enforceable in the Common Pleas.¹¹ The ward may also lose the right to an account by long delay.¹²

Partial accounts, though confirmed, are not binding upon the ward.¹³ Each ward has a right to a final account, when he arrives at the age of twenty-one.¹⁴ The guardian is then required by law to

⁵ *Brisbane v. Harrisburg Bank*, 4 Watts, 92; *Morris v. Wallace*, 3 Pa. 319.

⁶ *Chorpenning's Ap.*, 32 Pa. 315.

⁷ *Bauer's Est.*, 1 D. R. 484. (See act May 22, 1878, P. L. 83; *Tanner's Est.*, 218 Pa. 361.)

⁸ *Milligan v. Dick*, 107 Pa. 259. (See act June 4, 1901, P. L. 425, as to recording a declaration of trust.)

⁹ *Denison v. Cornwell*, 17 S. & R. 374; *Wills' Ap.*, 9 Pa. 103; *Comth. v. Lockwood*, 18 Pitts. L. J. 10; *Rau v. Small*, 144 Pa. 304.

¹⁰ *Lukens' Ap.*, 7 W. & S. 48; *Stanley's Ap.*, 8 Pa. 431.

¹¹ *Marr's Ap.*, 78 Pa. 66; *Lewis v. Browning*, 17 W. N. C. 527.

¹² *Bones' Ap.*, 27 Pa. 492; *Gress' Ap.*, 14 Pa. 463; *Mulfair's Ap.*, 110 Pa. 402.

¹³ *Douglass' Ap.*, 82 Pa. 169; *Yeager's Ap.*, 34 Pa. 173.

¹⁴ *Secker's Est.*, 3 W. N. C. 391; *Widdoes' Est.*, 16 W. N. C. 426.

file a full and complete account of his entire guardianship, embracing all his partial accounts.¹⁵ However, if the guardian settle with his wards in good faith, and there is no mistake or fraud shown, such settlement will not be overthrown¹⁶ and the costs may be imposed on them.¹⁷ Where a ward, in settlement, after majority takes a note guaranteed by the guardian to be as good as gold, he may sue on the guaranty and recover, if the note turns out to be worthless.¹⁸ The Orphans' Court may compel a guardian to settle an account, if he has given security, whether he be within the jurisdiction or not.¹⁹

93. Triennial accounts.

Section 10 of the act of 1832 requires the triennial accounts to be filed with the "clerk of the Orphans' Court for the information of the court and the inspection of all concerned." The account of the guardian which shall include all the items embraced in each triennial account shall be filed in the register's office to be passed upon by him like other fiduciary accounts. These triennial accounts "are intended to exhibit the situation of the fund, whether invested or not; if invested, where and how, and what interest and incomes are received; also what expenditures have been made towards the support and maintenance of the ward, and the repairs and improvements of his estate. And as the ward and all other parties concerned are presumed to act upon the faith of these statements of account, it follows that the guardian is estopped from denying their correctness, excepting, perhaps, so far as may be necessary to correct errors or mistakes."²⁰ It has been said that these triennial accounts may be required only by the ward or some one in his behalf.²¹ These accounts do not pass the register for confirmation and although they may bind the guardian, yet they do not conclude the ward.²² It has also been decided that they cannot be audited;²³ and, on the other hand, they have been audited,²⁴ and, when confirmed, have been held conclusive as to what they contain unless appealed from or changed on bill of review.²⁵ A partial account may be certified to the Common Pleas for lien and judgment to bind the guardian's real estate.²⁶

94. Power of the Orphans' Court to require an account.

The Orphans' Court has exclusive power, on the petition of the ward, to compel a guardian to settle his account of transactions

¹⁵ Wall's Ap., 104 Pa. 14.

¹⁶ Alexander's Est., 156 Pa. 368; Laney's Est., 2 D. R. 800.

¹⁷ Roth's Est., 150 Pa. 261.

¹⁸ Tissue v. Hanna, 158 Pa. 384.

¹⁹ Comth. v. Raser, 62 Pa. 436.

²⁰ Clark, J., in Walls' Ap., 104 Pa. 14.

²¹ Baldwin's Est., 2 Del. Co. 504; Jones' Ap., 8 W. & S. 143.

²² Yeager's Ap., 34 Pa. 173; Secker's Est., 3 W. N. C. 391.

²³ Braining's Est., 7 W. N. C. 34; Douglass' Ap., 82 Pa. 169; P. & L. Dig., vol. 8, col. 13372.

²⁴ Spath's Est., 144 Pa. 383.

²⁵ McLellan's Ap., 76 Pa. 231.

²⁶ Royer v. Myers, 15 Pa. 87.

during the ward's minority, whether the petition be presented during or after minority,²⁷ but not for moneys received by the guardian after the ward is of age.²⁸ And this applies to a guardian whose discharge a testamentary guardian has procured. The proceeding is not in a Court of Equity, but in the Orphans' Court.²⁹ A testamentary guardian appointed in another state, who resides in Pennsylvania, and whose ward and his estate are in the jurisdiction of the court, may also be required to account.³⁰ The Orphans' Court of the county of the ward's domicile, the ward being of age, and of the testamentary guardian, has the power to issue a citation.³¹ Also where the ward was domiciled with his father at the time of the appointment, that court has jurisdiction, although the ward may have gone to live with a relative in another county.³² The usual practice is to hear the petition and award a citation, though the court may make an order to file an account forthwith.³³

95. Form of petition for citation.

To the Honorable — —, Judge of the Orphans' Court of —
County:

The petition of Helen Ball respectfully represents that Richard Forest was by your honorable court duly appointed guardian of her estate on the — day of —, A. D. 19—; that she is now over the age of twenty-one years and that her said guardian has not filed an account of his trust although she has often requested him to do so.

Your petitioner therefore prays that a citation may be awarded in due form, requiring said Richard Forest, guardian as aforesaid, to file his final account of the said estate in the office of the register of wills of said county, according to law, or to show cause, if any he has, why he should not do so. And she will ever pray, etc.

Sworn to, etc.

Helen Ball.

[This form may be adjusted so as to apply to a trustee as well.]

96. Form of citation.

The court having endorsed an order upon the petition above awarding a citation and making it returnable on a day certain, the clerk will issue a citation in the following form:

The Commonwealth of Pennsylvania, County of —, ss.

In the Orphans' Court of said county, in the matter of the estate of Seymour D. Ball, deceased.

We, being willing, on complaint of Helen Ball, do grant a citation on Richard Forest, guardian of said Helen Ball, to compel the filing of your final account as such guardian.

Now, therefore, we command you, Richard Forest, guardian as aforesaid, that you file in the office of the register of wills of said county, a just and complete account and a true settlement make

²⁷ Wills' Ap., 9 Pa. 103; Rau v. Small, 144 Pa. 304.

²⁸ Evans' Est., 1 D. R. 453.

²⁹ McCormick v. O'Rorke, 2 W. N. C. 109; Lewis v. Browning, 111 Pa. 493.

³⁰ Mayer's Est., 14 Phila. 299.

³¹ Rively's Est., 7 Del. Co. 522.

³² Reitmeyer v. Wolfe, 2 D. R. 810; Packers' Est., 1 Campbell, 5.

³³ Wills' Ap., 9 Pa. 103.

of your management of said estate, without delay, or that you be and appear before the Hon. ———, president judge of our said court, at an Orphans' Court to be holden at the court house in ———, on ———, the ——— day of ———, A. D. 19—, at ——— o'clock M., and show cause, if any you have, why you have not done as within you are commanded.

Witness the Hon. ———, president judge of said court, at ———, this ——— day of ———, A. D. 19—.

[Seal.]

———, Clerk.

97. Answer to citation.

The guardian should, when cited, file his account without delay and so answer on the return day of the citation; or, if he have any good reason why the court should extend the time, he should state such reasons in answer to the citation, which must depend upon the circumstances and nature of his trust. The answer must be verified.

98. Who may require an account.

The ward himself may petition for either a triennial or a final account. Where the guardian is dead, a petition cannot be presented by a next friend. The proper course is to petition for the appointment of a guardian to take the place of the deceased guardian, and he can proceed to collect the estate from the parties in whose hands it may be.³⁴ Where the ward has died, a creditor of his estate may petition for a citation.³⁵ Where the ward has had access to the books of the guardian and has rested on his rights for fifteen years, he will not be awarded a citation.³⁶ In a case where the mother was guardian and there was a lapse of many years after the youngest child came of age, an accounting will not be required.³⁷ If no property came into the hands of the guardian during the minority of the ward, there is nothing to account for. The ward being *sui juris* can enforce his rights in the Common Pleas.³⁸ Where the guardian is also trustee under the will of the children's mother, who filed no account, the trust account must first be settled in order to ascertain what estate belonged to the *cestuis que trustent*.³⁹

99. Who may be cited.

A guardian who has been declared a habitual drunkard is not like a lunatic, civilly dead, and service of the citation upon him personally is valid.¹ If the guardian lives beyond the county or cannot be found, service may be made upon his bondsmen;² or if he has ap-

³⁴ Stewart's Est., 3 W. N. C. 476.

³⁵ Carr's Est., 4 C. C. 128.

³⁶ McCarthy's Est., 15 D. R. 54.

³⁷ McCoy's Est., 16 D. R. 171; Ware's Pet., 49 Pitts. L. J. 381. (See also Ischy's Est., 5 D. R. 334; Ralston's Est., 8 D. R. 328.)

³⁸ Portuondo's Est., 14 Phila. 271; Stryker's Est., 17 Phila. 507; Gibson's Est., 9 Lack. Jur. 265. (But see Waile's Est., 14 York, 51.)

³⁹ McHenry's Est., 15 D. R. 302, 472.

¹ McCloud's Est., 12 Phila. 81.

² Hayes' Est., 5 Montg. 199.

pointed a local agent to manage the estate, service may be made on such agent.³

100. Loss by laches.

The ward having attained his majority and having a clear right to require an account, if he delays to do so for upwards of six years, he may be barred of his remedy, the Orphans' Court applying the limitation by analogy.⁴ But no rigid rule exists to this effect and the court may require an account where justice and equity require it.⁵

101. Accounts by administrators of deceased guardians.

When a guardian dies, his administrator or executor and not his surety is the one to file his account as guardian;⁶ and such account should be promptly filed. He cannot relieve himself of the duty by filing an account as administrator. He must account for the entire guardianship estate.⁷ Where there are a number of wards, each is entitled to have an account, on coming of age.⁸ Where several partial accounts were filed and the guardian who held the money was beyond the jurisdiction, a final account was not required from his co-guardian, who was held blameless.⁹

102. Accounts of guardian and trustee.

Where one is both trustee and guardian, the trustee account should be first settled.¹⁰ If the trust be one over which the Common Pleas has jurisdiction, the trustee's settlement must be made in that court and not in the Orphans' Court.¹¹ One who is executor and also testamentary guardian must first settle his account as executor.¹²

103. Manner of stating accounts.

When a guardian has several wards of the same estate, he should file a separate account with each ward,¹³ although it is not essential in every case, as where they are all equally interested in a trust fund; but if he files but one account, he should so state it as to show the interest of each distinctly and definitely;¹⁴ or it will be referred back to him for that purpose.¹⁵ When he undertakes to file a separate account, he must not commingle with one account the credits of another.¹⁶ The triennial account, as above stated, is merely for

³ Gett's Pet., 2 Ashmead, 441.

⁴ Bones' Ap., 27 Pa. 492; P. & L. Dig., vol. 8, col. 13366; Gress' Ap., 14 Pa. 463; Maulfair's Ap., 110 Pa. 402.

⁵ Ischy's Est., 5 D. R. 16; Alexander's Est., 8 Lanc. L. R. 52; Walls' Ap., 104 Pa. 14; Eachus' Est., 2 Del. Co. 5.

⁶ Stewart's Est., 3 W. N. C. 476.

⁷ Pennell's Est., 2 C. C. 436.

⁸ Secker's Est., 3 W. N. C. 391.

⁹ Myer v. Myer, 187 Pa. 247.

¹⁰ Baskin's Ap., 34 Pa. 272.

¹¹ Baskin's Ap., *supra*.

¹² Fish's Ap., 34 Pitts. L. J. 403.

¹³ Killpatrick's Ap., 113 Pa. 46; Weyand's Ap., 62 Pa. 198; P. & L. Dig. of Dec., vol. 8, col. 13377.

¹⁴ Balliets' Ap., 2 Walker, 268.

¹⁵ Beard's Est., 1 C. C. 283; Scott's Est., 9 D. R. 416.

¹⁶ Moffitt's Accounts, 32 Pitts. L. J. 414.

information; but, nevertheless, it should be stated with care, so that it does not embrace anything which does not properly belong in it, and should omit nothing that has come into the guardian's hands. Following is a form:

104. Form of guardian's triennial account.
To the Honorable the Judges of the Orphans' Court of — County:
The first (or other) triennial account of R. A. Stevens, who was appointed by said court guardian of Reuben, James, and William P., minor children of John Kip, late of said county, deceased:

The accountant charges himself with the amount of inventory filed in the office of the clerk of the Orphans' Court of said county, amounting to . . . \$ — —
1908. Jan. 1. Interest from L. Hooker on mortgage, . . . \$ — —
July 5. Legacy from the executor of the estate of John Davis, deceased, . . . — —
Proceeds of sale of town-lot, by order of the court, . . . — —
Rent from farm, from January, 1908, to 1st December, 1910, . . . — —
(Add any other items in gross), . . . — —

Total charges, . . . \$ — —
The said accountant claims credit for the expenses and management of the estate as follows:
1908. Mch. 1. Taxes on farm, . . . \$ — —
Insurance on farm buildings, . . . — —
1910. Dec. 1. Repairs on cow-shed, . . . — —
O. S. Bones, Esq., counsel fees, . . . — —
C. Lamb, clerk O. C., on this account, . . . — —
Compensation of guardian to date, . . . — —
(Add any other items in gross), . . . — —

Total credits, . . . \$ — —
Balance due the estates of all the wards (or the guardian) to date, . . . \$ — —
The accountant also claims credit to date for disbursements to each of the wards as follows:

(Then state a separate account of payments for each ward, thus:)
Account with Reuben Kip.
Tuition and boarding at Wyoming Seminary, 1909, . . . \$150 00
Boarding at Mrs. Dieter's, 1910, . . . 50 00
Clothing from B. Oppenheimer, 1910, . . . 25 00
Physician's bill, Dr. Lenahan, 1909, . . . 10 00
Railroad fare, trip to Philadelphia, 1909, . . . 6 00
Total, . . . \$241 00

R. A. Stevens,
Sworn to, etc. Guardian.
In the same manner, detail as to the other wards.

105. Manner of stating final account.
As already stated, a guardian's final account must include his entire management of the ward's estate from the beginning and must

embrace all the partial accounts in one harmonious account of his transactions; otherwise exceptions may be filed on behalf of his wards.¹⁷ But if the only irregularity alleged is that he started the account with the balance of a partial account, it will not be cause for a bill of review.¹⁸ Where a guardian dies before stating a final account, his executors are bound to include his previous accounts, and if they are not satisfied with them, they may move an auditor, for correction.¹⁹ But a successor in the guardianship is not required to include his predecessor's accounts.²⁰ The final account should not embrace transactions subsequent to the date of the ward's majority.²¹ Rent due the widow has no place in the guardian's account.²²

106. Form of guardian's final account.

Final account of R. A. Stevens, guardian of Reuben Kip, a minor child of John Kip, late of the county of —, deceased.

The said accountant has stated an account of the management of the entire estate in his care and trust, which his wards, Reuben, James, and William P., minor children of said decedent held in common, which shows a balance due from this accountant to the whole estate, of . . . \$—— —

Which account is attached, and made a part hereof.

Of the amount so charged against this accountant, his ward Reuben is entitled to one-third, which is . . . \$—— —

The accountant also charges himself with a legacy received for his said ward, from Reuben S. Cole, executor of R. Hileman, deceased, amounting to . . . \$—— —

(Then add any other item which this ward is entitled to, separate from the other children.)

Total charges, . . . \$—— —

The said accountant claims credit for disbursements, and expenses for his ward Reuben, since his appointment as guardian, as follows:

(Here state every item expended for the ward or his separate estate.)

Total credits, . . . \$—— —

Balance due the ward (or the guardian), . . . \$—— —

R. A. Stevens,
Guardian of Reuben Kip.

Sworn to, etc.

This account is to be filed with the register to be passed upon by the court.

107. Credits and allowances.

For moneys which guardians or trustees pay to or on behalf of their wards, the court does not make orders, but the guardians should

¹⁷ Hughes' Ap., 53 Pa. 500.

¹⁸ Yeager's Ap., 34 Pa. 173; Falconer's Est., 1 D. R. 672.

¹⁹ Kuntz's Est., 1 Northam. 252.

²⁰ Wonder's Est., 6 York, 91.

²¹ Crowell's Ap., 2 Watts, 295; March's Est., 3 Northam. 29; Mill's Est.,

⁴ Kulp, 20; Scott's Est., 9 D. R. 416; Lamb's Ap., 58 Pa. 142.

²² Laney's Est., 2 D. R. 800.

nevertheless take vouchers in every case and file them with their accounts and crave allowance therefor.²³ If the advance of money is for a proper purpose and the ward confirmed it after arriving at age, the guardian will be allowed the amount.²⁴ But if he fraudulently obtains a release from the ward for a legacy never paid him, he will be surcharged.²⁵ A guardian who maintained his ward during childhood, free, and when she married, bought her an outfit which cost more than the ward's estate amounted to, will not be surcharged and such expenditures will be considered as necessities.²⁶ The guardian, being the mother and doing the best she can for the wards, will be treated equitably by the court in the adjustment of accounts.²⁷ But where a guardian has evidently neglected every duty as such and been compelled to file an account which is incorrect, he will be charged with the cost of the audit.²⁸ If any of the ward's money is misapplied surreptitiously under an order of court, the guardian will be surcharged;²⁹ and he will not be allowed for a church subscription made by the minor,³⁰ nor for a debt due from the parent of the ward, which is the administrator's business.³¹ When it is sought to surcharge a guardian with assets not in his account, the exceptant must prove the matter by his own witnesses and not by cross-examination of the guardian's witnesses.³²

108. Necessary payments — Insurance — Taxes, etc.

A guardian who, without an order of court, expends the ward's money for necessary repairs and improvements of his estate, will not be surcharged therewith, but it puts the burden on him of showing that they were necessary.³³ If the question is referred to an auditor, on exceptions to his account, the auditor should report on what facts he bases his opinion.³⁴ It has been held that in order to preserve the ward's real estate from sale, a guardian, who pays the debt, will be allowed for it in his account, although he did it without an order of court, on the principle of equity that the court will ratify that which it would have ordered to be done.³⁵ So he will be allowed payments to keep up the fire insurance on the property;³⁶ or for life insurance for the ward's benefit on her husband's life, but not in his own favor.³⁷ When taxes are due upon the ward's estate and it is necessary to pay them to save the property, the guardian should

²³ Mellinger's Est., 5 Lanc. L. R. 294.

²⁴ Smith's Ap., 30 Pa. 397; Kuhn's Est., 9 Lanc. Bar, 56.

²⁵ Richard's Est., 185 Pa. 155.

²⁶ Ober's Est., 21 Lanc. L. R. 31.

²⁷ Billman's Est., 9 D. R. 728.

²⁸ Miller's Est., 24 Supr. C. 32; 44 Supr. C. 35.

²⁹ McCuen's Est., 11 D. R. 315.

³⁰ Mintzer's Est., 13 D. R. 258.

³¹ Watson's Est., 8 Kulp, 280. (See *infra*, par. 108, however.)

³² Burdick's Est., 6 Lack. Jur. 361.

³³ Killpatrick's Ap., 113 Pa. 46. (See Miller's Est., 1 Pa. 326.)

³⁴ Sharpe's Est., 2 Phila. 280.

³⁵ Wauhoup's Est., 29 Pitts. L. J. 256; Craig's Ac., 26 Pitts. L. J. 89.

³⁶ McNickle v. Henry, 9 Phila. 243.

³⁷ Fenn's Ac., 2 Pearson, 485. This is a dubious venture and an anomalous case.

pay them promptly and take proper receipts for them. If it is not necessary, as where they accrued during the life tenancy and the ward's interest was only in remainder the payment will be disallowed.³⁸ If the guardian contracts debts for his ward, but has not paid them, he cannot have an allowance in his account.³⁹ Where a guardian is charged with interest on the whole estate, he is entitled to interest on his expenditures from their date,⁴⁰ unless the disbursements are less than the annual interest on the fund in his hands.⁴¹

109. Credits allowed or disallowed.

A guardian will be allowed for a doctor's bill, although the services were rendered to the ward before the guardian's appointment;⁴² also for expenses during the last illness and at the funeral of his ward,⁴³ or at the funeral of the ward's-indigent mother.⁴⁴ Where he has been allowed a certain sum by the court for a specific purpose, he cannot go beyond that, and if he does, he will have to pay the bill.⁴⁵ If he acts imprudently in expenditures, he will have to suffer the loss himself.⁴⁶ If he pays a judgment for which the ward's estate is not properly liable, it is at his risk.⁴⁷ The position of guardian is not a sinecure, but a trust, and if he runs up traveling expenses for that which he could have done as well without, he must foot the bill himself.⁴⁸ All of which shows, that he should be guided by the counsel of a safe and careful lawyer, and not conduct so critical a business in a haphazard and listless way.

110. Exceptions to guardian's account.

The guardian's account having been filed with the register of wills, and duly advertised by him according to law, will be presented to court, under the rules of the particular court, which see, confirmed *nisi* and lie over for the filing of exceptions, if anyone is moved to do so, unless exceptions have been previously filed as required in some jurisdictions. For example, in Cumberland County, by rule 217, "all accounts allowed by the register and trust accounts shall be presented for confirmation at a regular stated Orphans' Court; and no exceptions to such accounts will be heard, unless they shall have been filed before the meeting of the court upon the day on which the accounts shall be presented for confirmation." Rule 219 relates to filing accounts during the minority of the ward, with notice. The ward, or any person interested in the estate, may file exceptions to the account, unless where the discharge of the guardian is demanded under section 11 of the act of 1832, *supra*, in which case the court must appoint some person to do so. Exceptions filed by

³⁸ Schurr's Est., 13 Phila. 353; Laney's Est., 2 D. R. 800.

³⁹ Selleck's Ap., 16 W. N. C. 370; Myer's Est., 3 Kulp, 411.

⁴⁰ Hoshour's Est., 11 York, 159.

⁴¹ Huffer's Ap., 2 Grant, 341.

⁴² Fenn's Ac., 2 Pearson, 485.

⁴³ Scott's Est., 15 C. C. 316.

⁴⁴ Schnurr's Est., 13 Phila. 358.

⁴⁵ Snodgrass' Ap., 37 Pa. 377.

⁴⁶ Quinn's Est., 16 Phila. 223.

⁴⁷ McCreery's Ap., 31 Pitts. L. J. 230; Morris v. Garrison, 27 Pa. 226.

⁴⁸ Morgan's Est., 31 Pitts. L. J. 280.

other persons in such case are *coram non judice*.¹ In other cases the executor of a deceased surety may file exceptions.² The person filing exceptions must show his interest. The Orphans' Court may, on its own motion, correct manifest errors in an account.³ A ward who excepts must point out specifically the errors of which he complains, if he wishes a restatement.⁴ The filing of a transcript of the account in the Common Pleas for lien and judgment is not a waiver of the right to except to it.⁵ Exceptions being filed, the cause is put upon the argument list for further proceedings in court.

111. Balance after decree on account.

When a final decree is entered confirming an account or the findings of an auditor, from which no appeal is taken, said account showing a balance due the ward, a *fi. fa.* may issue to collect it from the guardian;⁶ and if the balance be due the guardian, he may have a rule to show cause why such writ should not issue.⁷ The filing of a transcript of the balance in the Common Pleas does not interfere with the process for collection in the Orphans' Court.⁸ Where the estate is of one presumed to be dead, and under the act of June 24, 1885, P. L. 255, the guardian may be permitted to pay the balance to the ward without security from him.⁹ The Orphans' Court may, on showing, for the best interests of the ward, permit her to change her domicile to Ohio, where a female is of age at eighteen, and order the guardian to pay the balance to her in accordance with the laws of that state.¹⁰

112. Costs of filing account.

The costs of filing an account, which embrace the register's charges and the fees for recording and discharge of the guardian are payable out of the fund, and this is so, even if the guardian be removed for insolvency, and the account is filed by him¹¹; or where he is charged with the other costs of the proceeding,¹² or has lost his right to compensation,¹³ or where he has made a fair settlement with his ward after coming of age, the ward will be charged with the costs of filing an account by the administrator of his guardian, which he has uselessly compelled.¹⁴ A guardian into whose hands no fund came cannot settle an account merely to charge his compensation.¹⁵

¹ *Grand Army, Etc., v. Wall*, 6 Lanc. Bar, 62; *Keneagy's Est.*, 2 Lanc. L. R. 196.

² *Bushong's Ac.*, 1 Lanc. Bar, No. 27; *Marck's Est.*, 3 Northam. 29.

³ *Maurer's Ac.*, 1 Leg. Rec. R. 193.

⁴ *Marten's Ap.*, 13 W. N. C. 289.

⁵ *Sheffer's Est.*, 1 York, 107.

⁶ *Weyand's Ap.*, 62 Pa. 198; *Bowman v. Herr*, 1 P. & W. 282, section 57, act of March 29, 1832; P. L. 190.

⁷ *Shollenberger's Ap.*, 21 Pa. 337.

⁸ *Weyand's Ap.*, 62 Pa. 198.

⁹ *Morrison's Est.*, 183 Pa. 155.

¹⁰ *Moffitt's Ac.*, 32 Pitts. L. J. 414.

¹¹ *Miller's Est.*, 7 D. R. 354.

¹² *Small's Est.*, 24 W. N. C. 92.

¹³ *Fish's Ap.*, 34 Pitts. L. J. 403.

¹⁴ *Rouch's Est.*, 2 Pearson, 480.

¹⁵ *Bell's Est.*, 2 Parsons, 200.

113. Costs of other proceedings.

Where his ward's interests are directly affected, the guardian is entitled to have allowances of expenses necessary thereto, as in resisting the widow's claim for partition;¹⁶ or proceedings to surcharge the executor;¹⁷ or where his services were such as to double the estate, and that he acted under advice of counsel and for the best interests of the ward.¹⁸ But where he institutes proceedings to set aside a widow's appraisement, he will be liable for the costs of his improper meddling;¹⁹ or where he improperly forecloses a mortgage.²⁰ In case of proceedings to remove him, when decided against him, he cannot claim the costs out of the estate;²¹ neither where he is not removed, but the proceedings were justifiable.²² Costs in such cases should be determined by the court in the proceeding itself.²³

114. Counsel fees for guardian.

A general rule is followed to allow the guardian his counsel fees for advising him in matters pertaining to the estate and in the stating and filing of his accounts. If the sum charged is unreasonable or objected to, the court may reduce it. A guardian who is also an attorney may be allowed a reasonable fee for his services as such to the estate.²⁴ Where he joins with others in litigation for the interest of his ward, in a contract to pay a contingent attorney fee, a proper proportion will be allowed;²⁵ also when he brings an action of ejectment for the ward's land;²⁶ and on appeal by the ward from a decree of distribution, which the ward abandons;²⁷ so where he is dismissed for insolvency, but has managed the estate properly.²⁸ For counsel in the management of the estate and stating and filing accounts an allowance will be made,²⁹ although he forfeited his commissions by neglect of duty.³⁰ But he will not be allowed to charge counsel fees in useless litigation,³¹ or where it is adverse to his ward's interest.³² The court will use its discretion in allowing or disallowing the amount charged. For stating an account where the sum was only \$365, a fee of \$20 was allowed;³³ and where it was

¹⁶ McNickle v. Henry, 9 Phila. 243.

¹⁷ Killion's Ap., 3 Brewster, 235.

¹⁸ Norris' Est., 26 W. N. C. 287.

¹⁹ Vandevort's Ap., 43 Pa. 462.

²⁰ Dougherty's Est., 1 C. C. 243.

²¹ Born's Est., 16 W. N. C. 68.

²² Silver's Est., 6 D. R. 267.

²³ Scott's Est., 9 D. R. 416.

²⁴ Mumma's Ac., 5 Clark, 424. Pearson, P. J.

²⁵ Evans' Est., 13 Lanc. L. R. 409.

²⁶ Furney's Ap., 12 W. N. C. 82.

²⁷ Dougherty's Est., 15 W. N. C. 32.

²⁸ Miller's Est., 7 D. R. 354.

²⁹ Dietterich v. Heft, 5 Pa. 87; McElhenny's Ap., 46 Pa. 347; Alexander's Est., 156 Pa. 368; Buist's Est., 8 Phila. 190; Martin's Est., 15 Phila. 514.

³⁰ Fish's Ap., 34 Pitts. L. J. 403; Norris' Est., 26 W. N. C. 287.

³¹ Dougherty's Est., 1 C. C. 243.

³² Worrell's Ap., 23 Pa. 44; Williams' Est., 3 Montg. Co. 52; Rouch's Ac., 2 Pearson, 480.

³³ Fish's Ap., *supra*.

\$30,000, the court allowed for stating the account and auditing it, \$100.³⁴ If the charge is excessive, the court will reduce it.³⁵ A guardian who succeeds another should retain a proportionate sum for attorney's fees for his predecessor.³⁶

115. Compensation of guardian.

The position of guardian is an onerous one, and in some respects only like that of an administrator. His duties are not only with the money in his hands, but the care, conduct and welfare of his ward. His compensation is often inadequate.³⁷ A mere percentage upon the fund he handles is sometimes short of fair compensation.³⁸ The commissions should be calculated and deducted as of the time when they are earned and not from the foot of the account.³⁹ Interest must not be included in the basis;⁴⁰ nor can he charge commissions upon each of his triennial accounts.⁴¹ He must account for the interest and claim his compensation separately.⁴² His commissions should be graduated by his time, trouble and responsibility rather than the amount.⁴³

The act of March 17, 1864, P. L. 53, providing that an executor and trustee shall have but one commission, has no application to a testamentary guardian.⁴⁴ If the guardian fails to claim his commissions in his account, it does not bar him from claiming them before the auditor;⁴⁵ and if objections are not made before the auditor, exceptions to the auditor's allowance will be dismissed.⁴⁶ A guardian cannot be deprived of his compensation merely because he allowed the fund to remain with the administratrix *c. t. a.*⁴⁷ If he wholly neglects his duty as guardian, he may be deprived of all commissions;⁴⁸ but the mere commingling of the money of the ward with his own, where there has been no fraud nor resultant injury, is not sufficient ground to deprive him of his commissions.⁴⁹

116. Amount of compensation.

Where the commission is calculated upon the whole estate coming into the guardian's hands, five per cent. has been considered a fair and reasonable rate.⁵⁰ A rate of one to one and a half per cent.

³⁴ Small's Est., 24 W. N. C. 92.

³⁵ Furney's Ap., 12 W. N. C. 82.

³⁶ Hall's Est., 30 Pitts. L. J. 450.

³⁷ Gracey's Ap., 3 Walker, 298.

³⁸ Strong, J., in McElhenny's Ap., 46 Pa. 347.

³⁹ Say v. Barnes, 4 S. & R. 112; Mulholland's Est., 175 Pa. 411; Huffer's Ap., 2 Grant, 341.

⁴⁰ Worrell's Ap., 23 Pa. 44.

⁴¹ Foltz's Ap., 55 Pa. 428.

⁴² Maurer's Ac., 1 Leg. Rec. 193.

⁴³ Burdick's Est., 6 Lack. Jur. 361.

⁴⁴ Malin's Est., 11 D. R. 213.

⁴⁵ Mintzer's Est., 13 D. R. 258.

⁴⁶ Jetter's Est., 14 Phila. 319; Kashner's Est., 15 Supr. C. 70.

⁴⁷ McMichael's Est., 14 D. R. 167.

⁴⁸ Maurer's Est., 18 Phila. 221.

⁴⁹ Klinefelter's Est., 16 York, 109; Malin's Est., 11 D. R. 213.

⁵⁰ Harland's Acs., 5 Rawle, 323; Twaddell's Ap., 5 Pa. 15; Worrell's

per annum, where the guardianship extended over a period of years, has been considered not excessive.⁵¹ The rate above may be increased where the guardian has been put to unusual trouble, expense and annoyance.⁵² In one case he was allowed nine per cent.⁵³ Where there were but few duties imposed on the guardian, he was allowed one and one-half per cent.⁵⁴ Thirteen per cent. and upwards have been frowned down.⁵⁵ Whilst the usual form of compensation is by a rate per cent., it does not prevent the guardian from receiving compensation in a gross sum;⁵⁶ or for particular trouble and expense;⁵⁷ or for the services of agents to look after the estate in another and distant place.⁵⁸ Where he has turned the management over to another, he is entitled to a reasonable sum for personal services;⁵⁹ or where he has forfeited his commissions.⁶⁰ The contract of the ward, while under age, to allow certain commissions, does not bind the estate.⁶¹ It has been held that when the guardian stands to his ward *in loco parentis*, he cannot charge for the care of the ward's person.⁶² If he has rendered no services of benefit to the estate, he is entitled to no compensation.⁶³ If he has carelessly handled the estate and failed to invest a fund, he will have his commissions reduced.⁶⁴

117. Loss of compensation.

A guardian will lose his right to pay where he neglects his duties, as such, and fails to account,¹ but the court may come to his rescue in a proper case and save it for him.² Where he has been negligent in his management of the estate and has failed to account properly,³ or has failed to collect what is due his ward,⁴ or has neglected to examine the account of his predecessor and to except to improper charges therein,⁵ he will lose his commissions. But if the first guardian's account was confirmed before the second was appointed, he was

Ap., 23 Pa. 44; Fessenden's Est., 1 Kulp, 139; Mulholland's Est., 175 Pa. 411; P. & L. Dig., vol. 8, col. 13438.

⁵¹ Pennypacker's Ap., 41 Pa. 494; Scott's Est., 15 C. C. 316.

⁵² Wonder's Est., 6 York, 91.

⁵³ Gracey's Ap., 3 Walker, 298.

⁵⁴ Luken's Ap., 47 Pa. 356.

⁵⁵ Foltz's Ap., 55 Pa. 428; Maurer's Ac., 1 Leg. Rec. R. 193.

⁵⁶ Harland's Acs., 5 Rawle, 323.

⁵⁷ Bell's Est., 2 Parsons, 200; Gissel's Est., 5 Kulp, 208.

⁵⁸ Morgan's Est., 31 Pitts. L. J. 280.

⁵⁹ Williams' Ap., 119 Pa. 87.

⁶⁰ Livingood's Ap., 2 Penny. 70; Spath's Est., 144 Pa. 383.

⁶¹ Bell's Est., 2 Parsons, 200.

⁶² White's Est., 7 Luz. L. R. 237. Rhone, P. J. Richard's Est., 185 Pa. 155.

⁶³ Hughes' Ac., 22 Pitts. L. J. 121.

⁶⁴ Noble's Est., 178 Pa. 460; Myers' Est., 3 Kulp, 411; Livingood's Ap., 2 Penny. 70.

¹ Watts' Ac., 24 Pitts. L. J. 117; Sauter's Est., 6 W. N. C. 95; Quinn's Est., 16 Phila. 223; Albert's Ap., 128 Pa. 613; McCloud's Est., 12 Phila. 81.

² Hoshour's Est., 11 York, 159; McMenamin's Ap., 41 Leg. Int. 226.

³ Scherr's Est., 13 Phila. 353; Carr's Est., 14 Phila. 265.

⁴ Kuhn's Est., 9 Lanc. Bar, 56; Stone's Ap., 1 Mona. 710.

⁵ Packer's Est., 6 York. 143. (See Glassburner's Est., 40 Supr. C. 134; Clark's Est., 39 Supr. C. 445.)

absolved from supine negligence.⁶ Where the testamentary guardian is also executor and as such wastes the estate, he will not be allowed compensation as guardian.⁷ One who uses the funds of his ward in his own business thereby forfeits his commissions, if the ward insists upon his rights.⁸ The same is true where he acts in bad faith and seeks to defraud his ward.⁹ The declaration by a guardian that he will not take commissions, unless it be a contract, does not prevent him from receiving them.¹⁰

118. Discharge of guardians.

Section 11 of the act of 1832, *supra*, provides:

"The Orphans' Court shall have power, upon the petition of any such guardian, to discharge him from the duties of his appointment: *Provided*, That no guardian shall be discharged from his liability for the estate of his ward, until he shall have rendered to the court an account of the management of his trust, nor until the same shall have been submitted to competent persons as auditors, for examination, and their report thereon be confirmed by the court, unless such account shall have been examined by the said court, and the appointment of auditors be found necessary; nor until such guardian shall have surrendered the residue of the estate standing upon his account, settled and confirmed as aforesaid, to a subsequent guardian of such ward, or to such other person as the court shall appoint to receive such estate: *And provided further*, That in every such case it shall be the duty of the court to appoint some suitable person to appear and act for the ward, in respect to the settlement of such account."

119. Discharge of domestic guardian, etc., of nonresident minor.

Section 2 of the act of May 13, 1889, P. L. 190, provides:

"When such nonresident guardian or trustee shall produce an exemplification from under the seal of the office (if there be a seal) of the proper court in the state of his residence, containing all the entries on record in relation to his appointment and giving bond and authenticated as required by the act of Congress as aforesaid, the Orphans' Court of the proper county in this state may cause suitable orders to be made, discharging any resident guardian, executor, administrator or trustee, and authorizing the delivering and passing over of such property, and also requiring receipts to be passed and recorded, if deemed advisable: *Provided*, The benefits of this act shall not extend to the citizens of any state in which a similar act does not exist or may not hereafter be passed: *And provided also*, That in all cases thirty days' notice shall be given to the resident guardian, executor, administrator or trustee, of the intended application for the order of removal; and the court may reject the application and

⁶ Groff's Ac., 1 Lanc. Bar, No. 29.

⁷ Fish's Ap., 34 Pitts. L. J. 403.

⁸ Spath's Est., 144 Pa. 383; Richard's Est., 185 Pa. 155; Mulholland's Est., 175 Pa. 411; Seguin's Ap., 103 Pa. 139.

⁹ Haviland's Ap., 8 Atl. 858; Lamb's Ap., 58 Pa. 142; McCahan's Ap., 7 Pa. 56.

¹⁰ Deering's Est., 15 Phila. 599; Williams' Ap., 119 Pa. 87.

refuse such order, whenever it is satisfied that it is for the interest of the ward or *cestui que trust* that such removal shall not take place."

120. Prerequisites to discharge of guardian.

Section 2 of rule 9, Allegheny County, provides:

"Before a guardian shall be entitled to a final discharge during the minority of his ward:

"(1) He must have rendered to the court an account of the management of his trust.

"(2) Personal notice of the filing of such account must have been given to the minors interested, or, if under that age, to the next of kin of full age.

"(3) Some suitable person must have been appointed by the court to appear and act for such wards in respect to the settlement of said account.

"(4) Such account must have been examined with special reference to such discharge and been confirmed by the court.

"(5) The balance found to be in the hands of the guardian must have been handed over to a subsequent guardian."

121. Discharge of guardian during minority.

Section 2 of rule 6, Philadelphia, provides:

"Where a discharge is asked for by a guardian during the minority of his ward, a petition must be presented, setting forth the grounds of the application, and asking for the appointment of a suitable person to appear and act for such ward in the settlement of the guardian's account, and notice of the application must be given to the ward, if over fourteen years of age, or if under that age, to the next of kin of full age.

"Section 3. Such petition must be accompanied by the account of the guardian, which, if proper grounds for a discharge are shown by the petition, shall be placed on the next audit list. Upon the settlement and confirmation of such account, and the surrender and payment of the balance shown thereby to a subsequent guardian, or to such other person as the court shall appoint to receive the estate, such discharge may be granted."

122. Application for discharge.

An application for the discharge of a guardian must be confined to his guardianship alone, under the act of 1832, *supra*,¹¹ which requires a full accounting,¹² and such account must be examined at a hearing, where the ward's interests, if a minor as yet, shall be represented by the appointee of the court.¹³ But where the ward has made a settlement and given a release to the guardian, after coming of age, and joins in a petition to discharge the guardian, an account is not necessary.¹⁴ As a rule, however, a guardian will not be discharged on his own application without the filing of his account,

¹¹ Morrow's Est., 15 W. N. C. 240.

¹² Braining's Est., 7 W. N. C. 34.

¹³ Wenke's Apn., 23 Pitts. L. J. 49; Neisly's Ap., 8 Pa. 457.

¹⁴ Marr's Ap., 78 Pa. 66.

its advertisement and confirmation as required by section 30 of the act of March 15, 1832, P. L. 135; nor until it has been examined by the court and a successor appointed as required by section 11, *supra*.¹⁵ The guardian should file a proper petition showing the status of the estate and his relations to it, so that the court may be fully advised as to the expediency of it.¹⁶ When a female ward marries, the guardianship of her person is by the new relation vested in her husband, but her estate still remains with her duly appointed guardian.¹⁷ When the ward dies, the guardianship ends,¹⁸ and, there being no liabilities, the estate goes to the minor's next of kin.¹⁹

123. Form of petition for discharge.

In the Orphans' Court of Lycoming County.

In the matter of the estate of Richard Hake, deceased.

The petition of Chester Myers respectfully represents that he was on the — day of —, A. D. 19—, by your honorable court appointed guardian of John Hake and Isabella Hake, minor children of said Richard Hake, late of the township of McIntyre, said county; that he has duly administered his trust, and the last named of said minors having arrived at full age, filed his account on the — day of —, 19—, with the register of wills of said county, which account was duly audited and confirmed finally on the — day of —, A. D. 19—. That the balance found due to said wards was by him fully paid and discharged and he exhibits their receipts and releases herewith. That no moneys or assets of said wards now remain in his hands and he therefore prays your honorable court to make an order discharging him from his said trust. And he will ever pray.

Sworn to, etc.

Chester Myers.

124. Form of request of wards.

We, the undersigned heirs of Richard Hake, deceased, being of full age, hereby certify that we have, each, received from Chester Myers, our guardian, all the moneys and estates that have come into his hands belonging to us and to which we were entitled, and we do hereby request that he be fully discharged by your honorable court as such guardian.

John Hake,
Isabella Hake.

I, James Green, surety of said Chester Myers, guardian, hereby join in the above request for his discharge.

James Green.

125. Order of court.

Now, to-wit, December 15, 1900, it appearing that Chester Myers, guardian of John Hake and Isabella Hake, has made full and final account and complete distribution of all the moneys and estate that have come into his hands as guardian, it is ordered by the court that the said Chester Myers be and is fully discharged as such guardian.

¹⁵ Bear's Ac., 3 Luz. L. Obs. 6; Wonder's Est., 9 C. C. 271.

¹⁶ Sheetz's Est., 6 D. R. 367.

¹⁷ Cumming's Ap., 11 Pa. 272.

¹⁸ Leitner's Est., 2 York, 31.

¹⁹ Buist's Est., 8 Phila. 190.

126. Removal of guardian.

Section 12 of the act of March 29, 1832, P. L. 190, provides:

"The Orphans' Court shall have power to remove any guardian, whether testamentary or otherwise, on due proof of his mismanagement of the minor's estate, or misconducting himself in respect to the maintenance, education, or moral interests of the minor; in any such case the court shall have power to order the offending guardian to deliver up, assign, transfer and pay over to the successor in the guardianship, or to such person as the court shall appoint, all and every the goods, chattels, rights, credits, title, deeds, evidences and securities whatsoever belonging to the minor, and in the hands or under the power of the guardian, and to make such other order and decree, touching the premises, as the interest of the minor may require."

127. Grounds for removal.

When a guardian changes his residence into another county, it does not furnish cause, in itself for his removal;²⁰ but if he removes permanently from the state, he may be removed on petition of any person interested, under section 27 of the act of March 29, 1832, P. L. 190.²¹ The guardian's refusal to pay the ward's money for maintenance makes him liable to be removed;²² and also when he has been convicted of conspiracy to defraud and sentenced to a term in prison.²³ If he becomes insolvent, he may be removed on petition of his surety.²⁴ Under the act of May 1, 1861, P. L. 680, a guardian may be removed for wasting and mismanaging the estate, even if he has given ample security.²⁵ An attempt of a guardian to sell his ward's estate far below its value is sufficient cause to dismiss him.²⁶ But a petition to remove a guardian on merely technical grounds, based on relationship, will not be entertained.²⁷ For mere trivial reasons of personal pique or feeling, a guardian will not be removed.²⁸ But if he uses the funds in his private business, it is such misconduct as will justify his removal.²⁹ What constitutes good cause for removal depends upon his acts and not his motives.³⁰

128. Manner of removal.

The proper course is to present a petition alleging the grounds upon which his removal is sought. One day's notice of the application is insufficient, and the case will be put on the argument list.³¹ The petitioner may be any friend or relative of the minor.³² The

²⁰ Visick's Est., 1 Lack. Jur. 136.

²¹ Fulton's Est., 14 Phila. 298.

²² Silver's Est., 5 D. R. 415.

²³ Soley's Est., 13 Phila. 402.

²⁴ Brown's Est., 32 Pitts. L. J. 204.

²⁵ Green's Est., 7 Phila. 502; Stanton's Est., 13 Phila. 213.

²⁶ Loughery's Est., 17 D. R. 665.

²⁷ Gorton's Est., 15 D. R. 550; Lesko's Est., 10 Kulp, 177.

²⁸ Sheetz's Est., 10 D. R. 461.

²⁹ Green's Est., 7 Phila. 502.

³⁰ Nicholson's Ap., 20 Pa. 50.

³¹ Maurer's Est., 1 W. N. C. 64.

³² Green's Est., 7 Phila. 502.

court will not proceed summarily, but award a citation, unless the case be one requiring immediate action.

129. Form of petition for removal.

To the Honorable the Judges of the Orphans' Court of Blair County:

The petition of Ellen Burd, by her next friend, Jasper R. Wolfe, respectfully represents that she is the minor child of John Burd, late of the city of Altoona, in said county, deceased; that on the — day of —, A. D. 19—, James Boyer was by said court appointed guardian of the person and estate of the petitioner, and that the property of the petitioner, amounting to fifty thousand dollars, passed into the hands of said guardian, as appears by an inventory of said estate filed on the — day of —, A. D. 19—. That the said guardian is wasting and mismanaging her said estate, by [here state in what particulars] [or misconducting himself in respect to the maintenance, etc., as the case may be].

She therefore prays that, upon due proof of the allegations herein made, the said James Boyer be removed from his said trust and that such further order be made touching the premises as the interests of your petitioner shall require.

And she will ever pray, etc.

Ellen Burd,

By her next friend, Jasper R. Wolfe.

Sworn to, etc.

130. Order for citation.

Now, — day of —, A. D. 19—, the within petition being read and considered, the court direct a citation to be issued to the said James Boyer, to appear before this court on the — day of —, A. D. 19—, next, at — o'clock M., to show cause why he should not be removed from the guardianship of the said Ellen Burd, and to abide all orders and decrees of the court in the premises.

Per Curiam.

131. Mode of procedure.

If the guardian does not answer the citation, a decree will not be taken against him *pro confesso*. The court will hear the witnesses of the complainant on the day fixed and the return of the citation and decide whether to decree a removal and the appointment of a successor.³³ If an answer is filed, the cause may be heard in open court, or placed upon the argument list as in other cases where issue is taken.

132. Form of decree of removal.

In the matter of the application of Miranda Mowry, by her next friend, Ernest Peter Bierly, for the removal of Adam Shafer, guardian of said minor.

And now, —, 19—, the petition being considered and proofs concerning its allegations having been heard by the court, and being satisfied of the truth of the statements therein contained, the court

³³ Shilling's Ap., 1 Pa. 90.

do order and decree that said Adam Shafer be removed from the said office of guardian forthwith, and that William J. Bair be appointed guardian for the said minor, both of person and of estate, and give bond in the sum of one thousand dollars, with sufficient sureties to be approved by the court. And it is further ordered, that said Adam Shafer do forthwith deliver and pay over to said William J. Bair all and every the goods, chattels, moneys, property, estate and effects of the said Miranda Mowry, in his hands.

By the Court.

The court may suspend removal for a short time, until a guardian may be chosen by the ward.³⁴

133. Release of guardian by ward.

Courts do not favor settlements and releases by wards to guardians outside, and when such are made by wards, who have come of age, and they have been over-reached in the settlement, they will order an accounting.³⁵ If, however, it is a fair, conscionable settlement, the ward will not be allowed, after some lapse of time, to repudiate it.³⁶ He must first show some mistake or fraud upon him.³⁷ By submitting to a citation, the guardian waives the release.³⁸ A release, to be effective, should be in writing and not depend upon oral statements.³⁹

(For form of release, see Distribution.)

Mere lapse of time does not prove a release.⁴⁰ But a full and fair settlement is equivalent to a waiver of an account by the ward.⁴¹

(See forms, *supra*.)

³⁴ Silver's Est., 5 D. R. 415.

³⁵ Say v. Barnes, 4 S. & R. 112; Greenawalt's Ac., 2 Clark, 1; Stanley's Ap., 8 Pa. 431; Cook v. Comth., 11 Atl. 574; Buttermore's Ap., 23 W. N. C. 14; Mulholland's Est., 154 Pa. 491; P. & L. Dig., vol. 8, col. 13467.

³⁶ Hawkins' Ap., 32 Pa. 263; Cowan's Ap., 74 Pa. 329; Roth's Est., 150 Pa. 261.

³⁷ Rouch's Est., 2 Pearson, 480; Alexander's Est., 156 Pa. 368.

³⁸ Hickman's Ap., 7 Pa. 464.

³⁹ Musser v. Oliver, 21 Pa. 362.

⁴⁰ Comth. v. Moltz, 10 Pa. 527.

⁴¹ Lewis v. Browning, 111 Pa. 493; Marr's Ap., 78 Pa. 66.

CHAPTER XIV.

THE PRICE ACT.

Unfettering of estates, by sale, mortgaging, leasing or letting on ground rent.

1. Power of courts.
2. Purpose of the act.
3. Effect of the act.
4. When the act is available.
5. Real estate held for or by minors.
6. Land held in trust.
7. Land subject to contingent remainder or executory devise.
8. Repairs and improvements.
9. Alternate jurisdiction.
10. Application of the act.
11. Power to invest in other real estate.
12. Petition — requisites.
13. Form of petition by guardian for private sale.
14. Form of consent of parties in interest.
15. Form of order of sale.
16. Form of petition for allotment to heirs.
17. Form of certificate of tenants in common.
18. Form of decree of court.
19. Who may petition — notice.
20. Manner and conditions of sale, etc.
21. Effect of sale, etc.—bar of interests.
22. Powers of fiduciaries to convey, etc.
23. Provisions extended to consolidation of lands with mining leases.
24. Purchase money, etc., substituted — security.
25. Appeals.
26. Limit upon accumulations.
27. Scope and effect of limitation.
28. Implied directions to accumulate.
29. Capitalization of income during minority of life tenant.
30. Accumulations for charity.
31. Retention of contingent fund for future needs of the trust.
32. Direction to pay incumbrances, etc.
33. Effect on the estate limited.
34. Allowance for maintenance of minors.
35. Vesting of void accumulations.
36. Construction of the act.
37. Ground rent.
38. Security in case of mortgaging and leasing.
39. Acknowledgment of deed or mortgage.
40. Power to ratify sales, etc.
41. Leasing of minerals in Mercer county.
42. Deeds by surviving trustees or successors.
43. Irregularity in appointment not to affect title.
44. Recording of deeds.
45. Sale of vacant ground of minor.
46. Form of decree for private sale.
47. Form of return of private sale.
48. Form of final decree.
49. Form of order on guardian to join in sale.

1. Power to sell, mortgage, lease or convey on ground rent.

Section 1 of the act of April 18, 1853, P. L. 503, commonly called "The Price Act," provides:

"In all cases where real estate shall have been acquired by descent or last will, the Orphans' Court, and in all other cases, the Courts of Common Pleas of the respective counties of this commonwealth,

shall have jurisdiction to decree the sale, mortgaging, leasing or conveyance upon ground rent of such real estate, in the cases hereinafter described: *Provided*, That any such court in the county where the premises shall be situated, shall be of opinion that it is for the interest and advantage of those interested therein that the same should be sold, mortgaged, leased, or let on ground rent, and may be done without injury or prejudice to any trust, charity or purpose for which the same shall be held: *And provided*, That the same may be done without the violation of any law which may confer an immunity or exemption from sale or alienation."

2. Purpose of "the Price Act."¹

It was said by Eli K. Price, Esq., in his work relative to the act: "Before the enactment now under consideration estates tail, as we have seen, were barrable, also contingent remainders, in certain instances were destructible, thereby destroying the interest of the remainderman, but not so—if under the protection of a strict settlement: the titles of a married woman might be conveyed, but not if limited to her sole and separate use, in the absence of an express power to convey or appoint; the interests of minors could be sold for their maintenance, but not sold or mortgaged for their advantage and the improvement of their estate; and generally a trust fixed upon real estate, without an expressed power of sale, was considered to make the land inalienable until the trust expired; and executory devises and interests were not alienable or barrable."²

"Under the act in review all estates in land are held in trust, or held by or for those under disability, or howsoever devised or strictly settled, except guarded by a condition or law made to inhere in the title to inhibit alienation, are made convertible into money, ground or other rents and productive to the intended living beneficiaries; while the product or purchase money continues under the same limitations for those afterwards beneficially interested, except, as before the act, estates tail and destructible contingent remainders may be barred, if such purpose be expressed in the petition, and be sanctioned by the court, without accountability for the price to those in remainder. * * * It means to give an actual purchaser the fee simple title, with requisition of security to protect the interests of those interested under the limitations in the purchase moneys, except as to those who could command the fee as of right; whose act of barring is favored,³ as a tenant in tail, who cannot bind himself not to bar the entailment.⁴ * * * It is true that before the act he who had the expectant interest might by deed attempt the conveyance of his future title, and he and his heirs would thus be estopped by his deed when the event occurred that gave him the title by the terms of the limitation.⁵ But such was not always the sure present title the purchaser acquires under our act."

¹ So called because it was drawn by Eli K. Price, Esq., an eminent lawyer of the Philadelphia bar.

² The Price Act, p. 9 (1874).

³ Ransley v. Stott, 26 Pa. 126.

⁴ Doyle v. Mullady, 33 Pa. 264; Hower's Ap., 55 Pa. 337.

⁵ Fearn, 365, 551.

3. Effect of the act.

It was said to be a remedial statute and one to be benignly and liberally expounded,⁶ so as to carry out the intent of the legislature.⁷ It was enacted as a rule of property, operating on all cases alike and is constitutional.⁸ Its purpose was not to settle disputes as to titles but to unfetter them and get rid of obstacles.⁹ It was "intended to unfetter estates, to facilitate the transmission of title, to enable persons acting in a fiduciary capacity to sell at private sale, when, in the opinion of the court, this would be to the advantage of the beneficiaries, and to secure to purchasers, thus induced to pay higher prices, absolute indefeasible titles, discharged of all liens or incumbrances, other than such as are expressly excepted; the fund produced by the sale being substituted for the land and placed under the control of the court in order that the rights of all persons interested may be fully protected."¹⁰ It was not intended to authorize the sale of land for the payment of debts.¹¹ The title is a part of the act and avails in the interpretation of it.¹²

4. When the act is available.

Section 2 of the act *supra*, as amended June 14, 1897, P. L. 144, provides:

"That such sale, mortgaging, leasing or conveyance upon ground rent, may be decreed whenever real estate shall be held for or owned by minors, lunatics, or habitual drunkards so duly found by inquisition; for the sole and separate use of married women; for religious, beneficial, or charitable societies or associations, incorporated or unincorporated, or for or by any other corporation; or by trustees for any public or private use or trust, and although there may exist a power of sale, but the time may not have arrived for its exercise, or any preliminary act may not have been done to bring it into exercise, or the time limited for its exercise may have expired, or any one or more persons required to consent or to join in its execution may have become *non compos mentis*, or have removed out of the state, or died, or should refuse to act, or unreasonably withhold consent. Also, when there has been or shall be a defective appointment in any deed or last will and testament, and the necessary power is not given to the executor, devisee, or appointee to make sale and conveyance of real estate; also, whenever the owner of real estate may have been absent and unheard from for seven years, under those circumstances from which the law would presume his or her death; whenever a husband shall own real estate having a wife who is a lunatic or a minor; whenever a married woman owns real estate, and her husband has abandoned her for two years,

⁶ Thompson, J., in *Gilmore v. Rogers*, 41 Pa. 120.

⁷ *Smith v. Townsend*, 32 Pa. 434.

⁸ *Grenawalt's Ap.*, 37 Pa. 95; *Freeman's Est.*, 181 Pa. 405.

⁹ *Bridesburg Land Co.'s Pet.*, 7 Phila. 436.

¹⁰ *Penrose, J.*, in *Yard's Est.*, 17 Phila. 436. (See also *Merrell v. Merrell*, 5 C. C. 531; *Orwig's Est.*, 7 C. C. 71; *Fulton's Est.*, 51 Pitts. L. J. 257; *Smith's Est.*, 207 Pa. 604.

¹¹ *Kiskaddon v. Dodds*, 21 Supr. C. 351.

¹² *Eby's Ap.*, 70 Pa. 314.

or been absent and unheard from for seven years; whenever a decedent shall have contracted by parol to sell real estate, and those interested do not think it expedient to plead the statute requiring contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold; whenever a decedent's real estate is subject to the lien of debts not of record; whenever real estate shall be entailed, or contingent remainders, or executory devises, or vested remainders which are liable to open and let in after-born children, shall be limited thereon ["therein," in the original act]; or whenever, in proceedings in partition in equity, it shall appear that real estate cannot be divided without prejudice to the interests of the owners; and, also, whenever real estate shall have been purchased, or any ground rent been reserved and be held by any person acting in a trust or fiduciary capacity. And such decree may be made, whether such ownership or interest shall be held or enjoyed in severalty, joint tenancy, coparcenary, or in common with others; and generally, in all cases where estates have been or shall be devised or granted in trust; or for special or limited purposes, or where any party interested therein is under a legal disability to sell or convey the same: *Provided*, That nothing in this act contained shall be taken to repeal or impair the authority of any act of assembly, general or private, authorizing the sale of real estate by decree of court or otherwise, nor to affect or impair any right or powers otherwise existing in any persons or corporations to sell, mortgage, lease or let on ground-rent any real estate. And every power to sell in fee simple real estate created by deed or will, shall be taken to confer an authority to sell and convey, reserving a ground rent or rents in fee, and the same to release and extinguish according to law and the stipulation of the deed, and also to grant and convey such ground rent or rents to any purchaser or purchasers thereof, free of all trusts."

Under section 2 the court may decree a sale of land that is subject to the lien of debts not of record, although such debts are not known to exist,¹³ or although it is subject to an executory devise over after a devise in fee to the petitioner.¹⁴ If the lien of the debts has expired the above provision does not apply.¹⁵ To make the act available the petition must be presented by the proper parties and it must allege facts which are within its purview.¹⁶ Where an executor had a power under the will, he was permitted to have the sale confirmed under this act, on giving security.¹⁷ But it was not intended for administrators or executors,¹⁸ nor can a sale be decreed under it to pay a mortgage created by decedent on land in another county where he had his residence.¹⁹ The court may authorize the guardian of minors, who is also life tenant, to mortgage the real estate when she is willing to apply

¹³ Green's Est., 1 Del. Co. 521; Pierce's Est., 7 Phila. 475.

¹⁴ Grenawalt's Ap., 37 Pa. 95.

¹⁵ Moyer's Est., 1 D. R. 600.

¹⁶ Spencer v. Jennings, 114 Pa. 618; 123 Pa. 184.

¹⁷ Wainwright's Est., 11 Phila. 147.

¹⁸ Spencer v. Jennings, 114 Pa. 618.

¹⁹ Burkhart's Est., 1 Mona. 474.

her life estate in payment.²⁰ Where the petition of the widow and heir is not accompanied by the schedule of debts, etc., required by the act of 1832, it will be treated as being under the act of 1853.²¹

5. Real estate held by or for minors.

The court may order a private sale of the undivided interest of one or more minors, although the parties owning the other interests do not join, but oppose it.²² But the sale will only affect the interest embraced and represented in the petition.²³ Such sale may be ordered notwithstanding the court had previously ordered the administrator to sell for the payment of debts.²⁴ The Orphans' Court of the county in which the land lies has jurisdiction of it.²⁵ If then the guardian is appointed in a different county than the one in which the land lies, he must apply for the sale where the land lies and account to the Orphans' Court of the county where appointed.²⁶ But if he also sold the life estate he must account for that in the county where situated.²⁷ [See act June 19, 1901, P. L. 574.]

6. Land held in trust.

It authorizes the sale of land held by trustees under a will and by virtue of partition proceedings.²⁸ And this is true also of amicable partition.²⁹ Where a testator creates a trust and empowers his executors and trustees to sell not exceeding one-fifth of his estate an order to sell the whole has been upheld under this act. It was said by Mitchell, J.: "Every testator makes his will in subordination to the law of the land. If he should, no matter how positively, attach a prohibition of alienation to an estate in fee, it is set aside without hesitation."³⁰ And upon this construction of the powers of the courts, it was held that where a man devised a burial place for his relatives, it might be invaded and sold³¹ when wanted for business purposes.

The Orphans' Court may order an improvement lease for fifty years, where the land is given in trust for one set of beneficiaries for life and the remainder to another set, though one objects.³² The court will not, nor ought it, loosely exercise the power to extinguish a man's will, but in every case an actual necessity should

²⁰ West v. Cochran, 104 Pa. 482.

²¹ Crawford's Est., 221 Pa. 131.

²² Gilmore v. Rodgers, 41 Pa. 120; Morrison v. Nellis, 115 Pa. 41.

²³ Pierce's Case, 7 Phila. 475.

²⁴ West v. Cochran, 104 Pa. 482.

²⁵ Morrison v. Nellis, 115 Pa. 41; Seiger's Est., 19 W. N. C. 404.

²⁶ Packer's Est., 1 Leg. Gaz. 13.

²⁷ Packer's Est., 7 Phila. 473.

²⁸ Phillips' Est., 7 D. R. 422.

²⁹ Hirsh's Est., 17 Phila. 512.

³⁰ Brock v. Penna. Steel Co., 203 Pa. 249; Grubb v. Penna. Steel Co., 203 Pa. 255.

³¹ Funck's Est., 16 Supr. C. 434.

³² Freeman's Est., 181 Pa. 405.

be made apparent.³³ It has been suggested that in the property might be sold to the *cestui que trust*.³⁴

7. Land subject to a contingent remainder or devise.

Section 2 of the act of 1853, *supra*, was amended June 14, 1897, P. L. 144, by adding a clause after "record," as follows: "Whenever real estate shall be subject to contingent remainders or executory devises or vested interests which are liable to open and let in after-born children, the court shall not be limited thereon." This amendment was made to meet a contingency for which the courts could not find in the life tenant objects where all the interests in the land were vested, no sale can be ordered.³⁵ Where there is a life tenant and a probable intestacy as to a strip of land the court will not be invocable to strip the heirs of it.³⁷ But where the life tenants are *sui juris* and the remainder is contingent, the Price Act authorizes the sale, if the court is satisfied against the objections of the life tenants.³⁸ An order under this act where the owner has been absent and unheard of for years will be refused unless a clear case is presented in

8. Repairs and improvements.

This act authorizes a sale or mortgaging for the purpose of paying repairs or improvements;⁴⁰ or to pay for such repairs in the lifetime of the testator;⁴¹ or in case of a sale to sell where the parties are *sui juris*.⁴²

9. Alternative jurisdiction.

The amendment of the Price Act made April 27, 1897, provides that where "the estate shall have been devised by deed and partly by descent or will, either the Court of Common Pleas or the Orphans' Court may entertain jurisdiction in a proceeding to make sale or lease thereof."⁴³ Where the estate is created by deed, the jurisdiction is in the Common Pleas.

10. Application of the act.

As already stated, the Price Act is not applicable to disputed titles; it was intended to afford a means to

³³ Woodward, J., in Schaffer's Est., 1 Woodward, 387 D. R. 140.

³⁴ Sharp's Pet., 6 Phila. 153.

³⁵ Anthracite Savings Bank v. Lees, 176 Pa. 402.

³⁶ Van Dusen's Est., 1 D. R. 156; Kerner's Est., 13 D. R. 1.

³⁷ Groetzinger's Est., 10 Northam. 327.

³⁸ Smith's Est., 207 Pa. 604; Louck's Est., 203 Pa. 278.

³⁹ Ulrich's Est., 14 Phila. 243.

⁴⁰ Lee's Est., 18 Phila. 2.

⁴¹ Burton's Est., 4 D. R. 106.

⁴² Lindsay's Pet., 2 Del. Co. 197.

⁴³ Reed v. Palmer, 53 Pa. 379; Fell's Est., 14 Phila. Est., 198 Pa. 454; Van Syckel's Est., 9 D. R. 367.

⁴⁴ Carswell's Pet., 1 Phila. 521.

free from contingent and other interests of a trust character, where the owners are incapable or prevented from acting themselves.¹ Thus where a minor is concerned, the only question for the court, is whether or not it is for his interest and benefit that his title shall be divested or incumbered.² If, then, it appears, that the testator has directed that the land shall not be sold during the life of his son and that the rents shall be devoted to his support, an order to sell will not be granted.³ The will should not be overridden when a sale cannot be made "without injury or prejudice to any trust, charity, or purpose," as the act provides.⁴ But where the land is heavily incumbered, and there is real danger of the rentals falling off and the taxes embarrassing it, an order will be granted.⁵ Where the *cestui que trust* is the sole beneficiary and under no disability, his objection to the petition by the trustee, who has an interest in the property, will be sufficient to defeat the petition.⁶ But when he joins in the petition with those entitled in remainder, the widow being sixty-six years old, it will not be defeated by the possibility of issue, but security will be required in the form of refunding receipts⁷ against such possibility. A sale to the *cestui que trust* will be ratified only upon clear and convincing evidence that it is proper and advisable⁸ and a separate use trust will not be extinguished, where the purpose of the sale is to vest the absolute title in the *cestui que use*.⁹ In connection with the lien of debts of decedent, the fact that a person who has an interest in the land has been absent and unheard from for seven years, is sufficient to warrant an order of sale.¹⁰ The criterion is whether the rights of possible creditors and the interests of the owners are subserved by the sale.¹¹ If the petition be to mortgage it will only be granted to the trustee, when it clearly appears that it will be for the interest and advantage of all persons concerned in the estate and without prejudice to any trust for which the land is held.¹² Said Smith, J.: "The statute plainly so limits the power of the courts as to preserve to the parties their constitutional rights of property, and contemplates the conveyance or mortgaging of estates only when advantageous to all concerned. The power conferred by the statute should be cautiously exercised; it was not designed to make the estate of one man subserve the interests of another. That some of the life tenants in the case

¹ Hower's Ap., 55 Pa. 337.

² Burke's Est., 3 D. R. 384.

³ Erwin's Ap., 1 Pitts. 232.

⁴ Heffner's Ap., 119 Pa. 462. Some later cases have had scant regard for this principle (Freeman's Est., 181 Pa. 405), which the Orphans' Courts are reluctant to follow. Van Dusen's Est., 1 D. R. 156. Penrose, J. Kerner's Est., 13 D. R. 311. Ashman, J.

⁵ Smith's Est., 207 Pa. 604; Groetzinger's Est., 10 Northam. 327.

⁶ Hollins' Est., 16 D. R. 441.

⁷ Brooke's Est., 15 D. R. 137; 214 Pa. 46.

⁸ Sharp's Petn., 6 Phila. 153.

⁹ McClurg's Est., 22 Pitts. L. J. 133.

¹⁰ Charlton's Est., 12 Phila. 102; Taylor v. Hoyt, 2 Mona. 206.

¹¹ Orwig's Est., 7 C. C. 71.

¹² Stevenson's Est., 4 Supr. C. 46. Smith, J. Affirmed, 186 Pa. 262.

before us, may also be co-remaindermen does not affect these controlling principles; their dual capacity cannot enlarge their rights to the prejudice of the rights of others." This is a merited rebuke to the aberrant disposition of the times to consume and "run through with" the estate earned by the ancestor and guarded by his foresight in his will, so as to preserve it from profligacy.

The debts made by the trustee are not such as are favored by the act, and where they are disputed and not reduced to judgment, they will furnish no valid basis for an order to sell.¹³ Where a trustee is also guardian and all the parties in interest consent and join in the petition a sale will be ordered, in his dual capacity.¹⁴ A son who is excluded from participation in the realty, the will having cut him off with an annuity, cannot by his sole objection prevent the confirmation of a sale.¹⁵

11. Power to invest in other real estate.

Section 2 of the act of April 13, 1854, P. L. 368, provides:

"That it shall and may be lawful for any trustee, committee, guardian, or other person acting in a fiduciary capacity, to invest trust moneys in ground rents or other real estate by leave of the proper court, under proceedings as provided in the act to which this is a supplement [1853, *supra*]: *Provided*, That it shall be the opinion of the court, that such investment shall be for the advantage of the estate, and no change be made in the course of succession by such change of investment, as regards the heirs or next of kin of the *cestui que trust*."

This power should be exercised with extreme caution by the courts and where it is resisted by parties interested in the land, an exchange will not be granted.¹⁶

12. Petition, requisites.

A petition should be single and specific as to its purpose. Therefore, it should not join a prayer to sell with one to invest the proceeds of the sale.¹⁷ Although irregular in form and inartistic-ally drawn, if the court through it, can discern jurisdiction of the subject matter and the parties interested, it will not be rejected.¹⁸ Where its purpose is to bar contingent interests under section 5, *infra*, it must specify such purpose, or the sale will be ineffectual and the purchaser need not accept the title.¹⁹ In order to bar contingent interests and executory devises they must be described in the petition and the purpose to extinguish them must be averred.²⁰ This feature should not be mixed up with a petition to sell under the act of 1832, *supra*, but, if it is, it may be treated as surplusage.²¹ A petition to sell the land of a minor should

¹³ Reilly's Est., 13 Phila. 201.

¹⁴ Pierce's Case, 7 Phila. 475.

¹⁵ Goddard's Est., 198 Pa. 454.

¹⁶ Miller's Est., 4 D. R. 328.

¹⁷ Graham's Est., 14 W. N. C. 31.

¹⁸ Fell's Est., 14 Phila. 248; Graham's Est., *supra*.

¹⁹ Westhafer v. Koons, 144 Pa. 26.

²⁰ Smith v. Townsend, 32 Pa. 434.

²¹ Wagner's Ap., 89 Pa. 303.

set out the derivation and extent of his title, the appointment of his guardian and the residence of each.²² It should show that it was derived by descent or will, in order to give the Orphans' Court jurisdiction.²³ It is not sufficient to say that petitioner is an heir or devisee; it should show how he is interested, and in case of a will, contain a copy thereof, or so much as fixes his interest.²⁴ It should contain a full description of the land to be sold or affected by the decree.²⁵ But where the schedules were omitted, they were permitted to be supplied from the records of a proceeding by the administrator to sell.²⁶ In a petition to mortgage it was held the schedules of personalty and debts were not essential;²⁷ though to prevent controversy it is best to present them. It was held that a private sale will not be invalidated for failure to state in the petition that the price offered was a fair one, etc.²⁸ Such petition, however, should be full and show a reason for the private sale desired.²⁹

13. Form of petition by guardian for private sale.

*In the Matter of the Estate
of Joseph Delp, Deceased.*

To the Honorable, etc.

The petition of Ralph Stone, guardian of Henry Delp, Helen Delp and Louise Delp, minor children of Joseph Delp, deceased, respectfully represents:

That Joseph Delp, late of the city of Harrisburg, died in said city in the County of Dauphin and State of Pennsylvania, on the — day of —, A. D. 19—, intestate, leaving a widow, Blanche Delp, a son Henry Delp, aged 22, and two daughters, Helen Delp, aged 18, and Louise Delp, aged 20, which minor children reside with their mother in Harrisburg, said county; that on or about the — day of —, A. D. 19—, letters of administration were issued by the register of wills of said county to Blanche Delp, widow, and that, on the — day of —, A. D. 19—, your petitioner was appointed guardian of said Helen Delp and Louise Delp, minor children of said Joseph Delp, deceased, and that his residence is in Harrisburg, Pa.

That the said minors are seized of an equal undivided interest in a certain tract of land situate in — —, of said county, bounded and described as follows: [Here describe the land.]

Which descended to them from their father, Joseph Delp. That, subject to the dower interest or life estate of their said mother, Blanche Delp, the interest of said minors is an undivided two-thirds of said land, Henry Delp, aforesaid, owning the other one-third.

That an offer has been made by one James Herman to purchase

²² Goldsmith's Est., 13 Phila. 389.

²³ Johnson's Ap., 114 Pa. 132.

²⁴ Heffner's Ap., 119 Pa. 462.

²⁵ Heffner's Ap., *supra*.

²⁶ West v. Cochrane, 104 Pa. 482.

²⁷ Orwig's Est., 7 C. C. 71.

²⁸ Smyth v. Neill, 1 W. N. C. 43.

²⁹ Lambrecht's Est., 22 W. N. C. 24.

the entire title for the sum of five thousand dollars cash, which your petitioner verily believes and hereby represents, is a higher and better price than could be obtained at public sale, under the circumstances, and that it would be for the interest, benefit and advantage of all the owners of said land, and particularly of said minors, to sell and convey the same at private sale.

He therefore prays your honorable court to make an order authorizing him, acting in conjunction with the said widow, Blanche Delp, and son Henry Delp, to sell, grant and convey said described land to the said James Herman, for the sum of five thousand dollars, as provided by the act of April 18, 1853, and its supplements,

And he will ever pray, etc.

Ralph Stone,
Guardian.

[Affidavit to truth of above.]

14. Consent of parties in interest.

We, Blanche Delp and Henry Delp, being the only other parties in interest in the premises above described do hereby declare that we know the contents of the above petition, and believe that the statements therein are true, and that we are satisfied with and consent to the said proposed sale free from our several interests therein, and believe that it would be for the best interest and advantage of all the parties in interest that the sale be ordered as prayed for.

Blanche Delp,
Henry Delp.

Date — — —, — —.

15. Form of order to sell.

And now, — — day of — —, A. D. 190—, on consideration of said Petition, and it appearing that all the parties interested have had due notice thereof, and the Court being of opinion that it would be to the interest and advantage of those interested that said real estate should be sold, and that it may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without violation of any law which may confer an immunity or exemption from sale or alienation: It is ordered and decreed that said Ralph Stone, guardian of Helen Delp and Louise Delp, be authorized and empowered to sell the premises described in said petition unto James Herman for the sum of five thousand dollars, and upon receipt of said purchase money to execute and deliver a good and sufficient deed of conveyance of the same to said purchaser, his heirs and assigns, in fee simple, and the said title shall be indefeasible by any party or persons having a present or contingent interest in said premises, and be unprejudiced by any error in the proceedings, and free and discharged from the lien of any debts of decedent not of record, security being first entered by said — — in the sum of — — dollars.

By the Court.

Attest:

— — —,
Assistant Clerk of Orphans' Court.

16. Form of petition for allotment of land.

To heirs, where one is a minor, and to charge one purpart with the widow's dower, releasing all the others.

In the Orphans' Court of Armstrong County, *In re* estate of John F. Heilman, deceased.

To the Honorable Willis D. Patton, Judge of said court:

The petition of F. A. Moesta, guardian of Alberta Heilman, minor child of John F. Heilman, deceased, respectfully represents:

1. That John F. Heilman, late of the borough of Kittanning, County of Armstrong, and State of Pennsylvania, died intestate on the 25th day of May, A.D. 1905, leaving to survive him a widow, Christina Heilman, a son Herbert G. Heilman, and three daughters, May Heilman, now intermarried with Chase Price, of Marion, Iowa; Ruth Heilman, of the borough of Kittanning, Pennsylvania, now over the age of twenty-one years, and Alberta Heilman, a minor child.

2. That on the 25th day of May, A.D. 1905, letters of administration were issued by the register of wills of said county, to Christina Heilman, H. E. Moesta and William H. Heilman, and by your honorable court, on the — day of —, 1905, your petitioner was appointed guardian of Ruth Heilman, Herbert G. Heilman and Alberta Heilman. That since the appointment Ruth Heilman and Herbert G. Heilman have arrived at the age of twenty-one years, the said Alberta Heilman being a minor child, and for whom your petitioner is still acting as guardian.

[Paragraphs 3, 4 and 5 aver a partnership, which was dissolved by the said John F. Heilman's death; but during his lifetime the partnership acquired real estate, some of which is included in this proceeding, and further aver that the partnership is so far liquidated that the real estate is no longer needed for the adjustment of partnership debts, and that this is only a portion of said real estate; and that the interest of said John F. Heilman in said partnership descended to his heirs.]

[Par. 6 describes in detail the various parcels so descending and the interest of the heirs therein.]

7. Your petitioner alleges that the property above mentioned is an income paying property and of considerable value; that all of the houses erected and constructed on said property are rented and that considerable difficulty is experienced in the management of said property on account of the numerous interests involved, and much more satisfactory management and control of said property could be had by a partition of the whole of said property, a portion of which should be allotted to William M. Heilman in severalty, a portion to James M. Heilman in severalty, and a portion to the heirs of John F. Heilman, deceased, and the dower interest of the widow Christina Heilman, released on the purparts apportioned and accepted by the said William M. Heilman and James M. Heilman and the whole of the same remaining a charge on the interest partitioned and allotted to the heirs of John F. Heilman.

[Pars. 8 and 9 and 10 and 11 and 12 and 13 and 14 set forth the parcels particularly to be partitioned and an agreement of all the parties who are *sui juris* to accept, provided the court authorizes the guardian of the minor child to join therein.]

15. Your petitioner further alleges that the division and partition of the land above stated is fair, equitable and just and to the best interest of all parties concerned and especially to the minor child of John F. Heilman, deceased, to-wit: Alberta Heilman, and that it is greatly to the interest of the owners of said premises that the agreement for the division of the land hereinbefore described be carried into effect.

He therefore prays the court that an order be granted authorizing him as guardian of Alberta Heilman, minor child of John F. Heilman, deceased, to join in the division and partition of the property described in this petition, under the terms and conditions mentioned herein; and further, that he be authorized, acting in conjunction with May Price, Ruth Heilman and Herbert G. Heilman and Christina Heilman, widow, aforesaid, to grant and convey by proper deeds to William M. Heilman, the property agreed to be taken by the said William M. Heilman, as his purpart and in lieu of his undivided one-third ($\frac{1}{3}$) interest in fee simple of the whole of the premises described in this petition, and that he be further authorized acting in conjunction with May Price, Herbert G. Heilman, Ruth Heilman and Christina Heilman, widow as aforesaid, to grant and convey to the said James M. Heilman, by proper deed, the property agreed to be taken by the said James M. Heilman, as his purpart and in lieu of his undivided one-third ($\frac{1}{3}$) interest in fee simple of the whole of the premises described in this petition, and your petitioner further prays the court for an order authorizing him, acting in conjunction with May Price, Ruth Heilman, and Herbert G. Heilman to accept a proper deed from William M. Heilman *et ux.* and James M. Heilman *et ux.* and Christina Heilman, widow, conveying to the said May Price, Ruth Heilman, Herbert G. Heilman and Alberta Heilman, minor child as aforesaid, the purpart agreed to be taken by the said children of John F. Heilman, deceased, in lieu of their undivided one-third ($\frac{1}{3}$) interest in the whole of the premises described above, to which they are entitled as heirs at law of the said John F. Heilman, deceased.

Your petitioner further prays that he be authorized, acting in conjunction with May Price and her husband Chase Price, Herbert G. Heilman and Ruth Heilman, for the purpose of accomplishing the amicable division and allotment of this property, to execute and deliver to said Christina Heilman a deed for the undivided one-third interest in the purpart allotted and conveyed to May Price, Ruth Heilman, Herbert G. Heilman and Alberta Heilman, minor child as aforesaid, for and during the term of her natural life, which conveyance shall be in lieu of the dower interest of the said Christina Heilman in and to the whole of the above described property. This petition is presented under the act of April 13, 1853, and its supplements, which provides as follows: "That it shall be lawful for trustees, guardians, married women, committees and corporations, in all the cases aforesaid, under the decree of the court as aforesaid, and with the like effect and indemnity to them in acting thereunder to make and take conveyance by deed acknowledged in court, without public sale, in order to square and adjust lines between adjoining owners, to make and take convey-

ances, to perfect the partition of real estate held in joint tenancy, coparcenary or in common with others, etc."

H. A. Heilman, Attorney for Petitioner.	}	F. A. Moesta, Guardian of Alberta Heilman.
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Verification.

County of Armstrong, ss.

F. A. Moesta, Guardian of Alberta Heilman, being duly sworn, says that the facts set forth in the foregoing petition are true.

F. A. Moesta.

Sworn to, etc.

17. Form of certificate of tenants in common.

We, James M. Heilman, William M. Heilman, the owners of the undivided two-thirds interest in the property described in the foregoing petition, and May Price, Ruth Heilman, Herbert G. Heilman and Christina Heilman, children and widow of John F. Heilman, deceased, the parties therein named, and the only parties interested in the premises therein described, do declare that we have examined said petition and believe the statements therein made to be true. We further declare that we are satisfied with said partition and division, in the manner and under the terms therein set forth and believe that it is to the best interest and advantage of all the parties interested in said premises that the partition of the property be effected in the manner and under the terms therein set forth.

[Signed by all the parties interested.]

18. Form of decree of court.

And now, to-wit: this — day of —, A. D. 1910, the within petition being presented in open court, and having given said petition and the matters therein contained a full and careful consideration, and being of the opinion that it is for the best interest and advantage of the said Alberta Heilman, minor child as aforesaid, that there should be a division and partition of the whole of the land described in said petition in the manner and form therein set forth, it is hereby declared, adjudged and decreed that F. A. Moesta, acting as guardian for Alberta Heilman, minor child of John F. Heilman, deceased, be authorized and empowered, acting in conjunction with May Price, Ruth Heilman and Herbert G. Heilman, children of John F. Heilman, deceased, to make any necessary agreement for the division and partition of the property described in said petition, as follows: A certain purpart of said land shall be taken and accepted by William M. Heilman in severalty; a certain purpart shall be taken and accepted by James M. Heilman in severalty, and a certain purpart shall be taken by the children of John F. Heilman, deceased, to-wit: May Price, Ruth Heilman, Herbert G. Heilman and Alberta Heilman, minor child as aforesaid, subject to the dower interest of their mother, Christina Heilman, which purpart shall be held by the said Alberta Heilman as tenant in common with May Price, Ruth Heilman and Herbert G. Heilman, for the purpose of carrying out the division of said

land among the parties above named in the manner set forth. The purparts to be taken by the respective parties have been fully set forth in said petition and are approved by the court. And the said F. A. Moesta, acting as guardian of Alberta Heilman shall, in conjunction with May Price, Ruth Heilman and Herbert G. Heilman, execute and deliver to the said Christina Heilman a deed for the undivided one-third interest to be held by her for and during the term of her natural life in and to the purpart agreed to be accepted and taken in this division by the children of John F. Heilman, deceased, to-wit: May Price, Ruth Heilman, Herbert G. Heilman and Alberta Heilman, minor child as aforesaid, and being the undivided one-third interest for life to the said Christina Heilman to be in lieu of her dower interest, and the said F. A. Moesta, acting as guardian of said Alberta Heilman, minor child as aforesaid, is hereby authorized to act in conjunction with May Price and Chase Price, her husband, Ruth Heilman and Herbert G. Heilman, to execute and deliver a proper deed, conveying all the right, title and interest which they have as heirs of the estate of John F. Heilman, in and to the purparts agreed to be taken and accepted by said William M. Heilman, and James M. Heilman, respectfully, their heirs and assigns forever.

_____,
By the Court.

19. Who may petition — Notice

Section 3 of the act of 1853, *supra*, provides:

"Such sale, mortgaging, leasing or conveyance upon ground rents may be decreed on the petition of any trustee, guardian, committee or person interested, clearly setting forth the facts needful for the information of the court, under oath or affirmation. And if all proper parties shall not have voluntarily appeared as petitioners or respondents, the court shall fix a day for parties to appear, and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day designed; and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice; and service made in any part of the United States and the territories thereof, with oath or affirmation of the fact, taken before any judge or justice of the peace, and filed of record, shall be good service; and guardians shall be served and appear for their wards; and if minors shall have no guardian, the court shall appoint a guardian for them; committees shall be served and appear for lunatics and habitual drunkards; and husbands shall be served and appear with their wives, except husbands who shall have abandoned their wives for two years, or been absent and unheard from for seven years. And if parties make default in appearing, the court, after investigation of the facts, may proceed to make a decree in the premises: *Provided*, That in the case of the appointment of a guardian by the court, and the payment over of money to him, or of the payment of money to any former guardian, the court shall take adequate security for the faithful application of such money; and before the payment of any money to any guardian not within

the court's jurisdiction, the court shall be duly notified that adequate security has been given to the court having jurisdiction over him, whether within or without this commonwealth."

20. Manner and conditions of sales, etc.

Section 4 of the act of 1853, *supra*, provides:

"Such sales, mortgages, leasing and letting on ground rent, shall only take place after full and careful investigation by the court, aided, when deemed necessary, by the report of a competent person to be appointed by the court; and shall be made by trustees, executors, administrators, guardians, committees or owners having a present vested interest, as the court may order; and be under the direction and subject to the approval of the court before which the deed shall be acknowledged, and be certified under seal to have been acknowledged. And all absolute sales in fee simple (except as hereinafter provided) shall be by public sale or vendue, and may be either entirely for cash, or partly on credit and partly for cash, after full advertisement for at least twenty days, by hand bills posted in at least twenty of the most public places in the city or county where the premises shall be situated, and in at least two newspapers, not less than three times in each: *Provided*, That if the court shall be of the opinion that under the circumstances a better price can be obtained at private than at public sale, as where the interest be undivided, or for other sufficient cause, the court may approve and decree a private sale; and such mortgaging, leasing and letting on ground rent, shall be upon terms and at rates to be approved by the court; and the specific execution of the contracts of decedents, upon the terms and at the price proved or admitted to have been agreed upon by the parties; but no such private sale, leasing or letting on ground rent, shall be upon terms or at rates less favorable than others, who of competent ability to contract and uniting in the sale of undivided interests, shall accept. And it shall be the duty of the court in decreeing sales, leases and conveyances upon ground rent of real estate, to order the premises, if necessary, to be so subdivided as to command the highest price or greatest rents; and for such purposes, where the premises may admit of or require it, shall have power to lay out roads, streets and alleys, and to vacate such as shall not have been paid for, or received into actual use by the public, if found to be inconvenient, and to make an unprofitable division of the property. *And provided further*, That no sale or sales shall be ordered or made under the provisions of this act, in any case, until security, to be approved by the Court of Common Pleas or Orphans' Court, be given, in at least double the value of the interest proposed to be sold."

21. Effect of sales, etc., bar of interests.

Section 5 of the act of 1853, *supra*, provides:

"The title of purchasers under all such sales, mortgages or conveyances upon ground-rent, shall be a fee-simple title, indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court; and by every such public sale, the premises sold shall be discharged from all liens. And every such sale and every conveyance

in fee-simple upon ground rent, shall have all the effect of any other proceeding or conveyance now authorized by law and strictly conducted to a final conclusion, to bar any estate tail, and to defeat contingent remainders, and in such case shall vest in the tenant in tail or particular tenant, whether minor, *feme covert* or otherwise, who, after such proceeding or conveyance, might have become entitled to the absolute fee-simple title, the absolute right to the purchase-money and the ground-rents reserved; and such sales and conveyances on ground-rent, shall also bar any right of the commonwealth to forfeit real estate that may have been held by or for any corporation beyond what has been authorized, if no proceeding to procure a forfeiture shall have been commenced before petition filed for a sale or letting on ground-rent: *Provided*, That the petition shall set forth an explanation of the title, and of the purpose to bar the entail, defeat the contingent remainder, or the right of the commonwealth to have inquisition, for any estate defeasible as aforesaid: *And provided*, That the purchase-money or rent reserved shall be a lien on the premises sold or let, until fully paid according to the decree of the court."

22. Powers of fiduciaries to convey, etc.

Section 7 of the act of 1853, *supra*, as amended by the act of April 18, 1864, P. L. 462, provides:

"It shall be lawful for trustees, guardians, committees, married women, and corporations, in all the cases aforesaid, under the decree of the court as aforesaid, and with the like effect and indemnity to them in acting thereunder, to make and take conveyances, by deed acknowledged in court, without public sale, in order to square and adjust lines between adjoining owners; to make and take conveyances, to perfect the partition of real estate held in joint tenantry, coparcenary, or in common with others; to purchase other real estate when needful to that already owned by any such party, or useful to the business thereupon carried on: Or when necessary to protect any security or rent held on property exposed to judicial sale: *Provided*, That no corporation shall be so authorized to purchase beyond its charter license: *And provided*, That no purchase or sale by authority of this act shall change the course of descent or transmission of any property, changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it, and all persons intrusted with moneys raised under this act shall be authorized to file their accounts in the court whence their authority was derived, and upon such notice as the court may order to parties interested, or after being audited, if deemed necessary, or by consent of all parties interested, such accounts may be finally confirmed, and upon payment of the balance, as may be decreed by the court, such accountants may be fully discharged from the trust.

"It shall be lawful for trustees, guardians, committees, married women, and corporations, in addition to the powers conferred by the seventh section of the act to which this is a supplement, under the decree of the proper court, and with the like effect, and indemnity to them in acting thereunder, to make and take, or to join with owners of other undivided interests in making and taking conveyances, by deed acknowledged in court, and without public sale, in

order to change, in part or in whole, the route or location of any right of way or passage existing over and upon adjoining or other lands: *Provided*, The court shall be of opinion that it is for the interest and advantage of the owner or owners of the land to which such right of way is appurtenant, that such change of route or location be made: *And provided further*, That it shall be in the discretion of the court, in such cases, to require security, or not, from the person or persons aforesaid, making or taking such conveyances."

23. Provisions extended to consolidation of lands in mining leases.

Section 1 of the act of June 8, 1874, P. L. 277, provides:

"Whenever, under the provisions of the aforesaid act of April 18, 1853, and the several supplements thereto, the courts of this commonwealth, or any of them, have power to decree a lease of lands for mining purposes, it shall be further lawful for the said courts to order and decree that such lands may be so combined and consolidated with other adjoining lands as to form one tract in which the several persons or parties so combining and consolidating, shall become seized of undivided interests, proportionate to their several divided interests before such combination and consolidation, and that the rents or royalties to be received under such lease shall be in the like proportions."

24. Purchase money, substituted — Security.

Section 6 of the act of 1853, *supra*, provides:

"The purchase money or mortgage money, ground or other rent reserved, shall, in all respects, be substituted for the real estate sold, mortgaged or let, as regards the enjoyment and ownership thereof, after the payment of liens and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest, present or future, vested, contingent or executory, as the real estate sold mortgaged or let had been held except only such

of the trust, and proper application of all moneys to be received according to the trust and decree of the court; which security shall inure to the benefit of all parties interested; and such security being so given, no purchaser or lessee shall be bound to see to the application of the purchase money or rents, or be, in any manner, liable to or affected by the former trusts or limitations upon the premises."

25. Appeals.

Section 8 of the act of 1853, *supra*, provides:

"In all cases and proceedings under this act, appeals may be taken to the Supreme Court from the Orphans' Court, as now provided by law in other cases, and in the Court of Common Pleas, as provided in equity cases, in the respective counties of the state: *Provided*, That if any decree be carried into execution, before the appeal be perfected, and written notice thereof be given to any vendee, mortgagee or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee or lessee, but the purchase- or mortgage-moneys or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus incumbered: *Provided further*, That before any decree be carried into effect, to afford such indemnity, twenty days be allowed from its entry, to take and perfect such appeal."

26. Limit upon accumulations.

Section 9 of the act of 1853, *supra*, provides:

"No person or persons shall, after the passing of this act, by any deed, will or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interests or profits thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler or testator; that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation of any person or persons who, under the uses or trusts of the deed, will or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, in so far as it shall exceed the limits of this act; and the rents, issues, interests and profits so directed to be accumulated, contrary to the provisions of this act, shall go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed: *Provided*, That any donation, bequest or devise for any literary, scientific, charitable or religious purpose, shall not come within the prohibition of this section; which shall take effect and be in force as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made: *And provided*, That notwithstanding any direction to accumulate rents, issues, interests and profits, for the benefit of any minor or minors, it shall be lawful for the proper court, as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education.

to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectations, whether, at the time being, minors or of lawful age."

27. Scope and effect of limitation.

The section, *supra*, is drawn after the form of the 39th and 40th of George III, chapter 98, and was intended to prohibit all directions for accumulation of income contained in limitations by deed or will of real or personal property, except in those cases in which they are expressly permitted.¹ Unlike the rule against perpetuities, a partial transgression will not render the entire provision void, but only so much as is in excess.² It has been held that a direction to accumulate for any period during the life of a person of age is void;³ and also where it extends beyond the limitation of the act during the life of a person for the benefit of others at his death;⁴ and where the accumulation is for a class whose members cannot be ascertained when it shall take effect.⁵ So an accumulation for a period after the death of the testator will fail;⁶ also, when the principal shall accumulate to a certain sum.⁷ If the class of beneficiaries is determinable immediately, the accumulation will be sustained.⁸ It has been questioned whether it can be maintained through a succession of minorities.⁹ The act does not cut out a direction to accumulate during the minority of the beneficiary, with a limitation over to a charity, in case the beneficiary dies during his minority.¹⁰ An accumulation in the form of temporarily withholding the income to provide a fund for the judicious management of a trust is valid and the testator may confer upon the trustee a discretionary power over it.¹¹ A trust may be valid as to the principal sum and void as to the accumulations;¹² and where the manifest purpose is to create an equitable estate, the void accumulations may go to the *cestuis que trustent* when they arrive at full age.¹³ An executor and trustee cannot include illegal accumulations in his account. If he does, they will be stricken out.¹⁴

¹ Sergeant's Est., 11 Phila. 8.

² Brown v. Williamson, 36 Pa. 338; Lennig's Est., 154 Pa. 209; 18 Phila. 144; McBride's Est., 152 Pa. 192; Paxson's Est., 35 C. C. 44.

³ Brubaker's Ap., 1 Mona. 447; Sharp's Est., 155 Pa. 289; McKee's Ap., 96 Pa. 277; Grim's Ap., 109 Pa. 391; Rhodes' Est., 147 Pa. 227; Wahl's Est., 8 C. C. 309; Hibb's Est., 143 Pa. 217.

⁴ Schwartz's Ap., 119 Pa. 337; Edward's Est., 190 Pa. 177; Frymeyer's Est., 17 Lanc. L. R. 401.

⁵ Morris' Est., 9 Montg. 69.

⁶ Williamson's Est., 143 Pa. 150.

⁷ Rogers' Est., 2 C. C. 545.

⁸ Sharp's Est., 11 Phila. 92.

⁹ Furness' Est., 16 Phila. 357.

¹⁰ McHugh's Est., 1 D. R. 154; 152 Pa. 442.

¹¹ Spring's Est., 216 Pa. 529; Wade's Est., 19 D. R. 197; Scott's Est., 19 D. R. 643.

¹² Weinmann's Est., 17 D. R. 489.

¹³ Young's Est., 16 D. R. 541; Yewdall's Est., 23 Montg. 43.

¹⁴ Middleton's Est., 17 D. R. 394.

28. Implied directions to accumulate.

An implied direction to accumulate is prohibited by the statute as well as an express direction.¹⁵ Such implication will arise where the payment of certain annuities is directed which are insufficient to exhaust the fund,¹⁶ or where the trustee is directed, after paying annuities, to expend the balance in alterations and repairs of the trust estate.¹⁷ But such implied directions are valid during the existence of minority for the benefit of the minor, in this respect, our act differing from the British law,¹⁸ and also for the purposes of charity.¹⁹ Such implication arises where the trustee is given discretion to pay the beneficiary only a portion of the income and withhold the balance.²⁰ But it does not apply where a trustee is given power to partition the estate after a number of years and to withhold the income until then.²¹ The language of the act of 1853 is so general, and in some cases so involved that the courts have been puzzled as to its exact application. The general opinion seems to be that the ninth section, *supra*, applies to a spendthrift trust.²² If so, *quære* whether the legislature should not clearly define the law in plain and terse terms instead of indefinite circumlocution and learned duplicity of meaning.

29. Capitalization of income during minority of life tenant.

Where an accumulation of income is provided for a life tenant until majority and then to be added to the corpus of the estate, upon which the income is to be paid, the capitalization is void.²³ This rule has been applied to a case where the estate vested immediately and before the testator's death.²⁴ In all such cases, the courts have denied the right of the testator to do with his own what he himself wot that he wot;²⁵ although, once in a while, some lone judge wonders how they ever came to make such a rule,²⁶ and to escape it will perceive that there was no intention to capitalize disclosed.²⁷ A direction to capitalize during the life tenancy for the benefit of the remainderman is doubtless void, and the accumulations will pass to the heirs or, under a residuary clause, to those entitled to the residuum.²⁸ And so of an annuity with an implied direction to

¹⁵ Eberly's Ap., 110 Pa. 95; Tripp's Est., 7 Lack. L. N. 263; 202 Pa. 260; Butler v. Butler, 9 Phila. 269.

¹⁶ McKee's Ap., 96 Pa. 277; Forsythe's Est., 47 Pitts. L. J. 73.

¹⁷ Mitcheson's Est., 15 Phila. 523.

¹⁸ Hoffman's Est., 14 D. R. 279.

¹⁹ Mayers' Est., 13 D. R. 277.

²⁰ Sergeant's Est., 11 Phila. 8.

²¹ Barger's Ap., 100 Pa. 239.

²² Eberly's Ap., 110 Pa. 95, commented upon in Hibb's Est., 143 Pa. 217; Grim's Est., 15 Phila. 603; 109 Pa. 391; Barger's Ap., 100 Pa. 239.

²³ Washington's Est., 75 Pa. 102; Stille's Ap., 4 W. N. C. 42; Carson's Ap., 99 Pa. 325; Farnum's Est., 191 Pa. 75; Lafferty's Est., 6 D. R. 22; White's Est., 8 D. R. 33; Fest's Est., 13 D. R. 193.

²⁴ Carson's Ap., 99 Pa. 325.

²⁵ Potter's Est., 13 Phila. 293.

²⁶ Carson's Ap., 99 Pa. 325.

²⁷ Penrose's Ap., 102 Pa. 448.

²⁸ Mitcheson's Est., 15 Phila. 523; Rhodes' Est., 147 Pa. 227; Martin's Est., 185 Pa. 51; Edward's Est., 190 Pa. 177; Schwartz's Ap., 119 Pa. 337;

accumulate the balance for the residuary estate.²⁹ The accumulations being void, a minor beneficiary, on coming of age, will be paid out of the principal of his share under the direction in a codicil and not the fund accumulated.³⁰

30. Accumulations for charity.

A bequest for charities, with accumulation, is not within the avoiding force of the act, *supra*, and the heirs cannot dispute the trust.³¹ However, if the trust be unlawful, it will not be saved by the broad *ægis* of charity.³² As between a charity and annuities, whether the accumulations are void or not, must await the expiration of the annuities.³³ A direction to accumulate for charity is not avoided by the fact that some adults will be let in on the income,³⁴ nor that the payment of the accumulation is postponed to a certain time;³⁵ and if that time be at the death of the surviving annuitant, such payment will take effect when the survivor is incapable of taking under the terms of the will.³⁶

31. Retention of contingent fund for future needs of the trust.

Where there are small incidental accumulations, when all of such accumulations are necessary to carry out the trust in various ways, they will not be avoided.³⁷ There must be an obvious main intent to accumulate.³⁸ So, under a spendthrift trust, accumulations may be allowed in anticipation of sickness and other exigencies.³⁹ Such surplus will be treated not as an accumulation offending the law, but as contingent and unavoidable.⁴⁰ The findings of the lower court upon this question will not be readily reversed.⁴¹

32. Direction to pay incumbrances, etc.

Whilst a direction to expend the income of a trust estate to pay off incumbrances and thus increase its value has been held to be void,⁴² a discretionary power to pay current expenses and repairs incidental to the estate is not,⁴³ whilst a general power to expend the balance of the income for improvements is.⁴⁴ But where the

Wright's Est., 227 Pa. 69; Roney's Est., 227 Pa. 127; Van Reed's Est., 2 Berks, 200.

²⁹ McKee's Ap., 96 Pa. 277; Howell's Est., 180 Pa. 515.

³⁰ Farnum's Est., 191 Pa. 75.

³¹ Curran's Ap., 4 Penny. 331.

³² McBride's Est., 152 Pa. 192.

³³ Young v. St. Mark's Lutheran Church, 200 Pa. 332.

³⁴ Lennig's Est., 154 Pa. 209.

³⁵ Biddle's Ap., 99 Pa. 525.

³⁶ Cook's Est., 10 C. C. 465.

³⁷ Eberley's Ap., 110 Pa. 95; Mitcheson's Est., 5 C. C. 99.

³⁸ Conrow's Ap., 3 Penny. 356; Lafferty's Est., 7 D. R. 253.

³⁹ Hibbs' Est., 143 Pa. 217.

⁴⁰ Howell's Est., 180 Pa. 515; King's Est., 210 Pa. 435.

⁴¹ Schwartz's Ap., 119 Pa. 337.

⁴² Lutz's Est., 18 Phila. 114.

⁴³ Lutz's Est., 9 C. C. 294.

⁴⁴ Mitcheson's Est., 5 C. C. 99. A statute capable of these diverse interpretations is in need of "fixing up."

legacies and expenses exceed the income, there is no accumulation, which is self-evident.⁴⁵ If a portion of the income is directed to be applied to pay the principal of the incumbrances, it offends against the law.⁴⁶

33. Effect on the estate limited.

A trust, with accumulations exceeding the limit of the law, is valid during the period allowed by it.⁴⁷ The trust being a valid spendthrift trust, though the incidental accumulations be void, is unaffected in its validity.⁴⁸ The accumulations may be valid in part and void as to the excess.⁴⁹ But if the main object of the trust is to create prohibited accumulations, it falls.⁵⁰ On the other hand, if the main purpose of the trust is valid, only the provision as to accumulations fails;⁵¹ and the income passes to the beneficiaries.⁵²

34. Allowance for maintenance of minors.

Notwithstanding a provision for accumulation, the courts may order an adequate allowance to minors for their maintenance, if there be no other adequate means.⁵³ If there be a succession of minorities, the maintenance will be charged upon each according to its necessity.⁵⁴

35. Vesting of the void accumulations.

Where there is a vested gift of the principal or corpus and the accumulation is declared void, it vests immediately in the beneficiaries.⁵⁵ But if the beneficiary is not entitled under the will, it goes to the residue.⁵⁶ If they accrue from a specific legacy or demise, they pass into the residuary estate.⁵⁷ If to be made out of the income of the residuum, they pass to the heirs or next of kin.⁵⁸

36. Construction of the act.

The act does not apply to accumulations in another state.⁵⁹ The rule of construction is, or ought to be, that the expressed or implied intent of the testator is not obnoxious to the law, and that the accumulation is for a valid and just purpose, unless the contrary clearly

⁴⁵ Williamson's Est., 143 Pa. 150.

⁴⁶ Hoffman's Est., 14 D. R. 279.

⁴⁷ Conrow's Ap., 3 Penny. 356.

⁴⁸ King's Est., 210 Pa. 435.

⁴⁹ Brown v. Williamson, 36 Pa. 338.

⁵⁰ Lare's Est., 8 D. R. 265.

⁵¹ Sharp's Est., 155 Pa. 289.

⁵² Stiver's Est., 5 C. C. 113.

⁵³ Reed's Ap., 4 Walker, 500; Kinike's Est., 10 C. C. 522.

⁵⁴ Furness' Est., 16 Phila. 357.

⁵⁵ Wahl's Est., 8 C. C. 309; Myer's Est., 18 Phila. 103; Ward's Est., 8 D. R. 701; Roger's Est., 179 Pa. 602; Martin's Est., 185 Pa. 51.

⁵⁶ White's Est., 8 D. R. 33; 163 Pa. 388.

⁵⁷ Sergeant's Pet., 11 Phila. 8; Howell's Est., 180 Pa. 515.

⁵⁸ Grim's Ap., 109 Pa. 391. (See Grim's Est., 147 Pa. 190; Martin's Est., 185 Pa. 51; P. & L. Dig., vol. 14, col. 27085.)

⁵⁹ Fowler's Ap., 125 Pa. 388; De Renne's Est., 15 Phila. 566; Mellon's Est., 16 Phila. 323; Gowen's Ap., 106 Pa. 288.

appears.⁶⁰ The purpose being doubtful, it should be construed favorably to a legal accumulation.⁶¹

37. Ground rent.

Wharton defines a ground rent to be "a periodical payment for the privilege of building on another man's land." It is real estate and in case of intestacy goes to the heir, or may pass by devise.⁶² A ground rent reserved in a conveyance in fee is, in Pennsylvania, a rent service, and to all rent services the right of distress is incident." This is so whether our tenure be in socage or allodial.⁶³ Our ground rent bears less resemblance to either an annuity or a rent charge. It is not granted like an annuity or a rent charge, but reserved out of a conveyance of the land in fee; and, were the statute of *quia emptores* in force here, would be a rent seck, charging neither the person nor the land.⁶⁴ It was settled in *Ingersoll v. Sergeant*,⁶⁵ that our ground rent is an ordinary rent service. The owner of the rent and the owner of the land itself, each has an estate in fee simple, of his interest,⁶⁶ and the owner of the rent is not liable for the taxes of the owner of the land.⁶⁷ When the two estates unite in one person, the rent is merged and extinguished,⁶⁸ unless there be a legal estate separate from an equitable one.⁶⁹

38. Security in case of mortgaging and leasing.

Section 10 of the act of 1853, *supra*, provides:

"The directions given in the sixth section of this act, in regard to the security to be given in cases of sales, mortgage or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage of real estate by order of the courts of this commonwealth: *And provided*, That no decree for the sale, mortgaging or letting of any real estate, under the provisions of this act, shall be made, except when the president of the court, or the law judge or judges thereof, shall be present; and that the acts in relation to special courts, where the president judge shall be interested, related to parties in interest, or otherwise incapable of acting, shall apply to all such provisions."

39. Acknowledgment of deed or mortgage.

Section 1 of the act of April 13, 1854, P. L. 368, amendatory of the act of 1853, *supra*, provides:

"In all cases of sales, mortgages, leasing and letting on ground-rent, of any real estate authorized under the act to which this is a

⁶⁰ Thouron's Est., 15 Phila. 521; McBride's Est., 152 Pa. 192; Myer's Est., 17 Phila. 425.

⁶¹ Wahl's Est., 8 C. C. 309; Brook's Est., 140 Pa. 84.

⁶² Cobb v. Biddle, 14 Pa. 444.

⁶³ Sergeant, J., in *Kenege v. Elliott*, 9 Watts, 258.

⁶⁴ Ch. J. Gibson in *Bosler v. Kuhn*, 8 W. & S. 183.

⁶⁵ 1 Wharton, 337; *Franciscus v. Reigart*, 4 Watts, 98.

⁶⁶ *Irwin v. Bank of the U. S.*, 1 P. & W. 349.

⁶⁷ *Phila. Library Co. v. Ingham*, 1 Wharton, 72.

⁶⁸ *Phillips v. Bonsall*, 2 Binney, 138.

⁶⁹ *Penington v. Coats*, 6 Wharton, 277; *Kramer's Est.*, 19 D. R. 603, on jurisdiction.

supplement, where the trustees, executors, administrators, guardians, committees or other persons authorized to make such sale, mortgage or lease, shall reside out of the county where such real estate is situate, the deed, mortgage or lease thereof may be acknowledged before the court of Common Pleas or Orphans' Court of any county of this state, where the person or persons executing the same may reside, and certified under the seal of such court to have been so acknowledged; and such certificate of acknowledgment shall be read in open court of the county where the real estate is situate and entered upon the records thereof; and upon being so entered, shall have the same effect as if the deed, mortgage or lease had been acknowledged before said court, as now required by law."

40. Power to ratify sales, etc.

Section 3 of the act of 1854, *supra*, provides:

"In all cases wherein any of the courts of this commonwealth might have authorized any sale or conveyance, or letting on ground-rent or otherwise, and such sale, conveyance or letting may have been made without the leave of such court, it shall be lawful for such court, if approving of such sale or conveyance or letting, to approve, ratify and confirm the same, with the same effect, as if such decree had preceded such sale, conveyance or letting."

Ordinarily a guardian may lease the property of his ward, but an oil lease is such a disposition of the real estate as he cannot make without power from the Orphans' Court in the first instance.¹

Under this act, a sale made by an executor for the payment of debts may be ratified and validated, but the better practice would be to present a petition, bringing the case clearly within its provisions.² However, the court may do so without a petition.³ This act is simply declaratory of what the courts have decided that they may ratify what, if asked for in advance, they would have ordered to be done.⁴

41. Leasing of minerals in Mercer County.

Section 1 of the act of March 18, 1869, P. L. 409, provides:

"The Orphans' Court of the county of Mercer shall have power, on the application of the guardian of any minor or minors owning minerals within said county, to authorize any guardian to lease said mineral lands, on such terms and conditions, and for such rental or royalty, per ton or otherwise, as shall appear just and equitable to said court, with the same force and effect as though said lease were made by a person of full age: *Provided*, That said guardian shall first file his bond in said court, in such sum, and with such surety or sureties, as shall be approved by said court, conditioned for the faith-

¹ Stoughton's Ap., 88 Pa. 198; Funk v. Holdeman, 53 Pa. 229.

² Bowker's Est., 12 Phila. 161; Charlton's Est., 12 Phila. 102.

³ Yard's Est., 15 W. N. C. 422.

⁴ Lee's Est., 17 W. N. C. 110, citing Musselman's Ap., 65 Pa. 480; Bell's Ap., 66 Pa. 498; Frankenfield's Ap., 103 Pa. 589; Patterson's Ap., 105 Pa. 369; Pile's Est., 25 C. C. 529; Corr's Est., 29 C. C. 276; Guest's Est., 4 Kulp, 17; N. C. R.'s Pet., 18 York, 177.

ful application and payment by him of all rental or royalty to be received under said lease."

42. Deeds by surviving trustees or successors.

Section 2 of the act of May 1, 1861, P. L. 431, provides:

"Where authority is or shall be given by decree of court to trustees, or other persons, to sell real estate, and any such trustees, or other persons authorized, shall have died, resigned or ceased to act, before a sale is effected or a deed executed, in all such cases sales may be effected and a deed executed by the surviving or succeeding trustee or trustees, or other persons, with as full effect, in all particulars, as if effected or executed by the persons acting in the trust, or other office, at the time a sale was originally decreed. Every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property, therein described, in the grantee, as fully and effectually as if the same had been made by all the persons who may have sold any such estate circumstanced as aforesaid."

43. Irregularity in appointment not to affect title.

Section 1 of the act of April 28, 1876, P. L. 50, provides:

"Wherever, in pursuance of proceedings in the Orphans' Court or Court of Common Pleas of any county, any person therein described as trustee, guardian, executor, administrator or as standing in any other fiduciary relation to the parties interested, shall grant and convey any real or personal estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee or purchaser, or the securities so entered, but the same shall be as valid in all respects as if such irregularity or defect had not existed: *Provided*, That this act shall not be construed to apply to any adversary action or other judicial proceeding, heretofore commenced or taken, for the recovery of property sold under any such order or decree, by reason of such irregularity, or to any action or proceeding now pending."⁵

This act validates defective proceedings only where the courts have jurisdiction of the subject matter; not where the court had no jurisdiction to appoint a trustee.⁶

44. Recording of deeds.

Section 1 of the act of March 23, 1867, P. L. 43, provides:

"All deeds made to convey real estate, sold under an act passed the 18th day of April, 1853, entitled 'An act relating to the sale and conveyance of real estate,' being acknowledged in court, and so certified to have been, by the clerk or prothonotary, as required by said act or supplements, may be recorded in the recorder of deed's office, without other acknowledgment. And the security required by said act may be approved by the proper court of like jurisdiction of the county in which the grantor or one of them is resident, and be

⁵ Halderman's Ap., 104 Pa. 251.

⁶ Halderman v. Young, 107 Pa. 324.

certified, under the seal of such court, to that wherein the sale was decreed; and such certificate shall be copied on the records thereof.”⁷

45. Sale of vacant ground of minor.

Section 2 of the act of March 16, 1847, P. L. 474, provides:

“The Orphans’ Court in and for any city or county of this commonwealth, in which vacant ground belonging to the estate of any minor may be situated, may, upon application of a guardian, setting forth that the said ground is unproductive and expensive, and that it would be to the interest and benefit of such minor, that the said ground should be let on ground-rent, it shall be lawful for said Orphans’ Court to make a decree authorizing the guardian to let the same, or any suitable part thereof, on ground-rent, and make and execute the proper and necessary deeds and conveyances therefor, reserving thereout such a yearly rent as to the said court may seem reasonable and just, to be secured in the usual manner, and making the principal or consideration-money to become payable after the period at which the said minor shall become of full age.”

46. Form of decree for private sale.

Now, — day of —, A. D. 19—, the report of — —, Esq., the examiner appointed by the court to investigate the facts set forth in the petition of said guardian and make report thereon, having been filed and confirmed, recommending that the prayer of the petitioner be granted; and the said court having given said petition and matters therein contained a full and careful investigation; and being of the opinion that it is for the interest and advantage of the said minors that their right, title, and interest in said lands should be sold; and that said sale may be made without injury or prejudice to any trust or charity, or any purpose for which said lands are held; and that said sale may be made without violating any law which may confer any immunity or exemption from sale or alienation; and the court being further of opinion that, under the circumstances in the case, a better price can be obtained at private sale than at public sale; and that said Ralph Stone, guardian, has given security for the faithful performance of his duties as guardian in the matter of said sale and the proceeds arising therefrom, which said security has been approved by the court; said court do now approve and decree a private sale of the estate, right, title, interest, property claim, and demand of the said minor children of Asa Hewit, deceased, viz.: — — and — —, and the estate, right, title, interest, property claim, and demand held by said guardian, in trust for his said wards of, in, to, and out of the said tracts of land to A. Barker, upon the following terms and rates; that is to say, for the sum of — dollars, payable as follows: — dollars down, — dollars on the execution and delivery of the deed, and the balance on the — day of —, 19—, with interest from the — day of —, 19—, on unpaid purchase-money, payable with each installment of principal. Deed to be made and executed, and after it is acknowledged in open court, to be delivered by the said guardian to the said purchaser, his heirs

⁷ For form of deed, see Richard’s form book, p. 501, vol. 1.

and assigns. The deferred payments to be secured by bond and mortgage.

By the Court.

47. Form of return of private sale.

In Re Estate of James Trescott, Deceased. { In the Orphans' Court of Luzerne County.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne:

I, Ralph Stone, guardian of Edith Trescott and William Trescott, minor children of James Trescott, the said deceased, do respectfully report and return:

That in pursuance of a decree made by said court, on the — day of —, A. D. 19—, authorizing and directing a private sale of the interest of the said minor children, in the real estate of said decedent, I have sold the right, title, and interest of Edith Trescott and William Trescott, the two minor children aforesaid, in and to all those certain five pieces, parcels or tracts of land, situate in the borough of Luzerne in said county, said land being fully described in the petition and decree of court to Bessie Spare of the county of Luzerne, State of Pennsylvania, for the sum of — dollars, on the terms prescribed in said order of sale.

Your petitioner therefore prays that said sale may be confirmed by the court and that he be permitted to acknowledge the deed to the said purchaser, agreeably to the act of Assembly of April 18, 1853, and its supplements in such case made and provided.

And he will ever pray, etc.

Sworn to, etc.

Ralph Stone.

48. Form of final decree.

Endorsed on the petition, if the purchaser and terms were named in the petition, will be the decree of the court. If these were not named it will be confirmed *nisi* and lie over under the rules of court:

Now, to-wit, — day of —, A. D. 19—, it is ordered, adjudged and decreed that the sale made and returned as above, be ratified and confirmed and that the premises sold be and remain unto Bessie Spare, her heirs and assigns, firm and stable forever. And it is further ordered and decreed, that said Ralph Stone, guardian, do acknowledge in open court, a deed for the said premises and deliver the same to said Bessie Spare, upon receiving from her the purchase money [and securities, where time is given], and that the costs of this proceeding be paid out of the funds in the hands of said guardian.

Per Curiam.

49. Form of order on guardian to join in sale of realty.

And now, —, A. D. 19—, petition presented and read, whereupon, on motion of — —, Esq., it is ordered and decreed that — —, guardian of said minor—, join with the other parties in interest in the sale and conveyance of the above-described premises to — —, for the sum of — dollars, for the whole thereof, and that upon

the receipt of the said minor— proportion of said purchase money, he join with said parties in executing and delivering to said purchaser a sufficient deed of conveyance for said premises in fee simple, security being first entered by said guardian in the sum of — dollars.

Attest: — —, Assistant Clerk of Orphans' Court. By the Court.

CHAPTER XV.

SALE OF REAL ESTATE FOR CONVERSION AND DISTRIBUTION.

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|---|--|
| 1. Power to sell and convert on petition of the widow and heirs. | 6. Form of petition in a testate estate. |
| 2. Valuation under act of 1874. | 7. Form of appointment of appraisers. |
| 3. All must join in petition. | 8. Form of order to appraise. |
| 4. Rules of court in Philadelphia. | 9. Form of return of appraisers. |
| 5. Form of petition for appraisers and sale of intestate's real estate. | 10. Form of approval and order of sale. |
| | 11. Effect of sale. |

1. Power to sell and convert on petition of widow and heirs.

Section 1 of the act of June 12, 1893, P. L. 461, provides:

"Whenever any person shall die seized of real estate, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the Orphans' Court of the proper county, in its discretion, upon the joint petition of the widow and heirs and the guardians or committees of such as are minors or under disabilities, in whom the real estate of the decedent shall have vested by descent or will, setting forth the description of the property, the desire to have the same sold, to order the executor, administrator or a trustee to make sale, after he shall have given bond, with one or more sureties, in double the appraised value of the real estate, to be approved by the court, and proceed thereafter in all respects in the manner now provided by existing laws in cases of the sale of real estate under proceedings in partition, and the proceeds of such sale, after the payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate: *Provided*, That such sale shall have the same effect in all respects as a 'public sale in proceedings in partition of real estate under existing laws.'"

By virtue of this act, when the land is not of a nature to be divided in partition, the cumbrous and expensive proceedings by inquest are rendered unnecessary. This act follows that of May 14, 1874, P. L. 166, for the sale of real estate valued at not more than \$1,000, by two disinterested persons.

2. Valuation of real estate — Act of 1874.

The act of May 4, 1874, P. L. 166, provides:

"Whenever any person shall die seized of real estate valued at not more than one thousand dollars, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the Orphans' Court of the proper county, in its discretion, upon the joint petition of the widow and heirs and the guardians or committees of such as are minors or under disabilities, in whom the real estate shall have vested, setting forth the description of the

property, the desire to have the same sold and its estimated value duly sworn to, together with the affidavit of two disinterested persons, stating that the real estate is not worth more than one thousand dollars, to order the executor, administrator or a trustee to make sale and proceed in all respects in the manner now provided by existing laws in cases of the sale of real estate for the payment of debts of a decedent, and the proceeds of such sale, after the payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate."

3. All must join in the petition.

Under these acts, *supra*, to give jurisdiction, all the parties in interest must join.¹ It is incompetent for the administrators to make the petition, even if the widow and heirs sign it;² but the order to sell must be directed to the legal representatives.³ Where a testator wills a daughter \$5 and thus excludes her by implication from the inheritance of the realty, she is not a party in interest necessary to the petition to give the court jurisdiction.⁴

4. Rules of court in Philadelphia.

Section 7 of rule 14, Philadelphia, provides:

"Applications under act of June 12, 1893, *supra*, for sale of decedent's real estate shall be upon the joint petition of the widow and heirs and the guardians or committees of such as are minors or under disabilities in whom the real estate vested by descent or will, setting forth the date of the death of decedent, the description of the property, the desire to have the same sold and converted into money for distribution, and praying the court to appoint appraisers to value and appraise the real estate for the purpose of ascertaining the value thereof, so that a proper decree may be made for the sale of the same. On return of the appraisement the court will order the executor, administrator or trustee to make sale, after he shall have given bond with one or more sureties in double the appraised value of the real estate, to be approved by the court, and proceed thereafter in all respects in the manner now provided for the sale of real estate under proceedings in partition."

Application for sale of real estate under act of 1874.

Section 6 of rule 14, Philadelphia, provides:

"Applications under act of May 14, 1874, *supra*, for the sale of decedent's real estate, shall be upon joint petition of the widow and heirs, and the guardians or committee of such as are minors or under disabilities, in whom the real estate shall have vested, setting forth the date of the death of decedent, the description of the property, the desire to have the same sold, and its estimated value, duly sworn to, together with the affidavit of two disinterested persons familiar with the value of real estate in the locality, that the real estate proposed to be sold is not worth more than \$1,000, accompanied with a certificate of the board of revision of the valuation thereof. And the

¹ Krug's Est., 9 D. R. 239.

² Bopp's Est., 18 York, 161.

³ Bopp's Est., *supra*.

⁴ Gantz's Est., 19 York, 6.

executor, administrator or trustee appointed for the purpose shall make sale and proceed in all respects as now required for the advertisement, return and confirmation, and accounting for the proceeds of sale and distribution in cases of sales of real estate for the payment of debts of a decedent."

5. Form of petition for appraisers and sale of intestate's real estate.

To the Honorable the Judge of the Orphans' Court of the County of Lancaster, Pennsylvania:

The petition of the undersigned respectfully represents:

That they are widow, heirs and all the legal representatives of ———, late of ———, in the county of Lancaster, State of Pennsylvania, deceased; that the said decedent died on or about the ——— day of ———, A. D. 19—, seized in his demesne as of fee of and in certain real estate, a schedule of which is hereunto annexed and made part of this petition; that under the intestate laws of this commonwealth the said real estate has descended and vested in them; that they desire the same to be converted into money for distribution.

They therefore pray your honorable court to appoint appraisers, and order them to value and appraise the said real estate for the purpose of ascertaining the value thereof, and that upon the return of the appraisers, and the approval of the same by the court, that your honorable court will order the sale of said real estate, as provided for under the act of June 12, A. D. 1893.

And further, your petitioners pray that the court will appoint ——— as ——— to execute said order upon ——— filing a bond in double the appraised value of said real estate, with sureties to be approved by the court, conditioned for the faithful performance of said trust, and the proper application of all moneys to be received from the sale of said real estate. And they will ever pray, etc.

———,
———.

Lancaster County, ss.

——— being duly ——— says that the statements in the foregoing petition are true, and the schedule of the real estate hereunto annexed is correct as —he— verily believe—.

———,
———.

——— and subscribed to before me this ——— day of ———, A. D. 19—.

———.

Schedule of Real Estate.

[Here describe all the real estate.]

6. Form of petition in a testate estate.

To the Honorable the Judge of the Orphans' Court of the County of Lancaster, Pennsylvania:

The petition of the undersigned respectfully represents:

That ———, late of ———, in the county of Lancaster, State of Pennsylvania, died on the ——— day of ———, A. D. 19—; that the said decedent died seized in his demesne as of fee of and in certain real estate, a schedule of which is hereunto annexed and made part of this petition; that under the provisions of the last will

and testament of said deceased the said real estate has descended and vested in — and —, as the devisees of the same; and that they are all and the only parties interested therein, and that they desire the same to be converted into money for the purpose of distribution.

They therefore pray your honorable court to appoint appraisers, and order them to value and appraise the said real estate for the purpose of ascertaining the value thereof, and that upon the return of the appraisers, and the approval of the same by the court, that your honorable court will order the sale of said real estate, as provided for under the act of June 12, A. D. 1893.

And further, your petitioners pray that the court will appoint — — as — to execute said order upon — filing a bond in double the appraised value of said real estate, with sureties to be approved by the court, conditioned for the faithful performance of said trust, and the proper application of all moneys to be received from the sale of said real estate. And they will ever pray, etc.

— —,
— —.

— — being duly — says that the statements in the foregoing petition are true, and the schedule of the real estate hereunto annexed is correct as —he— verily believe—.
Lancaster County, ss.

— —,
— —.
— —,

— and subscribed to before me this — day of —, A. D. 19—.

Schedule of Real Estate.
[Here describe all the real estate.]

7. Appointment of appraisers.

And now, —, A. D. 19—, in pursuance of the within petition, and for the purpose of appraising the real estate therein described, the Orphans' Court appoints —, —, disinterested and competent persons, to value and appraise said real estate and make return of said appraisement to said court on the — day of —, A. D. 19—.

By the Court.

Attest: — —, Clerk of Orphans' Court.

8. Form of order to appraise.

Lancaster County, ss.

At an Orphans' Court held at Lancaster, Pa., in and for said county on the — day of —, A. D. 19—.

In the matter of the proceeding under the act of June 12, A. D. 1893, for the sale of the following described real estate of which — —, late of —, in said county of Lancaster, Pa., deceased, died seized — to-wit: [Describe same as in the petition.]

And now, —, 19—, petition presented and read and on motion of — —, Esq., that court appoint —, —, disinterested men, appraisers, and it is ordered and decreed that the said appraisers do go upon the said real estate, and value and appraise the same, and make return thereof under their respective oaths or affirmations at

an Orphans' Court to be held at Lancaster, Pa., on the — day of —, A. D. 19—.

By the Court.

Attest: — —, Clerk of the Orphans' Court.

9. Form of return of appraisers.

Estate of — —, Deceased.

No. —, Term 19—.

To the Honorable the Judge of the Orphans' Court of Lancaster County:

The undersigned appraisers appointed by your honorable court to appraise the real estate in the annexed order described, respectfully report:

That they went upon the said real estate and having viewed the same do value and appraise the same as follows:

[Here insert the valuation upon each tract or parcel.]

Which appraisement they pray may be approved.

— —,
— —.

Lancaster County, ss.

Before me, — in and for said county, personally came —, —, who being duly — according to law, depose and say that the above appraisement is just and true to the best of their knowledge and belief.

— —,
— —.

— and subscribed before me this — day of —, A. D. 19—.

— —.

10. Form of approval and order of sale.

Now, — day of —, A. D. 19—, the return of appraisers filed, and said appraisement is approved and order of sale awarded.

By the Court.

Attest: — —, Clerk.

The order of sale and the proceedings thereon are as "in cases of the sale of real estate under proceedings in partition," which see.

It was suggested by Solly, J., that where the parties desire the land sold to be discharged of the widow's dower, the petition should so state.⁵

11. Effect of sale.

The effect of a sale under this act is to discharge the lien of a judgment,⁶ but not the statutory interest of the widow, unless the petition and decree so declare.⁷ When a trustee is appointed to make the sale, he should charge himself only with the proceeds of the sale and the expenses incident thereto. If he claims more it will be disallowed and his charges of rents sustained.⁸ The claim of the estate against a distributee will take priority against the judgment creditor of such distributee.⁹

⁵ Gross' Est., 26 C. C. 219.

⁶ Bentzel v. Wambaugh, 14 York, 141.

⁷ Gross' Est., 26 C. C. 219.

⁸ Zerphey's Est., 13 Lanc. L. R. 164.

⁹ Hartman's Est., 12 Supr. C. 69.

CHAPTER XVI.

PARTITION AND DOWER IN THE ORPHANS' COURT.

1. Nature of partition.
2. Jurisdiction of the Orphans' Court.
3. Jury of inquisition.
4. Jurisdiction in case of a will.
5. Devise to children in unequal portions.
6. Petition when there are no lineal descendants.
7. Partition of tenancy in common.
8. Right of widow to petition.
9. Interests derived from different ancestors.
10. Coal, timber and mineral rights.
11. Partition by three or more commissioners.
12. Jurisdiction when land lies in different counties.
13. Jurisdiction when lands lie in one or more counties.
14. Construction of last named act.
15. Acts extended to tenants in common and the Common Pleas.
16. Right to bring separate suits.
17. Proceeding by petition — notice.
18. The right to petition.
19. Parties to the proceeding.
20. Amendment of petition.
21. Effect of adverse possession or claim of title.
22. Time of proceedings.
23. Rule to show cause.
24. Answer to petition.
25. Precept for issue to the Common Pleas.
26. Form of petition for inquest.
27. Form of order for inquest.
28. Form of order in Lancaster county.
29. Form of writ.
30. Form of publication of notice.
31. Form of affidavit of publication.
32. Form of affidavit of service of notice.
33. Form of oath of appraisers.
34. The inquisition.
35. Proceedings when the lands cannot be divided.
36. Equalization of purparts.
37. Appraisement of purparts — fewer than heirs.
38. Residue after allotment.
39. Fixing time for payment of owelty.
40. Appraisement and valuation.
41. Form of return against division.
42. Form of return of allotment.
43. Form of return of the sheriff.
44. Return of inquest.
45. Confirmation of return.
46. Allotment when a higher price is bid.
47. Rule to accept or refuse.
48. Form of petition for rule.
49. Form of order for rule.
50. Form of publication of notice.
51. Form of acceptance of service.
52. Form of rule to accept or refuse.
53. Practice on rule.
54. Interpretation of acceptance.
55. Purpose of bidding.
56. Form of bid.
57. Form of acceptance of purpart.
58. Form of decree awarding purpart to bidder.
59. Form of decree awarding purpart at acceptance.
60. Setting aside proceedings for fraud.
61. Preference as to lands in another county.
62. Preference and election of heir confined to one share.
63. Title of allottee.
64. Rents and liens.
65. Securing of owelty.
66. Recognizance for owelty.

67. Form of recognizance.
68. Effect of recognizance.
69. Payment of owelty by non-residents.
70. Interest on owelty.
71. Rule to pay owelty.
72. Proceedings when estate is divided into fewer parts than there are heirs.
73. Rule to show cause why the land should not be sold.
74. When rule to show cause may be dispensed with.
75. Sale of purparts left over.
76. Form of petition for sale of purpart.
77. Form of order appointing trustee to make sale.
78. Return days of writs and orders of sale.
78. Form of notice by publication.
80. Form of return of sale.
81. Title not to be affected by revocation of letters.
82. Widow's share of purchase money to be charged on the land.
83. Valuation and charge of the widow's interest.
84. The widow's share to remain a charge.
85. Status of the dower interest.
86. Assignment and proceedings on the recognizance.
87. Payment into court, release and set-off.
88. The widow's interest when the estate consists of more than one tract.
89. Widow's share held in common before partition.
90. Widow's share may be charged on part of the land.
91. Widow's election of dower — citation.
92. Form of petition for citation to elect.
93. Form of citation.
94. Form of election for or against.
95. Dower interest — collection of.
96. Sale of dower interest by *vend. ex.*
97. Notice to nonresident life tenant.
98. Satisfaction when presumption of payment has arisen.
99. Executors, etc., to give security before sale.
100. The sale.
101. Ascertainment of liens against the heirs.
102. Confirmation of the sale.
103. Rights and duties of purchaser.
104. Purchaser to give recognizance.
105. Before suit on recognizance, refunding bond to be given.
106. Lien of recognizance.
107. Appointment of auditor to ascertain liens.
108. Calculation of amounts due parties.
109. Payment into court.
110. Payment into court, depository in Philadelphia.
111. Title acquired by the sale.
112. Completion of title after death of trustee.
113. When estate not liable for debts of decedent.
114. Distributees must give security to refund.
115. Filing account after sale.
116. Discharge of liens by sale.
117. Distribution and marshaling.
118. Effect on liens and titles.
119. Modes and rules of distribution.
120. Claims upon distributive shares.
121. Certificate of searches for liens.
122. Conversion by sale.
123. Conclusiveness of proceedings.
124. Trustee for parties unknown, etc.
125. Validating acts.
126. Partition docket.
127. Fees of sheriff and jurors.
128. Costs in partition generally.
129. Costs when paid out of the estate.
130. Right of appeal.
131. Form of petition to sell in order to satisfy a recognizance.
132. Form of petition to have recognizance satisfied.
133. Form of release of claim on recognizance.
134. Form of deed after sale in partition.
135. Form of bond securing widow.
136. Form of warrant in bond.
137. Form of mortgage accompanying bond.

1. Nature of partition.

The division or partition of lands which have descended to the heirs at law, or have been devised to them as tenants in common, has come down to us from the civil law.

When all the parties in interest are *sui juris* they may go upon the land, divide it, stake it off and each go into possession of his share without any proceedings in court, and they may even do so by parol, and, having gone into possession, the title is good.¹ Such a partition when duly executed will even bind a married woman or minors, whether they consent or not, if it be fair and advantageous.² But whilst this is held to be the law, it is a practice that is not to be encouraged when the same parties may do so in proper writings, each releasing to the others all their right, title and interest in the lands so divided; and if the land is not suitable for advantageous division, they may proceed as in the preceding chapter under the act of 1893, for its sale and conversion, where there are persons *non sui juris*. Or they may proceed by power of attorney to one of their number to sell the land free and discharged from the claims of each of them as by the forms given *infra*, under Family Agreements.

There are three methods of legal partition, viz.: by an action at law in the Common Pleas, by tenants in common, which is almost obsolete; by bill in equity, for which see Vol. IV of this series; and by petition in the Orphans' Court, to which this chapter is confined.

2. Jurisdiction of the Orphans' Court.

Section 36 of the act of March 29, 1832, P. L. 190, provides:

The Orphans' Court of the county where the real estate of a decedent is situate shall have power, on the application of the widow or any lineal descendant of the decedent having an interest in such real estate, if of full age, or if under age, on the application of his guardian, to appoint seven or more disinterested persons, chosen on behalf and with consent of the parties, or when the parties cannot so agree, to award an inquest, to make partition of the real estate of such decedent; and upon the return made by the persons so appointed, or of the inquisition taken, to give judgment that the partition thereby made be firm and stable forever, and that the costs thereof be paid by the parties concerned."

3. Jury of inquisition.

The act of May 1, 1879, P. L. 40, provides:

"Hereafter, in all partition proceedings on real estate, either in the Orphans' Court or Court of Common Pleas, in any county in

¹ Willard v. Willard, 56 Pa. 119; Cowan's Ap., 74 Pa. 329; Wolf v. Wolf, 158 Pa. 621; Spaulding v. Ferguson, 158 Pa. 219; Myers' Est., 179 Pa. 157; Caldwell v. Snyder, 178 Pa. 420.

² Calhoun v. Hays, 8 W. & S. 127. By agreement the heirs may take the land free from any questions arising under a will, as to conversion or otherwise (Adams' Est., 44 Pits. L. J. 331), or as to surface and subjacent estates in the minerals and incidental questions of easement. Jones v. Wagner, 66 Pa. 429; Republic Iron Works v. Burgwin, 139 Pa. 439.

this commonwealth, when, under existing laws of this commonwealth, an inquisition shall be held by the sheriff of the county, such inquisition shall consist of six men, instead of twelve, as heretofore."

4. Jurisdiction in case of will.

The act of May 9, 1889, P. L. 146, provides:

"The jurisdiction of the several Orphans' Courts of this commonwealth, in the partition and valuation of the real estate of decedents shall extend to all cases of testacy, without respect to the minority of the parties, their relationship to the testator, or the fact of a widow's election not to take under the will, and the proceedings in such cases shall be in the same manner and with like force and effect as is now provided by law in the partition of the real estate of persons dying intestate."

The act of April 21, 1846, P. L. 426, declared that the jurisdiction of the Orphans' Court should not be exclusive of the other courts. Before that it was held to be exclusive where a decedent estate was concerned.

Where the will creates a trust which would be impaired by partition, it will not be awarded;³ but where land is charged with the payment of a legacy, in such manner, that it must be first partitioned before it can be ascertained, a petition will be granted.⁴ Although a widow was given power to sell, if she died without exercising it, partition may be had.⁵ Where a widow, by power of appointment in her husband's will, provided in her will for sale and division of the proceeds, if the children elect to take their shares as land, they are estopped from challenging the right to partition.⁶ A creditor is in no position to object, since he is entitled to his lien or payment out of the proceeds of a sale.⁷ Where the widow is given a power of appointment which carries a fee, the children's interest depending on her failure to exercise the power, they cannot move for partition;⁸ and where a will provides for all of testator's children, whilst the mother of after-born children, has a right to demand partition, if she does not, the after-born children, being provided for, have no standing to petition.⁹ Personalty is incapable of partition proceedings, which applies to an unexpired term of a lease for two thousand years.¹⁰ If a will works equitable conversion of the realty into personalty, therefore, partition is barred.¹¹ This results where there is an imperative order to sell,¹² a mere discretionary power to sell

³ Seip's Est., 11 Northam. 138; Hutchinson's Ap., 82 Pa. 509; Clark's Est., 134 Pa. 140; Sheetz's Est., 52 Pa. 257; Weston's Est., 10 Kulp, 176; Kirchner's Est., 41 Pitts. L. J. 469; Joyce's Est., 5 C. C. 179; P. & L. Dig., vol. 15, col. 25269.

⁴ Cassady's Est., 13 Phila. 383.

⁵ Fullerton's Est., 17 D. R. 1081.

⁶ McNeile's Est., 217 Pa. 179.

⁷ Gibb's Est., 17 D. R. 36.

⁸ Sturgis' Est., 205 Pa. 435.

⁹ Leyrer's Est., 4 D. R. 693.

¹⁰ Townsend v. Boyd, 217 Pa. 386.

¹¹ Selfridge's Ap., 9 W. & S. 55; Ruffel's Est., 11 Phila. 46; Rankin's Est., 13 C. C. 617; Keim's Est., 201 Pa. 609.

¹² Severn's Est., No. 1, 211 Pa. 65.

being insufficient.¹³ Where, however, a reconversion takes place by an election to take as realty, partition will lie.¹⁴ Legacies charged on land by a will cannot be collected by grafting a demand for them on partition proceedings.¹⁵ A widow may estop herself of her right to partition where she is present and consenting at a sale of the land as directed by the will, her dower being charged on the land.¹⁶ But, even where she has elected, she may be permitted the feminine privilege of changing her mind, if no injury is done thereby.¹⁷ If division be directed in a will, but the manner is not pointed out, the Orphans' Court has jurisdiction^{17a} to make it effective. Where land has been definitely devised it should not be included in partition.^{17b}

5. Devise to children in unequal proportions.

Section 10 of the act of April 10, 1849, P. L. 591, conferred jurisdiction where "the whole or a part of the real estate of the decedent may be devised to two or more children, and when such real estate is devised to two or more children, to be held and enjoyed in unequal proportions, the said court shall decree such an appropriation of the moneys arising therefrom, as will best effectuate the intentions of the testator."

The remainder of the section applies to partitions already made.

It was held that the alienee of a child's share could petition.¹⁸ It applies to the partition of an estate devised to the wife for life, with remainder to the children, and if she stands by and makes no objection while the property is sold, she is thereafter estopped from claiming possession.¹⁹

6. Partition when there are no lineal descendants.

Section 46 of the act of March 29, 1832, P. L. 201, provides:

"When the decedent leaves no lineal descendants, the like proceedings shall be had in all respects on the application of the persons in whom the estate shall vest in possession: *Provided*, That if there be a life estate or life estates with remainders over, such remaindermen shall be made parties to the proceedings in partition, and shall have the right to accept or refuse the premises, at any valuation that may be made by seven men, appointed as aforesaid, or by an inquest, in the same manner as the lineal descendants of a decedent, such remaindermen being bound by recognizance or other sufficient security, according to the direction of the court, for the payment of the annual interest to the tenant or tenants for life, and thereupon the court shall give judgment, that the partition so made between

¹³ Davis' Est., 12 D. R. 356; Baum's Ap., 4 Penny. 25.

¹⁴ Brownfield's Est., 14 D. R. 518; Githen's Est., 9 D. R. 465.

¹⁵ McGrillis' Est., 13 D. R. 413.

¹⁶ Taggart's Ap., 99 Pa. 627.

¹⁷ Schweitzer's Est., 1 Northam. 65.

^{17a} Graham's Est., 32 Pitts. L. J. 85; Rawle's Ap., 119 Pa. 100; Naglee's Est., 52 Pa. 154.

^{17b} Schmidt's Est., 6 C. C. 494.

¹⁸ Ragan's Est., 7 Watts, 438; Stewart's Ap., 56 Pa. 241.

¹⁹ Scheible's Est., 5 C. C. 601.

them be and remain firm and stable forever, and that the costs thereof be paid by the parties concerned."

7. Partition of tenancy in common.

The act of March 13, 1847, P. L. 319, conferred jurisdiction on the Orphans' Court, in the case of "any undivided interest in fee simple, in any lands or tenements of which any person has died or shall hereafter die seized or possessed, as tenant in common or joint owner, with any other person or persons, as fully as if such decedent were solely seized or possessed thereof at the time of his or her death; and the inquest or seven men appointed to value and divide such decedent's real estate, shall value and return such interest, undivided in all cases; and if such decedent had other real estate, such interest shall be valued and returned, either by itself or in connection with some other portion of such decedent's real estate, valued as one of the purparts or shares into which they shall divide the whole real estate; and upon the return thereof, the proceedings shall be as in other cases."

The alienee of a tenant in common who purchases the undivided interest of a child of a decedent being his co-tenant, is entitled to partition.²⁰ But the court cannot by one decree partition the estate among those in whom the estate became vested as a devisee of one tenant in common and the heir of another, it seems.²¹

8. Right of widow to petition.

Section 2 of the act of April 20, 1869, P. L. 77, confers power, "on the application of the widow, or any one interested, to award an inquest to make partition of the same, and to decree the allotments thereof made, or in case of refusal to accept, to order a sale thereof, and secure the interest of the widow and all others interested, in the same manner and with like force and effect, as is now provided by law in the partition of the real estate of persons dying intestate."

The widow of a devisee is a proper party to partition.²²

9. Interests derived from different ancestors.

Section 1 of the act of February 26, 1869, P. L. 4, confirmed past partitions and authorized future partitions of real estate, in cases where several undivided interests in any premises are "derived from different ancestors, by descent or devise," in one proceeding in the Orphans' Court; but there must still be a common ownership.²³

10. Coal and timber rights.

Section 2 of the act of May 14, 1874, P. L. 156, provides:

Partition may be made under existing laws of lands and coal-rights thereon, and of lands and timber-rights thereon, whether the rights of all of the parties be coextensive with the whole or not, and whether the rights of some of them extend only to the lands

²⁰ Evans v. Evans, 4 Clark, 478; Stewart v. Allegheny Natl. Bank, 101 Pa. 342.

²¹ Snyder's Ap., 17 Leg. Int. 228. (See P. & L. Dig., vol. 15, col. 25201.)

²² Barclay v. Kerr, 110 Pa. 130. (See cases, *supra*.)

²³ Sander's Est., 16 Montg. 190.

and part of the coal thereon, or only to the lands and part of the timber thereon.

The act of February 26, 1870, P. L. 256, provides a mode of partitioning lands in Luzerne County, which "may reasonably be supposed to be lands containing coal or other minerals, promising a mine, mineral or quarrying value as well as in addition to a surface use or value." The court, whether law or equity, or the Orphans' Court, having jurisdiction, may proceed by sheriff's inquest, or by agreement of the parties, by the "seven wise men" to divide or appraise. This act furnishes a complete and peculiar practice adapted to the locality and reference thereto may be had. It is said that there is virtually no more coal land upon which this law can operate.

Where a testator owns an undivided interest in coal mines, and by his will blends the realty and the personalty for distribution, the executors and not the beneficiaries must petition for partition.²⁴

11. Partition by three or more commissioners.

Section 4 of the act of April 27, 1855, P. L. 369, provides:

"In any proceeding in any court for the partition of real estate, the court may appoint, on the agreement and nomination of the parties, three or more commissioners to divide or value the same, with the same effect as a sheriff's inquisition for the same purpose, and decree a compensation for such service, not exceeding three dollars a day each, unless the parties interested shall have agreed in writing to a larger recompense."

The duties of these commissioners are similar to those of the jury. The primary duties of the commissioners, like those of a jury, is to divide the land into as many purparts, of equal value, as there are heirs, if that be practicable. In such case the commissioners may allot one purpart to each heir, without appraising either the land as a whole or the several purparts. An erroneous statement in the petition may be stricken out even in the appellate court.²⁵

Inquest or Commission in York and Fayette Counties.

Section 1 of the act of February 13, 1867, P. L. 160, provides:

"The Orphans' Court of York and Fayette Counties shall have power, in all cases of testacy, on the petition of the widow, if living, or in case of her death subsequent to that of her husband, on the petition of her personal representative, to appoint three commissioners, or to award an inquest, in their discretion, for the purpose of making partition or valuation, as the case may require, of the dower of the widow in the real estate of such deceased husband; and the said court shall have power to make such decree thereon as shall secure the interest of such widow, or her representative in the premises, as to law and equity may appertain."

²⁴ Ramsey v. Ramsey, No. 2, 226 Pa. 252; Keim's Est., 201 Pa. 609; Painter v. Painter, 220 Pa. 82.

²⁵ Wistar's Ap., 105 Pa. 390.

12. Jurisdiction when land lies in different counties.

Section 44 of the act of March 29, 1832, P. L. 190, provides:

"When the lands, in respect to which application shall be made to the Orphans' Court as aforesaid, lie in one or more adjoining tracts in different counties, it shall be lawful for the Orphans' Court of the county in which the principal mansion is situate, or if there be no mansion or building on the lands, then the court of the county in which the greatest part of the land lies, on the application of any person interested, either to proceed by the appointment of seven or more men agreed on by the parties, or to issue their writ to the sheriff of the county within the jurisdiction of the court, specifying the lands of which a partition or valuation is to be made, and thereupon the said sheriff shall summon an inquest to divide or value the said lands, in the same manner as if the whole were within his proper bailiwick; and upon the return thereof, or upon the return of the seven or more men appointed by consent, as aforesaid, the court may further proceed therein, in all respects as if all the said lands were in the proper county; and any recognizance taken in pursuance of such proceedings shall be as effectual, to all intents and purposes, as if the lands bound by it were wholly within the county where such recognizance is taken: *Provided*, That an exemplification of the proceedings which may be had shall, within twenty days after the final decree therein, be delivered to the clerk of the Orphans' Court of each county in which the application shall not have been made, and in which any part of said lands are situate, which shall be entered on the records of such court at the joint expense of all parties concerned."

13. Jurisdiction when lands lie in one or more counties.

Section 1 of the act of February 20, 1854, P. L. 89, further provided as to tracts not divided by county lines alone, but such as lie in one or more counties. It is as follows:

"All the courts of this Commonwealth now having jurisdiction in matters of partition, shall have power to entertain suits and proceedings whether at law or in equity, or otherwise, for the partition of real estate, or the recovery of dower or the widow's third or other part, although the lands to be divided or recovered may lie in one or more counties of this Commonwealth: *Provided*, That such proceeding intended to embrace lands in more than one county, shall be brought only in the county where a decedent, whose land is to be divided, had his domicil, or where the homestead, or larger part of the estate in value shall be situated, and service of process may be made by any sheriff where real estate, to be divided, shall be situated, or any defendant may be found. And exemplification of the record may be filed in every county where such real estate shall be situated, in such court thereof as shall correspond in character to that of the court in which such proceeding may have taken place, and be received in evidence, with the like effect, as the records of the court where filed, except that any exemplification of the proceedings in the Supreme Court shall be filed in the District Court, or Court of Common Pleas of the proper county."

14. Construction of last act.

The preceding act required explanation and section 1 of the act of April 17, 1856, P. L. 386, afforded it as follows:

"The true intent and meaning of the act passed the 20th day of February, 1854, entitled "An act relative to suits in dower and partition," is hereby declared to be, to include and embrace all proceedings in partition, instituted or which may be instituted in the Orphans' Court in any of the counties of this Commonwealth, for the partition or valuation of the real estate of any decedent, in all cases where said real estate is situate in two or more counties of this Commonwealth. And that in all such cases all process, writs and notices required to be served personally upon any person or persons interested in such proceedings in partition, may be served by the sheriff of the county in which such proceedings in partition have been instituted or commenced; and the jurors for making such partition or valuation shall be selected from the same county in which such proceedings are instituted: *Provided*, That nothing in this act, or in the act aforesaid, passed the 20th day of February, 1854, shall be so construed as to prevent the parties interested in partition in the Orphans' Court in each county where such real estate is situate, except in cases where such real estate consists of adjoining tracts or parcels of land situate in different counties, if the Orphans' Court of the county in which the proceedings in partition are required by the said act relative to suits in dower and partition are required to be had, shall so order and decree."

This act did not clear up every question involved and it became necessary to further construe it, which was done by section 1, of the act of March 30, 1869, P. L. 15, which declared the true intent and meaning of the preceding acts to be, "to include and embrace all proceedings in partition necessary to be had, as well before as after the refusal of the heirs to take real estate at the valuation; and the said courts in which such proceedings are had are hereby authorized to order the sale of such real estate after such refusal, in the same manner as if all the real estate were situated in the county in which such proceedings are instituted: *Provided*, That the sales of such real estate shall be held in the county in which the real estate is situated unless otherwise ordered by the said courts."

These acts were held to bring all the tracts within the jurisdiction of the one Orphans' Court.¹

15. Acts extended to tenants in common and the Common Pleas.

The first section of the act of May 14, 1874, P. L. 156, extended the above recited acts so as to "include and embrace all suits whether at law or in equity, instituted or to be instituted in the Court of Common Pleas or Orphans' Court of any county of this Commonwealth, by any tenant in common or joint tenant, for the partition or valuation of any real estate; and writs of partition in

¹ Phillips' Est., 19 Phila. 148.

all such cases may be issued to an inquest of seven [six by act of 1879] men or to a commission of three men; and all proceedings in regard to the same shall be as provided by law in other cases."²

This act was held constitutional by a stretch of implication.

16. Right to bring separate suits.

Section 2 of the act of 1874, provides:

"Nothing contained in this act or the acts to which it is a supplement, shall be so construed as to prevent any tenant in common or joint tenant of real estate, situated in two or more counties of this Commonwealth, from bringing a separate suit, either at law or in equity, in either or any of such counties, for partition or valuation of so much of such real estate as is situated therein, except where such real estate consists of single tracts lying in adjoining counties."

17. Proceeding by petition — Notice.

Section 2 of the act of April 14, 1835, provides:

"In the proceedings for the partition and valuation of an intestate's real estate, the parties in interest shall be named in the petition, decree and notices, when known; but if it shall appear, on oath or affirmation, that the names or residence of any of the parties are unknown to the applicant for the partition, the Orphans' Court shall have power to direct such notices to be given to such parties by publication in the public newspapers, describing the parties, as far as practicable, as shall appear to the court to be reasonable and proper; and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings."

18. The right to petition.

In order to have a standing in court, the petitioner must show that he has an interest in the land to be partitioned, and that the decedent died in actual or legal possession of it.³ If the land has been devised to be sold and the proceeds distributed, it becomes personalty and partition will not lie.⁴ It is equally necessary to embrace in the petition all of the real estate of decedent and aver that it is all of the real estate of which he died seized.⁵ All the heirs, devisees and parties interested in the land must be named or they will not be bound by the proceeding.⁶ The interest which the petitioner must show is a genuine one as a right heir, widow, devisee or purchaser.⁷ So if the petition be presented by an illegiti-

² Phillips' Est., 23 W. N. C. 518.

³ McMaster v. Carothers, 1 Pa. 324; Longwell v. Bentley, 23 Pa. 99; Welch's Ap., 126 Pa. 297; Guido's Est., 10 Kulp, 150.

⁴ Brown's Ap., 27 Pa. 62; Yerkes v. Yerkes, 200 Pa. 419; Sauerbier's Est., 202 Pa. 187; Painter v. Painter, 220 Pa. 82; Glentworth's Est., 221 Pa. 329.

⁵ Rex v. Rex, 3 S. & R. 533; Ragan's Est., 7 Watts, 438; Brader's Est., 6 Luz. L. R. 41. Rhone, P. J. Danhouse's Est., 130 Pa. 256; Kantner's Est., 24 C. C. 310.

⁶ Richard v. Rote, 68 Pa. 248; Klingensmith's Est., 130 Pa. 516.

⁷ Steel's Ap., 86 Pa. 222; Brown's Ap., 84 Pa. 457; Thompson v. Stitt,

mate child, where the father lived for years in bigamy with its mother, no jurisdiction is conferred.⁸ Minors cannot petition by next friend; they must proceed by guardian.⁹ It was formerly held that the husband might petition in right of his wife, but it was said that the better practice was to present the petition jointly.¹⁰ The committee of a lunatic or habitual drunkard may petition.¹¹ When a devise has vested absolutely in a grandchild he may petition.¹²

Where a question arises upon the right of the petitioner to institute the proceedings this question must first be disposed of and if the judge finds adversely upon his right the petition will be refused.¹³ The court is not obliged to direct an issue in such case to have a jury pass upon the question, although petitioned to do so; nor would the verdict of a jury be binding upon its conscience.¹⁴ The language of section 4 of the act of 1840, providing for partition "where the parties interested or any of them are minors, or the course of descent is not altered" is disjunctive,¹⁵ and minority is made the test of jurisdiction under it.¹⁶

Notwithstanding a testator by his will directs his trustee therein named to make a division of his estate, this does not preclude the legatee from demanding legal partition when he arrives at the age of twenty-one and his legacy has vested,¹⁷ unless clearly the direction in the will works an equitable conversion or there is an imperative direction to sell, independently of discretion.¹⁸

A tenant by the curtesy is entitled to petition where he is tenant of an undivided interest through his deceased wife. Nor is his right defeated by a claim of adverse possession for twenty-one years based on mere proof of receipt of profits by the cotenants, the receipt of one cotenant being the receipt for all.¹⁹

Whilst a life-tenant has no right to come in and bid, yet he has a right to claim all the incidental advantages that may accrue from it. Where a testator gives all his estate to two daughters, but creates a trust for one of them the *cestui que trust* has no standing to sue at common law for partition which is a possessory action, for one joint owner against another.²⁰ He can bid with leave of court.

Under the act of 1832, *supra*, it was held that the mother and

56 Pa. 156; P. & L. Dig., vol. 15, col. 25219; Bishop's Ap., 7 W. & S. 251; Deshong's Est., 6 Del. Co. 519; Jones' Est., 6 D. R. 783; P. & L. Dig., vol. 15, col. 25212.

⁸ Perrine v. Kohr, 205 Pa. 602; 20 Supr. C. 36. (See Kate's Est., 148 Pa. 471.)

⁹ Swain v. Fidelity Ins. Co., 54 Pa. 455.

¹⁰ Rankin's Ap., 95 Pa. 358.

¹¹ Klohs v. Reifsnyder, 61 Pa. 240.

¹² Naglee's Est., 52 Pa. 154.

¹³ Kate's Est., 148 Pa. 471.

¹⁴ Sheehan's Est., 139 Pa. 168; Kate's Est., *supra*.

¹⁵ Gardiner's Est., 4 Pa. 502.

¹⁶ McIntosh's Est., 4 C. C. 593.

¹⁷ Carter's Est., 225 Pa. 355, following Caldwell v. Snyder, 178 Pa. 420; Rawle's Ap., 119 Pa. 100; Sheridan v. Sheridan, 136 Pa. 14.

¹⁸ Yerkes v. Yerkes, 200 Pa. 419; Sauerbier's Est., 202 Pa. 187; Painter v. Painter, 220 Pa. 82; Glentworth's Est., 221 Pa. 329.

¹⁹ Sander's Est., 41 Supr. C. 77; Lamon v. Rodgers, 42 Supr. C. 437.

²⁰ Johnson v. Gaul, 228 Pa. 75; Seiders v. Giles, 141 Pa. 93; Clark's

brothers were not entitled to petition;²¹ nor collateral heirs,²² but the heir of a lapsed devise is.²³ An heir who has been advanced his full share or more is not precluded;²⁴ nor one who advanced himself.²⁵ An alienee or devisee has the right to petition, either by representation²⁶ or by appointment.²⁷ But if there be suspicious circumstances connected with the alienation an issue will be awarded to try the right.²⁸ An heir of the half blood, not of the blood of the first purchaser, may not petition.²⁹ A life tenant who is in exclusive possession of the whole property cannot petition.³⁰ At the moment of the death of the life-tenant the remainderman, being entitled to possession, may institute partition.³¹ Section 1 of rule 14, Allegheny County, provides that "the respective interests of the parties in the subject of partition shall be distinctly set out in the partition and in the decree."

19. Parties to the proceeding.

It is an important jurisdictional requirement that all the parties in interest be named in the petition, notices and decree in order to divest their title. But if their names are not known, or the residences, the facts should be stated, so that the notices published may be prepared with a view to give the best warning of which the case is susceptible.³² The shares of each should also be set forth.³³

Section 1 of rule 11, Philadelphia, provides: "Petitions for partition shall conclude with a prayer for a citation to the parties in interest (whose names, and the nature and extent of their respective interests must be fully set forth in the petition), to show cause why an inquest in partition shall not be granted as prayed for."

In order to give jurisdiction all of the parties must be interested in all of the lands brought into the partition;³⁴ parties interested in other lands cannot be included.³⁵ The objection to the jurisdiction can be raised at any time. Jurisdiction will not be con-

Est., 134 Pa. 140; Hutchinson's Ap., 82 Pa. 509; Longwell v. Bentley, 23 Pa. 99; Willing v. Brown, 7 S. & R. 467.

²¹ Deshong's Est., 6 Del. Co. 519.

²² Negley's Est., 23 Pitts. L. J. 41.

²³ Jones' Est., 6 D. R. 783.

²⁴ Harris' Ap., 10 Atl. 135; Datt's Est., 34 Pitts. L. J. 349.

²⁵ Dech's Est., 7 York, 43.

²⁶ Stewart's Ap., 56 Pa. 241; Ragan's Est., 7 Watts, 438; Harrison's Est., 4 Luz. L. R. 105.

²⁷ Rawle's Ap., 119 Pa. 100.

²⁸ Mealey's Est., 1 Ashmead, 363; Wallace v. Elder, 5 S. & R. 142.

²⁹ Caughey v. Harrar, 21 Lanc. L. R. 353.

³⁰ Kerner's Est., 12 D. R. 718.

³¹ Stevenson's Est., 50 Pitts. L. J. 419.

³² Richards v. Rote, 68 Pa. 248; Ragan's Est., 7 Watts, 438; Elliott v. Elliott, 5 Binney, 1; Welch's Ap., 126 Pa. 297; Baird v. Corwin, 17 Pa. 462; McClure v. McClure, 1 Phila. 117.

³³ Walton v. Willis, 1 Dallas, 351.

³⁴ Small's Ap., 1 Mona. 664; Harlan v. Langham, 69 Pa. 235.

³⁵ Mushrush's Est., 23 C. C. 629; Marcy's Est., 9 Kulp, 128.

ferred by consent.³⁶ When a party seeks partition the Orphans' Court may in its equitable powers impose an equitable lien upon his interest.³⁷ The trustee of a contingent interest who was omitted in the petition may be added *nunc pro tunc*.³⁸ Since the act of 1893 a husband need not be joined as a party in the partition of his wife's estate;³⁹ but he may be⁴⁰ and it is the better practice to join him as tenant by the curtesy.⁴¹ If all the parties in interest are named in the proceedings, though inartistically, they will not be set aside.⁴² A mortgagee is not entitled to be a party nor to be notified;⁴³ but lessees for years are properly made respondents.⁴⁴ It has been held that a redeemable ground-rent is the subject of partition as real estate⁴⁵ and also oil in place.⁴⁶ The Common Pleas having appointed a trustee under a separate use clause in a deed, the Orphans' Court will not take jurisdiction.⁴⁷

One who has quit-claimed is not entitled to petition for partition;⁴⁸ nor one who has sold his interest in the land;⁴⁹ or one who has leased it for life;⁵⁰ or relinquished to the widow for life.⁵¹ But one who is indebted to a co-tenant is not disqualified.⁵² A lease for twenty years will not oust partition;⁵³ nor will a claim for improvements, which can come in on the fund if well founded.⁵⁴ However, where it is apparent that there will be nothing left to partition after the debts are all paid, a petition will be refused.⁵⁵

Where the title depends on a will, a copy of the will should accompany the petition.⁵⁶

20. Amendment of petition, etc.

If not jurisdictionally defective the petition may be amended as to parties,⁵⁷ but where it is fundamentally bad, as where it included land in which some of the parties were not interested, amend-

³⁶ Small's Ap., *supra*; Romig's Ap., 8 Watts, 415.

³⁷ Muenich's Est., 52 Pitts. L. J. 191.

³⁸ McIntosh's Est., 4 C. C. 593.

³⁹ Powell's Est., 3 D. R. 508.

⁴⁰ McCoy's Est., 1 D. R. 60.

⁴¹ Welch's Ap., 126 Pa. 297; Gress' Est., 6 York, 143.

⁴² Reid v. Clendenning, 193 Pa. 406; Hay v. Harbison, 52 Pitts. L. J. 219.

⁴³ Long's Ap., 77 Pa. 151; McCandless' Ap., 98 Pa. 489; Girard, Etc., Co. v. Farmers', Etc., Bank, 57 Pa. 388.

⁴⁴ Wistar's Est., 18 Phila. 80; Duke v. Hague, 107 Pa. 57; Stat. 32d, Henry VIII, ch. 32.

⁴⁵ White's Est., 167 Pa. 206.

⁴⁶ Clever's Est., 40 Pitts. L. J. 358.

⁴⁷ Nixon's Est., 45 Pitts. L. J. 112.

⁴⁸ Wolf's Est., 13 Lanc. L. R. 329.

⁴⁹ Coyle's Est., 9 D. R. 405.

⁵⁰ Breneman's Est., 1 Lanc. L. R. 53.

⁵¹ Keisel's Ap., 7 Pa. 462; Hunsecker's Est., 6 D. R. 202.

⁵² Salin's Est., 10 D. R. 97.

⁵³ Mayer's Est., No. 2, 17 D. R. 677.

⁵⁴ Casa's Est., 7 D. R. 678.

⁵⁵ Butts' Est., 20 Lanc. L. R. 41.

⁵⁶ Drum's Est., 8 D. R. 407.

⁵⁷ Schweitzer's Est., 1 Northam. 65; Marcy's Est., 9 Kulp, 128.

ment has been refused;⁵⁸ or where the parties were improperly set forth.⁵⁹ Amendment has been permitted even after judgment and decree of sale,⁶⁰ and after appeal to correct an inadvertent exception.⁶¹ Defects as to names which are supplied by the answer may be considered as amended by it.⁶² An amendment will be allowed as to the quantity of the estate.⁶³ A motion to quash will be refused as to immaterial matters.⁶⁴ A party may object and is not bound by the unauthorized appearance for him by an attorney.⁶⁵ A widow who is entitled, cannot compel her husband's executors to join in the partition.⁶⁶ The petition having been entered on the motion list, until further materials can be gathered to complete it, jurisdiction will be held to have attached, and when the rewritten petition is filed will be of the date of placing the petition on the motion list, although proceedings have meantime been commenced in the Common Pleas.⁶⁷

21. Effect of adverse possession or claim of title.

Pending an issue on a will, the title being in dispute, proceedings in partition will be suspended,¹ until the rights of the disputants can be determined in a court of law.² But there must be a real question as to title or adverse possession, and whether such a question is presented will be considered by the Orphans' Court.³ There must be some valid ground of dispute.⁴ If the title has already been settled in an action at law, partition will proceed.⁵ A question of title is for the Common Pleas; but one of heirship, for the Orphans' Court.⁶ Where the question raised is one of fact to be determined by a jury, as abandonment, the question will be sent to the Common Pleas;⁷ or where a trust is averred;⁸ or an agreement of sale.⁹ If the title be in question in lunacy or habitual drunkenness proceedings, in the Common Pleas, the proceedings will be dismissed.¹⁰ Actual adverse possession is sufficient to stay proceedings in the Orphans' Court.¹¹ Where one claims by adverse possession or title

⁵⁸ Sander's Est., 16 Montg. Co. 190.

⁵⁹ Gross' Est., 6 York, 143.

⁶⁰ Pitzer's Est., 24 C. C. 359.

⁶¹ Wistar's Ap., 105 Pa. 390; Landmesser's Est., 9 Kulp, 524.

⁶² Lowrie's Est., 19 C. C. 600.

⁶³ Himelspark's Est., 8 D. R. 183.

⁶⁴ Lusch's Est., 10 D. R. 224.

⁶⁵ Van Emon's Est., 39 Pitts. L. J. 423.

⁶⁶ Sperring's Est., 10 Kulp, 135.

⁶⁷ McNeile's Est., No. 3, 14 D. R. 318.

¹ Dermond's Est., 10 Del. Co. 508.

² *McMasters v. Carothers*, 1 Pa. 324; *Adelman's Est.*, 6 Kulp, 382; *Brader's Est.*, 6 Luz. L. R. 41; *Williams v. Landman*, 8 W. & S. 55; *Eell's Est.*, 6 Pa. 457; *Flaherty's Est.*, 5 Phila. 477.

³ *Welch's Ap.*, 126 Pa. 297.

⁴ *McCorkle's Est.*, 184 Pa. 626.

⁵ *Wistar's Ap.*, 115 Pa. 241.

⁶ *Davis' Est.*, 13 Phila. 407; 14 Phila. 256.

⁷ *Bishop's Est.*, 200 Pa. 598.

⁸ *Black's Est.*, 18 Phila. 109.

⁹ *Whitaker's Est.*, 48 Pitts. L. J. 210.

¹⁰ *Sampson's Est.*, 4 D. R. 204.

¹¹ *Wall's Est.*, 24 C. C. 560; *Bagwill's Est.*, 16 Phila. 408.

he should set it up against the partition, when proceedings will be stayed and the cause sent by precept to the Common Pleas,¹² where the question will be raised on a plea of *non tenent insimul*.¹³ Possession by the widow for upwards of thirty years has been held not to be adverse under the circumstances.¹⁴ Wild and uncultivated lands may be partitioned without actual possession.¹⁵

22. Time of proceedings.

The statute is silent as to the time when to begin proceedings. It has been held that where there is no adverse possession partition may be commenced twenty-six years after the death of decedent.¹⁶ Following the reasoning of the court below in *Kein's Est.*, which was affirmed upon the ground that there was a conversion and therefore partition did not lie,¹⁷ a number of courts held that if partition be brought within a year after the death of decedent, it is premature.¹⁸ This practice was discountenanced in *Reifsnyder's Est.*,¹⁹ where the Supreme Court said they did not intend to affirm the lower court except upon the one controlling question; and that partition proceedings might be commenced the day after the death of the decedent. But Justice Mestrezat suggested, as a proper rule, that before partition be awarded a rule to show cause be issued. The debts of a decedent are by law made a lien for two years, and partition may be made subject to them within that time,²⁰ but if the land is to be sold discharged from these debts, the parties in interest should enter into an agreement that the proceeds of the sale shall stand in lieu of the land, and file it at the time when application is made for an order to sell.

23. Rule to show cause.

It was said by Mestrezat, J., in *Reifsnyder's Est.*, 214 Pa. 637, quoting Agnew, in *Horam's Est.*, 59 Pa. 152:

"It would be better if the Orphans' Court would require a rule to show cause to be issued and served on all the parties in interest before awarding the inquest. If on the return of the rule there are any valid reasons for not awarding or for delaying the inquest, they can be made known and the court can make such decree as the facts may warrant. If it should appear that the estate was heavily indebted and that all or part of the real estate would be required to pay the indebtedness, the court could exercise its discretion and delay the partition proceedings."

The rule to show cause, issued as in other cases, should be served, as the writ, upon all parties in interest within the jurisdiction; upon those *sui juris*, personally; upon the guardians of minors who

¹² *Slayman v. Clark*, 15 Supr. C. 591.

¹³ *Richards' Est.*, 8 Lanc. L. R. 205.

¹⁴ *Erismen's Est.*, 8 Lanc. Bar, 169.

¹⁵ *Bellas v. Graham*, 3 Am. L. J. 64; *Merklein v. Trapnell*, 34 Pa. 42.

¹⁶ *Merklein v. Trapnell*, 34 Pa. 42.

¹⁷ *Keim's Est.*, 201 Pa. 609.

¹⁸ *Breen's Est.*, 11 D. R. 745; *Theilacker's Est.*, 12 D. R. 230; *Darlington's Est.*, 9 Del. Co. 583.

¹⁹ 214 Pa. 637. (See also *Myer's Est.*, 25 C. C. 235.)

²⁰ *Marcy's Est.*, 9 Kulp, 128.

have guardians; upon next of kin for those who have none, and upon the minors themselves who are above fourteen years, following actions real. As to those minors having no guardians, upon return of service upon next of kin, the court will appoint a guardian *ad litem*, or, upon application, guardian of the person and estate. Service by publication must be made in case of nonresidents.

The service of process on a committee, *ad litem*, of a lunatic in the Orphans' Court as well as the Common Pleas, is regulated by section 1 of the act of June 10, 1901, P. L. 553, amending the act of June 26, 1895, so as to read as follows:

"That in all actions or proceedings in partition, and in all other actions and proceedings whatsoever, either at law, in equity or in the Orphans' Court, now or hereafter to be begun, whenever it shall appear to the court that any of the defendants or respondents therein is a lunatic and has no committee, it shall be lawful for the plaintiff or petitioner therein to serve all writs, process, bills of complaint or citations upon one or more of the next of kin of such lunatic; and if no committee be appointed under existing laws, it shall be the duty of the plaintiff or petitioner upon or after the day upon which he might take judgment or decree by default, against defendant or respondent if he were of sound mind to make application to the court in which action or proceeding are [is] begun for the appointment of a committee, *ad litem*, for such lunatic, and such appointment being made, to give notice to the person appointed; and thereafter all writs, process, bills of complaint, citations, rules and pleadings shall be served upon such committee and such service shall be as effectual as though made on a committee regularly appointed under existing laws. And said committee *ad litem* shall have full power to accept service of said bills of complaint, writs, process, citations, rules or pleadings, or waive the issuance of the same or time of service, and in partition proceedings to accept a purpart or purparts, or refuse to accept the same, to enter into recognizances, to bid at sales and purchase the whole or any part of the real estate being partitioned and to execute bonds and mortgages for the purchase money, to receive and receipt for owelty: *Provided*, however, that the exercise of said power shall be at all times during the pendency of said proceedings under the control and supervision of the court." ^{20a}

24. Answer to petition.

If a rule to show cause is issued and served, an answer to such rule may dispose of all preliminary questions which stand in the way of partition. If no rule is issued, an answer may raise all questions, by confessing and avoiding, or denying or traversing the petition. One who answers must do so on his knowledge or belief, or both.²¹ A plea may not be properly received to a petition in the Orphans' Court.²² But the petition may be demurred to for insufficiency. It is a mere *dictum*, but a sound suggestion, that partition should not be invoked except there be no other remedy.²³

^{20a} See *obiter*, Ferguson's Est., 204 Pa. 253.

²¹ Davis' Est., 13 Phila. 407.

²² Wistar's Ap., 18 Phila. 80; 115 Pa. 241.

²³ Keim's Est., 201 Pa. 609.

25. Precept of issue to the Common Pleas.

If in response to a rule to show cause or in answer to the petition questions of fact arise of such preliminary moment, that the Orphans' Court deems it unwise to proceed, until they are resolved by jury trial, it will by its precept direct the clerk to certify such questions in due form to the Court of Common Pleas. The ordering of such a precept is discretionary and not reviewable.¹ Such a question is that of the relationship of the petitioner;² or his legitimacy.³ Although the court may have appointed a commissioner or examiner, if not satisfied with his report on the facts, an issue may still be directed.⁴ The authority of this court is found in section 55 of the act of March 29, 1832, P. L. 190, which says: "The Orphans' Court shall have power to send an issue to the Court of Common Pleas of the same county, for the trial of facts by a jury, whenever they shall deem it expedient so to do." This was by act of April 20, 1846, P. L. 411, amended so that on questions of distribution an affidavit was required, which see under Distribution, with proper forms.

If the parties in interest all agree, they may waive the inquisition and apply to court to appoint a trustee to sell.^{4a}

26. Form of petition for inquest.

In the Matter of the Estate
of John Love, Deceased.

To the Honorable Ellis L. Orvis, President Judge of the Orphans'
Court of Centre County:

The petition of Willis Love of the borough of Millheim in said county respectfully represents that John Love, late of said county, died at his late residence in the said borough of Millheim on the — day of —, A. D. 19—, intestate, and letters of administration were duly granted by the register of wills of said county to Sylvia Love, his widow; that the interest of your petitioner is that of a son and heir of said John Love; that said decedent left surviving him a widow, Sylvia Love, whose residence is Millheim, Pennsylvania; Willis Love, the petitioner, whose residence is also Millheim, Pennsylvania; one daughter, Gladys Wolfe, intermarried with Newton Wolfe, whose residence is at Loganton, Clinton County, Pennsylvania, and one daughter, Bonnie Love, a minor, whose guardian is William A. Tobias, and who both reside at Millheim in said county and state; who are all the heirs and parties in interest; that said decedent died seized of three separate parcels of land, situate and described as follows: [describe each separately and give its location] which are all the real estate whereof said John Love died seized or possessed; that as yet no partition of said land has been made nor have the parties interested been able to agree upon a partition;

Wherefore your petitioner prays your honorable court to award a writ in due form for an inquest to make partition of said described

¹ Kate's Est., 148 Pa. 471.

² Armstrong's Est., 14 Phila. 320.

³ Kates' Est., *supra*.

⁴ Thomas' Ap., 124 Pa. 640; Thomas v. Thomas, 124 Pa. 646.

^{4a} Sherr's Est., 19 W. N. C. 64.

lands to and among the parties interested therein, in such manner and in such purparts as is by law authorized and directed, if the same can be made without prejudice to or spoiling the whole; but if such partition cannot be made thereof, then to value and appraise the same, and make return of their proceedings according to law.

And he will ever pray, etc.

Willis Love.

Centre County, ss.

Willis Love, being duly sworn, says that the facts set forth in the above petition are just and true to the best of his knowledge and belief.

Willis Love.

Sworn to, etc.

Upon such petition, if the court is not fully satisfied, a rule to show cause why the inquest should not be awarded may be granted, returnable on a day fixed, and served on the parties in interest. But this is unusual, and the ordinary course is to grant the petition.

27. Form of order for inquest.

Now, to-wit, — day of —, A. D. 19—, inquest awarded as prayed for; and it is ordered, that notice be given to the parties resident within the county, as directed by law, and to parties interested who are not resident within the county, by publication in one weekly newspaper printed and published in said county for six successive weeks prior to the holding of the inquest, and by mailing a copy of such newspapers, containing said notice, to the last known place of residence of such nonresident parties. Returnable the first day of next term.

By the Court.

If the rules of court provide for mailing a copy of the notice in a registered letter to the last known place of residence, this should be complied with. This is the more certain method of giving notice in such cases. The court has power to fix the return day as it deems proper.⁵

28. Form of order in Lancaster County.

It is ordered by the court that the —, — to view the said premises, and make partition thereof between the heirs and legal representatives of said deceased, if the same can be done without prejudice to and spoiling of the whole. But, if they find the same cannot be so divided, that they then inquire and report whether the said premises will conveniently accommodate more than one of the said heirs and legal representatives without prejudice to and spoiling of the whole. And if they so find, that they ascertain and report how many the same will, as aforesaid, accommodate; describing each purpart by metes and bounds, and returning a just valuation and appraisement thereof. But in case partition cannot be made between all the heirs and legal representatives aforesaid, nor the said premises accommodate more than one of the heirs and legal representatives, that they then value and appraise the whole premises, agreeably to law; that legal notice of the time and place of holding

⁵ Kantner's Est., 24 C. C. 310; Harrison's Est., 4 Luz. L. R. 105.

such inquisition be given to all the parties interested, or their legal representatives, that they may be present if they think proper, and that the report of said proceedings be made to the said Orphans' Court at an Orphans' Court to be held at Lancaster, in and for the said county, on the — day of —, A. D. 19—.

By the Court.

Attest: — —, Clerk of Orphans' Court.

29. Form of writ of inquest.

Luzerne County, ss.

The Commonwealth of Pennsylvania to the High Sheriff of the county of Luzerne, greeting:

Whereas, at an Orphans' Court held at Wilkesbarre, in and for the county of Luzerne, the — day of —, in the year of our Lord one thousand nine hundred and —, before the Honorable — —, judge of the said court:

In the matter of the estate of — — (here follows a copy of the material parts of the petition).

And whereupon, the said court, on due proof and consideration of the premises, awarded an inquest for the purpose aforesaid.

We therefore command you, that taking with you six good and lawful men of your bailiwick, you go to and upon the premises aforesaid, and there in the presence of the parties aforesaid by you to be warned (if upon being warned they will be present), and having respect to the true valuation thereof, and upon the oaths and affirmations of the said six good and lawful men, you make partition to and among the heirs and legal representatives of the said intestate, in such manner and in such proportions as by the laws of this commonwealth is directed, if the same can be so parted and divided, without prejudice to or spoiling the whole. And if said partition cannot be made thereof without prejudice to or spoiling the whole, then you cause the said inquest to inquire and ascertain whether the same will conveniently accommodate more than one of the said representatives of the said intestate, without prejudice to or spoiling the whole; and if so, how many it will as aforesaid accommodate, describing each part by metes and bounds, and returning a just valuation of the same, with a map or draft of the premises and each purpart. But if the said inquest, by you to be summoned as aforesaid, to make the said partition or valuation, shall be of opinion the premises aforesaid, with the appurtenances, cannot be so parted and divided as to accommodate more than one of the said representatives of the said intestate, then you cause the inquest to value the whole of the said real estate, with the appurtenances, having respect to the true valuation thereof agreeable to law, and that the true partition or valuation so made, you distinctly and openly have before our said justice at —, at an Orphans' Court, there to be held on the regular day of sessions thereof, after such inquest shall be made under your hand and seal, and under the hands and seals of those by whose oaths or affirmations you shall make such partition or valuation. And have you then and there this writ.

Witness, — —, judge of our said court at Wilkesbarre aforesaid, the — day of —, in the year of our Lord one thousand nine hundred and —.

— —,
Clerk of Orphans' Court.

30. Form of publication of notice.

In the estate of John Love, late of Millheim, Centre County, Pa., deceased.

The heirs and all parties in interest will take notice that in pursuance of an order of the Orphans' Court of Centre County a writ of partition has issued from said court to the sheriff of said county, returnable on —, the — day of —, A. D. 19—, and that the inquest will meet for the purpose of making partition of the real estate of said decedent, on the — day of —, A. D. 19—, at — o'clock — M. of said day, upon the premises, at which time and place you can be present, if you see proper. The premises in question are described as follows: [Describe each parcel.]

Hugh Taylor, Sheriff.

If there be a legal publication designated, it should also be published in the same.

The time of publication is not indicated in the act of 1832, *supra*. But by analogy to the act of 1835, for partition in the Common Pleas, the time is six weeks and not three, as generally practiced.¹ Since the act of 1893, the husband of an heir is no longer a party to whom notice must be given. If an heir has aliened, however, the alienee is entitled to notice.² But a mortgagee need not be notified. He must take notice.³ The legal representatives should also be notified.⁴

31. Form of affidavit of publication.

[Paste copy of advertisement on sheet.]

Centre County, ss.

Charles R. Kurtz, of Bellefonte, Pa., in said county, being duly sworn, says that he is the publisher [or principal clerk or manager] of the *Centre Democrat*, a weekly newspaper of general circulation, published and printed in Bellefonte, Centre County, Pa., and that the annexed advertisement, which was cut from said newspaper, appeared in all of the weekly editions of said paper for the consecutive period of six weeks preceding the — day of —, A. D. 19—, to-wit, on — [here specify the date of each issue].

Charles R. Kurtz.

Sworn to, etc.

32. Affidavit of service of notice.

If the sheriff serves the notice on residents, his return is sufficient. But if served by petitioner or another, an affidavit of service must be made and appear of record. Following is a form:

Centre County, ss.

Willis Love, being duly sworn, says that he served a notice of the petition and of the time and place of holding an inquest upon the lands of John Love, deceased, as awarded by the court, on Sylvia Love, widow, and William A. Tobias, guardian of Bonnie Love, personally, by handing to each of them a true copy and making known

¹ Rankin's Ap., 95 Pa. 358.

² Welty v. Ruffner, 9 Pa. 224; Merklein v. Trapnell, 33 Pa. 42.

³ Long's Ap., 77 Pa. 251.

⁴ Neeld's Ap., 70 Pa. 113.

to them the contents, on the — day of —, A. D. 19—, at Millheim, Pa.

Sworn to, etc.

Willis Love.

If service is not made according to law and the rule of court, the proceedings will be quashed.⁵ When some have been notified and others have not, the court may stay proceedings until notice is duly given.⁶ Notice need not be given to the widow and heirs before awarding partition.⁷ A party is not bound by notice to his trustee when such trustee had no power;⁸ nor is a life tenant, who is not made a party.⁹ Where the tracts are widely separated, a notice that the inquest will be held "on the premises" is not definite enough, unless it states on which premises.¹⁰ Where a minor had removed from the state and the sheriff mailed him a copy, the minor coming of age before such notice, an exception on the ground of minority was dismissed.¹¹

33. Form of oath of appraisers.

No particular form of summons of a jury to hold the inquisition is requisite. As a matter of practice the sheriff merely notifies or requests six qualified and disinterested men to accompany him to the premises on the day fixed in his writ. But before they can act, they must be duly sworn. Following is a form of the oath:

We [each name], and each of us, being duly sworn according to law, depose and say that we will well and truly view and inquire whether the lands and tenements in this writ of partition mentioned, can be divided to and among the parties in the said writ named, without prejudice to or spoiling the whole, and if we find that the same can be so divided, then we will make partition thereof accordingly and justly and equitably allot to each his or her share, by metes and bounds, in severalty; but if we find that the same cannot be so divided, then we will make a just valuation and appraisement thereof, according to the best of our knowledge and belief and according to the command of the writ of inquest to us submitted.

(Signed.) — — —,

Sworn to, etc.

Etc.

The sheriff himself, or anyone having authority to administer an oath, may do so.

34. The inquisition.

The six good and lawful men of the county are presumed to be substantial citizens and not mere pick-ups or office loafers. They must be also disinterested, or their return may be challenged, as well as themselves, by anyone interested.¹² The sheriff himself should

⁵ Kantner's Est., 24 C. C. 310; Gross' Est., 6 York, 143; Richard's Est., 8 Lanc. L. R. 205.

⁶ Hanbest's Est., 11 Phila. 10.

⁷ Horam's Est., 59 Pa. 152; Vensel's Ap., 77 Pa. 71.

⁸ Richards v. Rote, 68 Pa. 248.

⁹ Klingensmith's Est., 130 Pa. 516.

¹⁰ Landmesser's Est., 9 Kulp, 524.

¹¹ Comfort's Est., No. 2, 6 York, 165.

¹² Young v. Bickel, 1 S. & R. 467.

select the jurors and conduct the inquisition. He cannot, by his deputy, depute a constable to attend to it.¹³ The sheriff may be present at the inquisition, but he has no part in the inquisition itself, except to oversee that the jurors attend to their business and make a return, which he signs as sheriff. Judge Rhone says: "All the heirs who may be present are to be respectfully heard by the jury and the whole proceeding is to be conducted in the most fair, deliberate and judicial manner."¹⁴ If the jurors find that they can make an allotment without spoiling the whole, they are required to return the same, which in form is similar to the negative report, except that where the latter says: "Do find that the property described in the said writ cannot be, etc.," they find that it can be and proceed to designate the purparts and to whom allotted, describing each in detail. Reports of allotments have become rare, the too great haste of the present time being to sell the land and spend the proceeds, so that now there are not many estates in the family name of the progenitor of a century ago.

The primary duty of the inquest is to divide and allot purparts of equal value to each heir, if it can be done, and in such case an appraisement is not contemplated,¹⁵ but the sheriff must make the allotment.¹⁶ The secondary duty is to value the same and decide whether the land can be divided so as to accommodate more than one of the heirs, if not all, and to value such purparts, as well as the whole.¹⁷ An inquest was set aside where the jury did not consider whether a widow and child of an intestate could be accommodated by a division of the land;¹⁸ also, where the land was divided subject to the widow's dower without valuing the purparts.¹⁹ The inquest may divide the land into more purparts than there are heirs and those which are not accepted may be sold.²⁰ It was held error to divide and appraise coal lands, by appraising the surface and the subjacent coal separately.²¹ The widow, as life tenant, may work an open mine to exhaustion, and the inquest cannot limit her right to an equal division with the heirs.²² The jury are the sole judges as to the number of purparts into which the land is divisible.²³

35. Proceedings when the lands cannot be divided.

Section 37 of the act of March 29, 1832, P. L. 190, provides:

"When any such estate cannot be divided among the lineal descendants as aforesaid, or the widow and such lineal descendants, without prejudice to or spoiling the whole, the said seven or more persons, or the said inquest, as the case may be, shall make and

¹³ *McMasters v. Carothers*, 1 Pa. 324; *Horan's Est.*, 59 Pa. 152.

¹⁴ *Rhone's O. C.*, vol. 3, p. 199.

¹⁵ *Wistar's Ap.*, 105 Pa. 390; *Hamilton's Est.*, 17 D. R. 505.

¹⁶ *Giffin's Est.*, 30 Pitts. L. J. 60.

¹⁷ *Davis' Est.*, 1 Luz. L. R. 405.

¹⁸ *Bishop's Ap.*, 7 W. & S. 251.

¹⁹ *Benfield's Est.*, 7 W. N. C. 575.

²⁰ *Darrah's Ap.*, 10 Pa. 210; *Davis' Est.*, 1 Luz. L. R. 405.

²¹ *Christy's Ap.*, 110 Pa. 538.

²² *Carother's Est.*, 37 Pitts. L. J. 354.

²³ *Rice's Est.*, 50 Pitts. L. J. 412.

return a just appraisement thereof to the Orphans' Court, and thereupon, but not otherwise, the said court may order the same:

"I. To the eldest son, if he be living; but if he be dead, to his children, if any, in the order of their birth, and preferring males to females; and in like manner to his other lineal descendants in the same order.

"II. If the eldest son, or his lineal descendants, do not accept the same, then to the second and other sons, or their lineal descendants successively, in the order of birth, in like manner as is provided for the eldest son and his descendants.

"III. If the second or other sons, or their descendants do not accept the same as aforesaid, then to the eldest daughter or her lineal descendants, in like manner as is provided in the case of the eldest son.

"IV. If the eldest daughter, or her lineal descendants, do not accept the same, then to the second and other daughters, or their lineal descendants successively, in like manner as is provided for the second and other sons.

"In every such case, the party accepting the same, or someone in his behalf, paying to the other parties interested their proportionable parts of the value of such estate, according to the just appraisement thereof, made in manner aforesaid, or giving good security by recognizance or otherwise, to the satisfaction of the court, for the payment thereof, with legal interest, in some reasonable time, not exceeding twelve months, as the court may direct; and the persons to whom or for whose use, payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same."

36. Equalization of purparts.

Section 38 of the act of 1832, *supra*, provides:

"When equal partition in value cannot be made by the seven men appointed as aforesaid, or by the said inquest, they shall make a just appraisement of the respective purparts or shares in which they may divide the estate; and thereupon the court may order the said purparts or shares successively to the persons entitled to make choice therefrom, in the order and according to the rules enacted in the preceding section, where the estate cannot conveniently be divided; and they shall award that one or more purparts or shares shall be subject to the payment of such sum or sums of money as shall be necessary to equalize the value of the said purparts, according to the said appraisement thereof; which sum or sums of money shall be paid or secured to be paid, by the several persons accepting such purparts, in the manner prescribed in the foregoing section."

37. Appraisement of purparts, fewer than heirs.

Section 39 of the act of 1832, *supra*, provides:

"When such estate cannot conveniently be divided into as many shares as there are parties entitled, the seven men appointed as aforesaid, or the said inquest, shall make a just appraisement of the respective purparts or shares into which they may divide the estate, and thereupon the court may order the shares successively to the parties entitled, to make choice therefrom, in the order and according

to the rules hereinbefore provided for the case where the estate cannot conveniently be divided, they, or someone in their behalf, paying or securing to be paid to the other parties interested, their respective parts of the value thereof, in the manner prescribed as aforesaid."

If the parties refuse to accept under section 37, *supra*, the court may assign the shares subject to owelty, in order to make complete partition.²⁴ When the inquest divides the estate into more shares than there are heirs, the extra shares may be sold.²⁵ The heirs may agree among themselves to change the valuation.²⁶ If the inquest returns land of several ancestors valued as of but one and it does not appear that partition of more than one estate was contemplated, the return is fatally defective.²⁷

38. Residue after allotment.

Section 10 of the act of April 25, 1850, provides:

"In all cases of partition, either in the Courts of Common Pleas or in the Orphans' Courts, the courts having jurisdiction thereof are empowered, wherever it shall appear advisable and proper, to cause the share or shares of the party or parties appearing in court to be allotted and assigned to them, and to permit the residue of the premises to remain for the person or persons entitled thereto, and subject to a future partition among them, if more than one person be so entitled."

39. Fixing time for payment of owelty.

Section 1 of the act of May 8, 1876, P. L. 140, provides:

"In all cases in the Orphans' Courts in this commonwealth in which real estate shall be taken by an heir or other person legally authorized to take the same, charged with owelty, payable to other heirs, or to others who hold the interest of such other heirs, the said courts shall have power to fix, for the payment of the principal of such owelty, such time or times as in the judgment of the court shall be to the advantage of those entitled to the estate: *Provided, however,* That the principal and annual payment of legal interest thereon be adequately secured."

40. Appraisement and valuation.

Judge Rhone says:²⁸ "Where there can be no division of the land amongst the heirs in equal shares, the jury must appraise and value the land either in purparts or as a whole and in this appraisement it is wise not to exceed the probable market value of the property, for the heirs may afterwards bid against each other, if the purparts be valued too low, but if they be too high, the result must be a public sale unless the parties agree to reduce the valuation. This was different when the eldest heir had an absolute right to take the land at the appraisement. * * * The jury may adjourn from time to time, if necessary, but if they do not complete their labors

²⁴ Sampson's Ap., 4 W. & S. 86.

²⁵ Darrah's Ap., 10 Pa. 210.

²⁶ Mason's Ap., 41 Pa. 74.

²⁷ Hogg's Est., 206 Pa. 415.

²⁸ Rhone's O. C., vol. 3, p. 199.

before the return day named in the writ, the order should be renewed by the court."

It is immaterial how the jurors arrive at their valuation if it be just and fair.²⁹ A juror's affidavit cannot be heard to inculcate his fellows. Each purpart must be valued at a round sum and not at a price per acre.³⁰ Where there is a widow and collateral heirs only, she is entitled to have her half, including the mansion house, set apart to her in severalty for life, if it can be done without prejudice to or spoiling the rest, provided the remainder can be actually divided, without prejudice, among the other heirs, for the acts of assembly so declare.³¹ But there must be an actual partition.

41. Form of return against division.

Estate of William H. Hutson, } In the Orphans' Court of Luzerne
Deceased. } County.

Luzerne County, ss.

An inquisition indented and taken on the premises in Franklin Township, in the county aforesaid, this — day of —, in the year one thousand nine hundred and —, at — o'clock — M., before — —, high sheriff of the county aforesaid, by the oaths and affirmations of the jurors whose names and seals are hereunto annexed, good and lawful men of my bailiwick, who say upon their oaths and affirmations that, having been taken by the said — —, high sheriff as aforesaid, in his proper person, to the premises described in the writ to this inquisition annexed, and the parties in the said writ named having been severally warned, and as many as chose being present, do find that the property described in the said writ cannot be parted and divided without prejudice to or spoiling the whole thereof, they therefore divide and part the same into three purparts or lots, which in size, location, metes and bounds, fully appear by a draft of the same hereto attached and made a part of this inquest, and designated as purparts.

No. 1, valued at two thousand dollars.

No. 2, valued at fifteen hundred dollars.

No. 3, valued at eighteen hundred dollars.

(Here give a full description of each of the several purparts, and there being more than one lot attach a draft of each and number it.)

In testimony whereof as well I, the said sheriff, as the jurors aforesaid, to this inquisition have fixed our hands and seals the day and year above mentioned.

— — — — —	Sheriff.
— — — — —	[Seal.]
— — — — —	[Seal.]
— — — — —	[Seal.]
— — — — —	[Seal.]
— — — — —	[Seal.]
— — — — —	[Seal.]

²⁹ White v. White, 5 Rawle, 61.

³⁰ Galbraith v. Galbraith, 6 Watts, 112; Morris v. Galbraith, 8 Watts, 166.

³¹ McCall's Ap., 56 Pa. 363.

42. Form of return of inquest where a division and allotment has been made to heirs.

Luzerne County, ss.

An inquisition indented and taken in Plymouth Township, in the county aforesaid, this 22d day of October, in the year of our Lord one thousand nine hundred and —, before Aaron Whitaker, high sheriff of the county aforesaid, by the oaths and affirmations of the persons whose names and seals are hereunto annexed, good and lawful men of my bailiwick, who say upon their oaths and affirmations, that, having been taken by the said Aaron Whitaker, high sheriff as aforesaid, in his proper person, to the premises in the writ to this inquisition annexed, and the parties in the said writ named having been severally warned, and as many as chose being present, that the property described in the said writ can be divided and parted without prejudice to or spoiling the whole thereof, and therefore that they have parted and divided the same, as follows, to-wit: into three equal parts, having due respect to the true valuation thereof; and one equal third part thereof, with the appurtenances, that is to say, all that certain messuage, piece or parcel of land, bounded and described as follows: [here follows description] I have allotted, assigned, and delivered unto William Eley, Esq., as guardian of the said Mary Ellen Massaker in the said writ named, being his full share, part, and purpart of and in the said premises in the said writ mentioned, with the appurtenances, to be held by the said William Eley, guardian of the said Mary Ellen Massaker, as aforesaid, and to his successors as guardians as aforesaid in severalty forever.

And one equal third part thereof, with the appurtenances, that is to say, all that messuage, piece, or parcel of land, bounded and described as follows: [here follows description] I have allotted, assigned, and delivered unto Delbert Massaker, in the said writ named, being his full share, part, and purpart of and in the premises in the said writ mentioned, with the appurtenances, to be held by the said Delbert Massaker, his heirs and assigns in severalty forever.

And the other third equal part thereof, with the appurtenances, that is to say, all that messuage, piece, or parcel of land, bounded and described as follows: [here follows description] I have allotted, assigned, and delivered unto Harriet Bolen, in the said writ named, being her full share, part, and purpart of and in the premises in the said writ mentioned, with the appurtenances, to be held by the said Harriet Bolen, her heirs and assigns in severalty forever.

In testimony whereof I, the said sheriff, as well as the jurors aforesaid, to this inquisition have fixed our hands and seals, the day and year above mentioned.

— — —, Sheriff. [Seal.]
And each of the jurors.

43. Form of return of the sheriff.

In the estate of William H. Hutson, deceased.
To the Honorable Judge of the Orphans' Court of the County of Luzerne:

The undersigned sheriff of said county respectfully returns the writ of partition, in the above estate, hereto attached, as follows: That he first gave due and legal notice of the time and place of

holding the inquisition in partition in the above estate of John Hutson, Mary Hutson and Charles Lose, guardian of Jane Hutson, personally, and that he served the same on Ann Brown and John Brown, and on Ellen Smith and John Smith, by publication in the *Times-Leader*, a weekly newspaper published in Wilkesbarre, for three successive weeks prior to holding the inquest, and by mailing a copy of each of said newspapers to their last known place of residence, during each week of publication aforesaid; that at the time and place fixed in said service he held the said inquest of partition, as appears by the inquisition duly signed and attached hereto. All of which he desires may be confirmed by the court.

Sworn to, etc.

Sheriff.

The affidavits of service and publication should be attached and returned with the return of the inquest.

44. Return of inquest.

The sheriff's return of the inquest is conclusive as between the parties and may not be contradicted,¹ and should be unanimous,² though it has been held that it need not necessarily be so.³ Where the sheriff's return set forth notice to all the parties and presence at the inquest, on exceptions, it was shown that a party had no notice.⁴ However, the return need not specifically show that notice was given to each heir, when it avers they were all duly warned.⁵ The return, when dividing the land, must contain a description of each purpart; and when valuing the land, it should be described as well;⁶ not only that, there should be a plot or draft where a division is made,⁷ unless the return itself describes each in detail.⁸ When the inquest set apart the widow's share and mansion house, the partition must be based on the actual value of the land and not its rental value.⁹ If it does not show such valuation, it will be set aside.¹⁰ The life tenant is entitled to have his share set apart in the land if it can be done without prejudice to or spoiling the whole.¹¹

45. Confirmation of return.

"The return is presented to the court which orders it filed, and if it appears to be correct in form it is ordered confirmed *nisi*, and at the time fixed by the rules of court, if there be no exceptions, the same is confirmed *absolutely*. If there be any objection to the mode of procedure, or to the conduct of the jury, or to the valuation, or to any other matter, it should be made in writing, under oath, and filed with the court between the confirmation *nisi* and the final

¹ Denning's Est., 4 C. C. 179.

² White v. White, 5 Rawle, 61. Gibson, C. J.

³ Snyder's Est., 1 Wilcox, 190.

⁴ Ragan's Est., 7 Watts, 438; Davis' Est., 3 Kulp, 91.

⁵ Horam's Est., 59 Pa. 152; Welch's Ap., 126 Pa. 297.

⁶ Christy's Ap., 110 Pa. 538.

⁷ Davis' Est., 1 Luz. L. R. 405. Harding, J.

⁸ Massacer's Est., 4 Kulp, 13; Silvius' Est., 18 Lanc. L. R. 92.

⁹ Carother's Est., 37 Pitts. L. J. 354; Kline's Est., 1 Leg. Gaz. 198.

¹⁰ McCall's Ap., 56 Pa. 363.

¹¹ Giffin's Est., 30 Pitts. L. J. 60.

confirmation. Such exceptions will be heard, in their turn, when the argument list is called."¹² If the exceptions are sustained, the return will be set aside. The proceedings may be set aside for a grossly inadequate valuation;¹³ want of proper notice;¹⁴ plain mistake of fact or law, affecting the interests of the parties; omission to return a map or drafts of the purparts; or any other material matter set forth in the writ.¹⁵

Everything being regular, and no exceptions, the order of the court will be endorsed upon the return: Confirmed *nisi*. By the court. When the time fixed by the rule of court has passed, the order will be as follows:

Now, — day of —, A. D. 19—, report of inquest in partition confirmed absolutely and judgment entered that the partition made as returned be and remain firm and stable forever and that the costs be paid by the parties concerned.

By the Court.

A failure to confirm the return is fatal to all subsequent proceedings.¹⁶

46. Allotment when a higher price is bid.

Section 10 of the act of April 22, 1856, P. L. 532, was amended by the act of June 1, 1907, P. L. 364, so as to read thus:

"In all cases of partition of real estate in any court wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned, but if no higher offer be made for such real estate, or any part thereof, it shall be allotted or ordered to be sold as provided by law. Where the real estate or any part thereof, shall be allotted to the widow as the highest bidder, two-thirds of the purchase money thereof shall be paid to those entitled thereto, as provided by law; the remaining one-third of such purchase money shall be paid to a trustee or trustees, to be appointed by the court, which trustee or trustees shall give bond in double the amount of the money to be received, with sufficient sureties, to be approved by said court; the trustee or trustees, as aforesaid, shall pay annually, in lieu of dower, the interest on said one-third of the purchase money, to the widow during her life, and, at her death, the said trustee or trustees shall pay the said purchase money to such as are entitled by law thereto."

This act has been construed in *Scarlett's Est.*, 39 Supr. C. 284, held constitutional and it was decided that where the widow bid and was allotted the whole at her bid, she thereby lost her right to have one-half of the estate, which she would otherwise have received under the intestate laws. and could receive interest on only one-third. Under the practice in Chester County, she was also taxed with one-

¹² Rhone's O. C., vol. 3, p. 200.

¹³ Kreider's Est., 18 Pa. 374; *Rex v. Rex*, 3 S. & R. 533.

¹⁴ Stewart's Ap., 56 Pa. 241.

¹⁵ Rhone's O. C., vol. 3, p. 201.

¹⁶ Duffy's Est., 228 Pa. 563.

third of the costs.¹⁷ The legislature had overlooked widows who, since they had no children, were entitled to one-half of the realty. So the act of 1907 was amended by the act of May 8, 1909, P. L. 489, so as to provide that where the widow is entitled to one-third only, by law, two-thirds shall be paid to the heirs, and where she is entitled to one-half, she shall be given the one-half and the heirs one-half.

47. Rule to accept or refuse.

Section 8 of the act of April 7, 1807, 4 Sm. L. 398, provided as follows:

"In order to give the younger children or representatives of an intestate an opportunity of accepting or refusing the estate of the intestate, in case of an appraisement or partition into fewer parts than there are children or representatives, the Orphans' Courts of the different counties of this commonwealth are hereby authorized, upon application, to grant a rule upon any of the children or representatives, to come into court within a certain time, and to accept or refuse the same; a copy whereof shall be served upon the party personally, ten days before the return thereof, in case he, she or they reside within the county; or, if they reside out of the county, a copy of the rule shall be published in at least one newspaper printed in the proper county, or, if there be none therein, then in some adjacent county, and in one daily newspaper of the city of Philadelphia, for the space of one month before the return thereof; and in case he, she or they do not come in, according to said rule, and accept or refuse, the court shall and may direct the same to be offered to the next child or representative in order."

The rule need not contain the word bid.¹

Section 2 of the act of April 25, 1850, P. L. 569, provides:

"In all cases of the partition or valuation of real estate in any of the Orphans' Courts of this commonwealth, it shall be lawful for the said courts, upon the application of the widow or any of the heirs of the decedent, instead of the separate rules heretofore issued in such cases, to grant a rule upon the parties interested to appear and accept or refuse the said real estate at the valuation, or show cause why the said real estate, or any part thereof, should not be sold, in case they or any of them should neglect or refuse to take and accept the same as aforesaid."

Before the final confirmation of the inquisition, this rule cannot legally be issued.² If the court omits to fix a return day in the order for the rule and the clerk issues it to the first day of the next term, it is good.³ An order for publication in two newspapers, when only published in one, after the return has been confirmed, will be sufficient notice.⁴ It was formerly held that decedent's widow was not entitled to notice to accept or refuse; which notice may be served by anyone and need not be served by the sheriff.⁵

¹⁷ Martin's Est., 1 Chester Co. 512; Boyer's Est., 8 C. C. 423.

¹ McNeile's Est. (No. 6), 15 D. R. 341; 217 Pa. 179.

² Gross' Est., 6 York, 143.

³ Sankey's Ap., 55 Pa. 491.

⁴ Sankey's Ap., *supra*.

⁵ Geibler's Est., 1 Pearson, 445; Vensel's Ap., 77 Pa. 71; Horam's Est., 59 Pa. 152.

Section 40 of the act of 1832, *supra*, virtually supplies the act of 1807, and is as follows:

"In all cases of appraisement or partition mentioned in the preceding section, the Orphans' Court shall, on application, grant a rule on all persons interested to come into court at a certain day by them to be fixed, to accept or refuse the estate or a share or portion thereof, as the case may be, and in case the party entitled to a choice do not come into court in person, or by guardian or attorney duly constituted, or in case he shall refuse the same, a record shall be made thereof, and the court may and shall direct the same to be offered to the next in succession, according to the rules hereinbefore provided."

48. Form of petition for rule.

To the Honorable — —, President Judge of the Orphans' Court of Luzerne County:

In the matter of the partition of the estate of James Jordan, deceased.

The petition of Richard Jordan respectfully represents that on the — day of —, A. D. 19—, his petition was presented to your honorable court, whereupon a writ of partition was awarded, and in pursuance thereof an inquisition was, after due and legal notice, held upon the premises on the — day of —, A. D. 19—, and said inquest was duly returned to court, setting forth that the real estate in the said writ described could not be parted or divided equally among all the heirs, without prejudice to or spoiling the whole thereof, but that it could be parted and divided so as to accommodate more than one of the heirs and that they had divided the said real estate into three purparts and valued the same as follows:

Purpart No. 1 at \$2,000.

Purpart No. 2 at \$1,500.

Purpart No. 3 at \$1,800.

And the said return was by the court confirmed on the — day of —, A. D. 19—.

Your petitioner therefore prays the court to grant a rule on the heirs and other interested parties, to appear on a certain day, to be fixed by the court, and accept or refuse the real estate at the valuation, or make bids on the same, or show cause why the same shall not be sold on their neglect or refusal to accept the same.

And he will ever pray, etc.

— —,
Attorney for Heirs.

(Affidavit of truth.)

49. Form of order for rule.

Now, — day of —, A. D. 19—, upon consideration of the above petition, a rule is granted upon the heirs and other parties interested, to appear in open court on the — day of —, A. D. 19—, at — o'clock — M., and accept or refuse the real estate at the valuation returned, or make bids on the same, or show cause why the same shall not be sold on their neglect or refusal to accept the same. Notice to be given to all persons interested resident within the

Commonwealth of Pennsylvania, by personal service, and notice by advertisement for three successive weeks in the —, a weekly newspaper published in said county, to John Jordan and May Raesley, and that a copy of each issue of said newspaper containing said advertisement, to be sent by mail to each of said nonresident parties at his or her last known place of residence.

By the Court.

50. Form of publication of notice.

Estate of James Jordan, late of Franklin Township, Luzerne County, and State of Penn- sylvania, Deceased.	}	In the Orphans' Court of said County.
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Now, — day of —, 19—, court grant rule upon the heirs and other parties interested in the partition of the estate of the said decedent, to appear in open court, on — the — day of —, A. D. 19—, at — o'clock — M., and accept or refuse the real estate at the valuation fixed by return of inquest, or make bids on the same, or show cause why the same shall not be sold on their neglect or refusal to accept the same.

In pursuance of the above order, notice is hereby given to John Jordan, of Pittsburgh, Pa., and to May Raesley and William Raesley, of Corning, N. Y., and all other nonresidents of this commonwealth, interested in said estate, to appear in Orphans' Court on —, the — day of —, A. D. at — o'clock — M., in accordance with said order of the Orphans' Court.

— —, [Seal.]
Clerk of the Orphans' Court.

(Here add proof of publication to nonresident heirs.)

51. Form of acceptance of service.

We, the undersigned heirs of James Jordan, late of Franklin Township, county of Luzerne, and State of Pennsylvania, deceased, hereby accept service of the within rule, to accept or refuse the real estate at the valuation returned, or make bids on the same, or show cause why the same shall not be sold on their neglect or refusal to accept the same.

[Signed by each.]

An acceptance of service of notice of the rule is an admission of the legality of the proceedings, and an answer filed nineteen days after is too late to challenge the right.⁶

52. Form of rule to accept or refuse.

Lancaster County, ss.

At an Orphans' Court held at Lancaster, Pa., in and for said county, on the — day of —, A. D. 19—.

In the matter of the inquisition, held on the real estate of — —, late of —, in the county of Lancaster, Pa., deceased, which said inquisition was read and confirmed *nisi* on the — day of —, A. D. 19—.

⁶ McNeile's Est., No. 4, 15 D. R. 105; 217 Pa. 179.
VOL. 3 PRACTICE—22

And now, —, on motion of — —, Esq., the court grant a rule on the heirs and legal representatives of said deceased to come into court on — day of —, A. D. 19—, at — o'clock — M., to accept the real estate of said deceased at the valuation made thereof by the inquest aforesaid, to bid more for the same, or show cause why said real estate should not be sold according to law.

By the Court.

Attest: — —, Clerk of Orphans' Court.

53. Practice on rule.

"On the day fixed by the rule, any heir who desires to do so, makes a bid in writing, seals it in an envelope and delivers it to the clerk, and after all have exercised this right, the bids are opened by the clerk, read and filed. A decree is then drawn by counsel and submitted to the court awarding the purparts to the highest bidder on giving the required security.⁷ If no one bids the old rule of allotment prevails, and if no one elects to take the land at the valuation it is ordered sold.⁸ If a joint bid is made, the land or a purpart is awarded jointly.

"It will thus be seen that the order of proceedings at the return of the rule is (1) to accept bids above the valuation, if any; (2) if there be no bids, then to accept the offer of the heirs to take the purparts at the valuation in the order of preference as hereinafter set forth; (3) if no one bids above the valuation, and no one accepts at the valuation, then the court orders the land to be sold at public sale, unless all the parties agree that some one of their number may take it at an undervaluation. As the land belongs to the heirs they may all agree to any other modification of these methods of disposing of it.

"The several rules to show cause may be embraced in one with the foregoing alternatives, and they may be dispensed with by the court on application of all the heirs of full age and the guardians of such as are minors."

54. Interpretation of acceptance.

Laches loses the right to accept at the valuation, especially where the value has increased.⁹ It was formerly held that the widow is not included as one entitled to take the land at the valuation;¹⁰ but having been recognized in the acceptance, it is too late to object after the time for appeal has passed.¹¹ The alienee of the eldest son is entitled to take his place in the order of acceptance.¹² The ward is bound by the selection of a purpart by his guardian.¹³ Whilst a life-tenant (as a tenant by the curtesy) has no right to elect or to come in and bid, yet he has a right to claim all the incidental advantages that may accrue from an allotment or sale

⁷ Rhone's O. C., vol. 3, p. 202.

⁸ Eyerman v. Detwiller, *supra*.

⁹ Wentz's Ap., 7 Pa. 151.

¹⁰ Painter v. Henderson, 7 Pa. 48; Gourley v. Kinley, 66 Pa. 270; Geibler's Est., 1 Pearson, 445.

¹¹ Painter v. Henderson, 7 Pa. 48.

¹² Ragan's Est., 7 Watts, 438; Stewart's Ap., 56 Pa. 241.

¹³ Gelbach's Ap., 8 S. & R. 205.

and has an equal right to object to an unauthorized allotment by the inquest. He can only bid by leave.

When an inquest divide the purparts so as to be of unequal value and appraise them, their power of allotment is gone and their return will be set aside unless all the parties in interest agree to let it stand.¹⁴

The right to accept or refuse is statutory and executors are not authorized to do so.¹⁵

Since the widow has now the right to bid and take the land, the cases holding to the contrary are obsolete. She was formerly allowed to take as heir.¹⁶ A husband of an heir is not entitled;¹⁷ nor the life-tenant being father of deceased son who inherited from the maternal ancestor.¹⁸ The right of priority by age and sex applies only to the Orphans' Court.¹⁹

The act of 1856 does not change the order of choice.²⁰ In order to accept at the valuation it must be done on the return of the rule or the right will be forfeited.²¹ An order of sale was revoked where a notice of acceptance was sent to the attorney, whose absence was the excuse for not presenting it.²²

55. Purpose of bidding.

Judge Rhone says:²³

"This section provides for full equality among the heirs in the selection of the land and makes the valuation by the jury of little consequence so long as it is not above its market value. The purpose of this act was to enable the parties to correct unfairness or undervaluation and make the premises command the highest price, but only one bid is allowed lest the court room would be converted into an auction stall, and the parties be incited to over-reaching each other by superior means or by strife.²⁴ This mode of allotment of purparts is the most simple and fair and it has been quite universally adopted."

Since the act of 1856, a female heir may bid above the valuation and take the allotment in the first instance.¹ The bid of a married woman without the assent of her husband was held validated by her husband's joining in the recognizance.² All bids must be in writing³ and each party can make but one bid,⁴ and he can not raise it, amend it or withdraw it.⁵ The acceptance of several pur-

¹⁴ Sander's Est., 41 Supr. C. 77.

¹⁵ Ferguson's Est., 204 Pa. 253.

¹⁶ Danhouse's Est., 130 Pa. 256.

¹⁷ Eby's Est., 5 C. C. 434.

¹⁸ Himelspark's Est., 8 D. R. 183.

¹⁹ Klohs v. Reifsnyder, 61 Pa. 240.

²⁰ Bartholomew's Ap., 71 Pa. 291.

²¹ Wentz's Ap., 7 Pa. 151; Wistar's Ap., 13 Atl. 550.

²² Rasley's Est., 2 Leg. Rec. 232.

²³ Rhone's O. C., vol. 3, p. 202.

²⁴ Klohs v. Reifsnyder, 61 Pa. 240; Eyerman v. Detwiller, 136 Pa. 285.

¹ Horam's Est., 59 Pa. 152.

² Clever's Est., 40 Pitts. L. J. 358.

³ Eyerman v. Detwiller, 136 Pa. 285; Sutton's Ap., 112 Pa. 598.

⁴ Bartholomew's Ap., 71 Pa. 291.

⁵ Emerick's Est., 11 Phila. 74.

parts for his several wards, by a guardian, binds them.⁶ But if he has no funds he need not accept.⁷ He will not be held for a mistake of judgment.⁸ A guardian's acceptance will not be avoided because of an irregular appointment.⁹ The amount of the bid remains a lien upon the land.¹⁰ The right to bid was by the act of March 22, 1865, P. L. 31, conferred upon the committee of a lunatic or habitual drunkard.

56. Form of bid.

To the Honorable M. F. Sando, President Judge of the Orphans' Court of Lackawanna County:

I, Carl M. Wilson, one of the sons of James Wilson, late of Scranton City, deceased, hereby bid for purpart No. 1, in the inquest of partition, which is valued at \$2,000, the sum of \$2,500, or an advance of \$500 on said valuation.

Carl M. Wilson.

— day of —, A. D. 19—.

57. Form of acceptance of purpart.

To the Honorable M. F. Sando, President Judge of the Orphans' Court of Lackawanna County:

I, Llewellyn Jones, oldest son of Rhys Jones, late of the city of Carbondale, deceased, hereby accept purpart No. 3, in the partition of the estate of said deceased, at the valuation of said inquest, to-wit: three thousand dollars.

Llewellyn Jones.

— day of —, 19—.

58. Form of decree awarding purpart to bidder.

In the Estate of } In the Orphans' Court of Lackawanna
James Wilson, Deceased. } County.

In the matter of partition of said estate.

Now, to-wit, — day of —, 19—, Carl M. Wilson, one of the sons of James Wilson, deceased, having on the — day of —, A. D. 19—, filed in said court his written offer by which he bid and elected to take purpart No. 1 at the sum of \$2,500, which is more than the valuation fixed by the inquest, and there being no other bid, the court orders and adjudges the said land, to-wit: purpart No. 1, being all of that parcel or tract of land situate [here describe same] to the said Carl M. Wilson, his heirs and assigns forever; on condition that he enter into a recognizance, with security to be approved by the court, in the sum of \$5,000, less his share of the estate, as hereafter ascertained, conditioned to secure the payment of the costs and expenses of these proceedings and to secure unto Mary Wilson, widow of said decedent, her interest in the fund, and also to secure unto the other several heirs of said decedent the payment of the amounts due to them out of the fund with interest,

⁶ Totten's Ap., 46 Pa. 301.

⁷ Milligan's Ap., 82 Pa. 389.

⁸ Bowman's Ap., 3 Watts, 369.

⁹ Dull's Ap., 108 Pa. 604.

¹⁰ Wetherill v. Warner, 6 Phila. 182.

in the manner and at such time as the court may decree on the final distribution of the said fund agreeably to the acts of assembly in such case made and provided.

By the Court.

59. Form of decree awarding purpart at acceptance.

In the Estate of Rhys Jones, } In the Orphans' Court of Lackawanna
Deceased. } County.

In the matter of the partition of the real estate of said decedent.

And now, to-wit, — day of —, A. D. 19—, Llewellyn Jones, one of the sons of Rhys Jones, deceased, having, on the — day of —, A. D. 19—, filed in said court an acceptance by which he elected to take purpart No. 3 at the valuation fixed by the inquest, to-wit, the sum of three thousand dollars, and there being no other bid, the court order and adjudge the said land, to-wit, purpart No. 3, being all that certain tract or parcel of land, situate in the city of Carbondale, said county, and State of Pennsylvania, bounded and described as follows (here give a description of the land): to the said Llewellyn Jones, his heirs and assigns, forever, on condition that he enter into a recognizance, with security to be approved by the court, in the sum of four thousand dollars, less his share of the estate as hereinafter ascertained; conditioned to secure the payment of the costs and expenses of this proceeding, and to secure unto Jennie Jones, widow of said decedent, her interest in the fund, and also to secure unto the several other heirs of said decedent, the payment of the amount which shall be due to them, in the manner and at such times as the court may decree, on the final disposition of the fund, agreeably to the acts of assembly in such case made and provided.

By the Court.

60. Setting aside proceedings for fraud.

A daughter who, through the covin and misrepresentation of her brother, ignorantly signs a paper in partition proceedings by which she would lose her share, is not estopped from averring the fraud on her and coming in to move to have the proceedings set aside and the order revoked.¹ An estoppel to be binding must be intelligently made, in full light of the facts.² An inquisition may be set aside for plain mistake of law or fact or for fraud.³ If a guardian dies pending partition and the inquest proceeds without one to represent the ward the return will be set aside.⁴ Or if they include lands held adversely.⁵ After an allotment has been made, if the party fails to give security, the decree may be rescinded.⁶ An offer to give more for the land after 18 months have elapsed will be held too late.⁷ Where an heir's interest was sold at sheriff's sale and allotted

¹ Kimmel's Est., 226 Pa. 47.

² Miller's Est., 159 Pa. 562; Harrington v. Stivanson, 210 Pa. 10.

³ Kreider's Est., 18 Pa. 374; Horne's Est., 10 D. R. 226; Evans' Est., 3 Lanc. L. R. 17.

⁴ Korn's Est., 6 D. R. 435.

⁵ McMasters v. Carothers, 1 Pa. 324.

⁶ Fleming v. Rouch, 2 Pearson, 204.

⁷ Osborne's Est., 149 Pa. 412.

to the purchaser, the setting aside of the sale vitiates the allotment and it will be rescinded.⁸ The allottee is not to be deprived of his right because the recognizance was not properly filed. The court can rule him to perfect it.⁹

61. Preference as to lands in another county.

Section 9 of the act of April 7, 1807, 4 Sm. L. 398, provides:

"Where any person shall die intestate, after the passing of this act, leaving lands or tenements in more than one county in this commonwealth, if, after inquisition held, any of the legal representatives of such intestate shall accept of the real estate upon the valuation thereof, in any one county, such person shall not have the right of preference, or elect to take the real estate or any part thereof in any other county, until all the other heirs or legal representatives shall refuse to take the same at such valuation."

It is also provided that "In any case where one of the heirs of a decedent has elected to take the real estate of such decedent in one county, or any share thereof, if divided into shares, such heir shall not have the right of preference or election to take the real estate or any share thereof in any other county, or any other share in the same county, until all the other heirs shall have neglected, after due notice, or refused to take at such valuation."

62. Preference and election of heir confined to one share.

Section 45 of the act of 1832, *supra*, provided:

"In any case where one of the heirs of a decedent has elected to take the real estate of such decedent, in one county, or any share thereof, if divided into shares, such heir shall not have the right of preference or election to take the real estate or any share thereof in any other county, or any other share in the same county, until all the other heirs shall have neglected, after due notice, or refused to take the same at such valuation."

63. Title of allottee.

"The acceptance of real estate at the valuation and entry into a recognizance with surety approved by decree vests in the taker the fee simple in the land accepted, and the shares of the other heirs are divested *eo instanti*, and transmuted into personalty. They have no longer *jus in re*, but have from that time *jus ad rem*; in other words, a debt owing by the recognizor, secured by a lien on his estate in the land; they cannot reach the real estate only through the recognizance and can convey no right, title or interest therein."¹ This was a case where a married woman took the land in her own right. Where the husband and wife take it at the valuation they are tenants by entireties and not in common.²

A son, who is also guardian of minor children, who takes at the

⁸ Evans' Est., 150 Pa. 528.

⁹ Gregg's Ap., 20 Pa. 148.

¹ Livingston, P. J., in Eshelman's Case, 5 Lanc. Bar, No. 14; Comth. v. Cashman, 32 Supr. C. 459.

² Moyer v. Moyer, 13 D. R. 739. Jacobs, J. (See this case for discussion of the married woman acts.)

appraisement holds it in his own right and free from all trusts.³ The title vests when the allottee files his recognizance which is approved by the court, so that a loss by fire thereafter falls on him alone.⁴ But if by agreement with the other heirs he enters into possession before giving recognizance his equitable title may be levied upon and sold for his debt.⁵

64. Rents and liens.

Rents which accrue before partition belong to the co-tenants *pro rata*.⁶

Land charged with legacies, when partitioned, is subject to the lien apportioned.⁷ But a collateral tax is not apportioned and the sale of one purpart for enough to pay the tax discharges the whole.⁸ Where a mortgage is of an undivided interest partition shifts the mortgage to the purpart of the mortgagor.⁹ Judgment creditors must follow the purparts.¹⁰ The inquisition supersedes a power to lease or sell in a will.¹¹

65. Securing of owelty.

"It is manifest that if equal partition be made no heir has anything to pay but his share of the costs and expenses of the proceeding, but if equal partition cannot be made, and some one or more of the heirs take land, they will owe the rest something; this amount which is paid and received to equalize the partition is called owelty and the statutory mode of securing it is as follows:¹²

Section 37 of the act of 1832, *supra*, provides:

"In every such case, the party accepting the same or some one on his behalf, paying to the other parties interested their proportionable parts of the value of such estate according to the just appraisement thereof, made in manner aforesaid, or giving good security by recognizance, or otherwise, to the satisfaction of the court, for the payment thereof, with legal interest in some reasonable time, not exceeding twelve months, as the court may direct. And the persons to whom or for whose use payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same."

66. Recognizance for owelty.

The recognizance which the allottee must give to secure the widows and heirs their respective interests should be taken by the clerk in the name of the commonwealth for the use of those inter-

³ Cowan's Ap., 74 Pa. 329.

⁴ Dornblaser's Est., 22 C. C. 379.

⁵ Robisson v. Miller, 158 Pa. 177.

⁶ Carr's Est., 38 Pitts. L. J. 343.

⁷ McLanahan v. Wyant, 2 P. & W. 279.

⁸ Mellon's Ap., 114 Pa. 564.

⁹ Long's Ap., 77 Pa. 151; McCandless' Ap., 98 Pa. 489.

¹⁰ Williard v. Williard, 56 Pa. 119; Stewart v. Allegheny Natl. Bank, 101 Pa. 342.

¹¹ Stark's Est., 9 Kulp, 525.

¹² Rhone's O. C., vol. 3, p. 204.

ested, and upon it each one interested may sue for his own interest without joining the rest.¹³ The court must direct the time of payment and approve the security.¹⁴ Some old forms were taken in the name of the president judge, as the law prescribes no form,¹⁵ but the practice is as above stated.¹⁶

Section 3 of rule 14, Allegheny County, provides:

"Twenty-four hours' written notice of justification of recognizances in partition shall be given to parties interested, which recognizance signed by the principal, and when necessary by the sureties, shall be justified and acknowledged in open court."

Such recognizance need not be taken in open court elsewhere.¹⁷ If improperly entered, an opportunity will be given to perfect it.¹⁸ A recognizance by three severally for land taken jointly will hold.¹⁹ The recognizance binds the whole estate charged with owelty²⁰ and not the unpaid interests only.²¹ It is not a lien against other lands than those taken at the appraisement.²² After twenty years there is a presumption of payment against it, and under some circumstances less time.²³

In an action on the recognizance, advancements received by the plaintiff are a proper set-off.²⁴ The share of a deceased infant can only be recovered by the administrator.²⁵

Where the husband for his wife and in her right accepts the land and gives a recognizance, the only interest he acquires is a life tenancy in his wife's share,²⁶ and a right to the owelty he has advanced.²⁷

(For *scire facias* on recognizance, see Vol. II, p. 803.)

Owelty to the widow, if not secured by recognizance is not a continuing and preferred lien.²⁸ Where a recognizance is given and the allottee conveys a part of the land to an heir "as a recompense," parol testimony is inadmissible to explain this conveyance.²⁹

The interest of a son in a dower fund secured to his mother, on his

¹³ Kidd v. Comth., 16 Pa. 426.

¹⁴ Gregg's Ap., 20 Pa. 148. Woodward, J.

¹⁵ Riddles' Ap., 37 Pa. 177.

¹⁶ Eshelman v. Shuman's Admr., 13 Pa. 561; Comth. v. Same, 18 Pa. 343.

¹⁷ Hartman's Ap., 21 Pa. 488.

¹⁸ Gregg's Ap., 20 Pa. 148.

¹⁹ Ebbs v. Comth., 11 Pa. 374.

²⁰ Taggart v. Cooper, 1 S. & R. 496; Kean v. Franklin, 5 S. & R. 146; Allen v. Reesor, 16 S. & R. 10; Allen v. Getz, 2 P. & W. 310.

²¹ Cubbage v. Nesmith, 3 Watts, 314.

²² Allen v. Reesor, 16 S. & R. 10.

²³ Ankenny v. Penrose, 18 Pa. 190; Briggs' Ap., 93 Pa. 485; P. & L. Dig., vol. 15, cols. 25474-5.

²⁴ Blanchard v. Comth., 6 Watts, 309.

²⁵ Pauley v. Pauley, 7 Watts, 159.

²⁶ Fogelsonger v. Somerville, 6 S. & R. 267; McCullough v. Wallace, 8 S. & R. 181; Weeks v. Haas, 3 W. & S. 520; Sneviley v. Wagner, 8 Pa. 396; McMillan's Ap., 52 Pa. 434.

²⁷ Stoolfoos v. Jenkins, 8 S. & R. 167; Barkley v. Adams, 158 Pa. 396; Thompson v. Stitt, 56 Pa. 156.

²⁸ Hillbish's Ap., 89 Pa. 490.

²⁹ Comth. v. Cashman, 32 Supr. C. 459.

death, passes as personalty, and if he dies intestate, without wife or child, it goes to the mother.³⁰

As there is no lien docket in the Orphans' Court, a recognizance for owelty is a lien without being indexed, either there or in the Common Pleas, and the purchaser must beware;³¹ for it takes priority of a mortgage by the allottee of his interest, before allotment;³² and this applies to even an amicable partition.³³ It cannot be split so as to apply for some and not for others.³⁴ A purchaser at sheriff's sale under a judgment on the recognizance takes an exclusive fee simple in the entire lot.³⁵ It covers the entire interest, and the rule applies equally to a married woman's share.³⁶ The same result follows an Orphans' Court sale of the purpart for the payment of debts.³⁷ But an assignee's sale, without notice of the application to the owner of the owelty does not discharge it.³⁸

By a sale under judgments upon recognizances all the liens for owelty are discharged.³⁹ But where the parties agree that owelty charged upon land shall remain a lien until fully paid and the court so decrees, a purchaser at sheriff's sale takes the land, subject to the charge.⁴⁰ A minute on the clerk's docket is sufficient notice.⁴¹

Where the recognizance is to pay the heirs' shares within one year, held to include the widow's interest, also.⁴² When an heir takes a purpart the lien of the recognizance attaches at once.⁴³

The cognizor and his surety are personally liable on the recognizance,⁴⁴ and if the cognizor dies his personal estate is primarily liable.⁴⁵ Section 51 of the act of 1832 providing for satisfaction is silent as to notice and publication and mailing of copies has been held sufficient.⁴⁶

67. Form of recognizance.

We, James Roe, of Pittston, in the County of Luzerne, and State of Pennsylvania, and John Stone, of Wilkesbarre Township, said county, and State of Pennsylvania, acknowledge ourselves to owe and be indebted to the Commonwealth of Pennsylvania, for the use of Mary Roe, widow, and the children and heirs of Richard Roe, late of Franklin Township, in the County of Luzerne, and State of Penn-

³⁰ Keisel's Est., 24 Montg. Co. 34.

³¹ Riddle's Ap., 37 Pa. 177; Holman's Ap., 106 Pa. 502.

³² McCandless' Ap., 98 Pa. 489; Allegheny Natl. Bank's Ap., 99 Pa. 148.

³³ Darlington's Apprn., 13 Pa. 430.

³⁴ Leibert's Ap., 119 Pa. 517.

³⁵ Cabbage v. Nesmith, 3 Watts, 314; Klinger v. Siewell, 6 Kulp, 229.

³⁶ Snively's Est., 129 Pa. 250.

³⁷ Gilmore v. Comth., 17 S. & R. 276; Crawford v. Crawford, 2 Watts, 389.

³⁸ Dodson's Est., 6 C. C. 617.

³⁹ Hancock's Est., 1 Kulp, 85.

⁴⁰ Cella's Est., 17 Supr. C. 428.

⁴¹ Hartman's Ap., 21 Pa. 488; Riddle's Ap., 37 Pa. 177. But see Woodward, J., in Gregg's Ap., *supra*.

⁴² Bailey v. Comth., 41 Pa. 473.

⁴³ Light v. Zeller, No. 2, 144 Pa. 582.

⁴⁴ M'Carty v. Gordon, 4 Wharton, 321.

⁴⁵ Kinter's Ap., 62 Pa. 318.

⁴⁶ Hancock's Est., 1 Kulp, 85.

sylvania, deceased, in the sum of three thousand and fifty dollars, lawful money of the United States, to be levied of our and each of our goods and chattels, lands and tenements.

The condition of the above recognizance is such that, whereas, by an inquest awarded by the Orphans' Court of Luzerne County, purpart No 1, of the real estate of said Richard Roe, deceased, was valued and appraised at the sum of two thousand dollars, which valuation and appraisal was duly confirmed by the said court, and the said purpart was awarded to the said James Roe, on the — day of —, A. D. 19—, on his acceptance of the same at the valuation or sum of two thousand dollars. And whereas on the report of an auditor it has been found that there is due from him the sum of \$1,525, after deducting the costs of this proceeding and his share of the estate.

Now, if the said James Roe, his heirs, executors and administrators shall pay said Mary Roe, widow of said Richard Roe, deceased, the sum of — dollars, being the annual interest on — dollars of the said purchase money, one-half thereof semi-annually, on the — day of —, and the other half thereof on the — day of —, of each and every year, during her natural life, and shall pay to Jane Roe, John Roe, and Ann Brown, children of decedent, each the sum of — dollars, within one year from the — day of —, A. D. 19—, the same being the amount of owelty payable to said heirs on said purpart No. 1; and also pay to the various parties entitled thereto the full sum of one hundred and seventy dollars of costs and expenses of partition included in said report, within — days after this date; and shall also pay to Jane Roe, John Roe and Ann Brown, or their heirs or assigns, each the sum of — dollars, at the death of the widow, agreeably to the act of assembly in such case made and provided; then the above recognizance to be void; otherwise to be and remain in full force and virtue.

— —, [Seal.]
 — —, [Seal.]
 — —. [Seal.]

In the presence of

— —,
 — —.

[Where the rules of court require justification by sureties, add justification in the usual form.]

Taken and acknowledged in open court this — day of —, A. D. 19—.

By the Court.
 — —, Clerk.

[Above forms are from Vol. II, Rhone's O. C.]

It has been held that such recognizance should follow the order of court, there being no fixed form. It should show the exact amount due the widow,¹ and usually follows an auditor's report which finds such facts, and the amount of the costs and expenses. But in separate Orphans' Courts an adjudication only is necessary, which the judge makes upon petition for that purpose. However, the parties

¹ Bailey v. Comth., 41 Pa. 473.

may by agreement have an auditor appointed. The form of the recognizance above complies with the law.²

68. Effect of recognizance.

"The recognizance is a lien upon the land until paid, and any amount due thereon may be collected by an action of *scire facias* or of debt in the Common Pleas. It may also be collected by proceedings in the Orphans' Court, for it is provided by section 49 of the act of 1832, *supra*, that "in all cases where, in consequence of proceedings in partition, the share or any part thereof of an heir in real estate shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale or otherwise, the Orphans' Court, before making a final decree confirming the partition or sale as aforesaid, may appoint a suitable person as auditor to ascertain whether there are any liens or other incumbrances on such real estate affecting the interests of the parties; and if it shall appear, by the report of such auditor or otherwise, that there are such liens, the said court may order the amount of money, which may be payable to any of the parties against whom liens exist, to be paid into the court, and shall have the like power, as to the distribution thereof among lien creditors or others, as is now exercised by the courts of common law, where money is paid into court by sheriffs or coroners; and where recognizances or other security shall be given for the payment of money, the court may make an order on the party giving such recognizances or other security to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition"; and it is further provided by sections 1 and 2 of the act of May 14, 1866, "in all cases in which, under a proceeding in the Orphans' Court of any county, any money has been charged upon real estate, payable at a future period, it shall be lawful for any person claiming an interest therein, when the same shall have become payable, to apply, by bill or petition, to the said Orphans' Court for the payment of the same; whereupon, such court having caused due notice to be given to the owner of such real estate, and to such other persons as may be interested, shall proceed, according to equity, to make such decree or order for the payment of the said charge out of such real estate as shall be just and proper; and it shall be lawful for the owner of such real estate so charged, when the same shall become payable, to pay the amount of such charge into the said Orphans' Court, which payment shall operate as a complete discharge thereof; and the said Orphans' Court may thereupon appoint a suitable person as auditor to distribute the same among those legally entitled."³

The act of May 8, 1876, P. L. 140, *supra*, gives the Orphans' Court power to fix the time of payment of owelty.

69. Payment of owelty by nonresidents.

Section 1 of the act of April 6, 1844, P. L. 214, provides:

"In cases of partition of estates made by any Orphans' Court,

² Riddle's Ap., 37 Pa. 177.

³ Rhone's O. C., vol. 3, p. 205.

under authority of the acts relating to Orphans' Courts, and where the court shall have decreed any share or shares to any heir or legal representative, not residing within this commonwealth, with the payment of owelty annexed, it shall be lawful for the court, upon application made by any party lawfully interested in the same, to order a rule upon the party, his or her legal heirs or representatives, requiring the payment of said owelty, at such time and upon such terms and conditions as the court shall direct; and if the said rule cannot be served within this commonwealth, a publication thereof as directed by the first section of the act of March 26, 1808, relating to notice of partitions, shall be deemed an effectual service, and upon return and proof thereof, and upon refusal or neglect to comply with the said rule, the court may enforce the same by ordering a sale of such share or shares, for the purposes aforesaid, as in other cases of sales under the act of March 29, 1832."

The publication required by the act of 1808 is sufficient when it contains "the nature and substance of any such writ of partition, and if such publication be made in such [Philadelphia] daily newspaper, one day in each week, for six weeks successively, prior to the return day of the writ, and in the same manner, in one newspaper printed within or nearest to the county where such writ is to be executed it shall be deemed an effectual service in the cases by the said section intended to be provided for."

The act of April 11, 1835, P. L. 199 (section 4), provides for the publication of the summons in the common law action of partition, "in such newspaper as the court may direct, for six weeks previous" to the return day or the day of taking inquisition."

70. Owelty — Interest.

Under the act of May 8, 1876, P. L. 140 — relating to interest on owelty — the heirs making partition by agreement may provide that no interest shall be collected on a recognizance for owelty.⁴ There is no prescribed form of recognizance in partition.⁵ Interest as such is only recoverable where there is a failure to pay a liquidated sum due at a fixed day and the debtor is in absolute default.⁶ Interest runs from the time of acceptance and not the time of payment of the shares;^{6a} or from the time when allottee can get possession of the land.^{6b}

71. Rule to pay owelty.

Section 1 of the act of April 6, 1844, P. L. 214, provides:

"In cases of partition of estates, made by any Orphans' Court, under authority of the acts relating to Orphans' Courts, and where the court shall have decreed any share or shares to any heir or legal representative not residing within this Commonwealth, with the payment of owelty annexed, it shall be lawful for the court, upon application made by any party lawfully interested in the same, to

⁴ Meyers' Est., 179 Pa. 157.

⁵ Riddle's Ap., 37 Pa. 177.

⁶ Richards v. Citizens' Gas Co., 130 Pa. 37.

^{6a} Hubley v. Hamilton, 1 Yeates, 392.

^{6b} Bair's Est., 14 Lanc. Bar, 186.

order a rule upon the party, his or her legal heirs or representatives, requiring the payment of said owelty, at such time and upon such terms and conditions as the court shall direct; and if the said rule cannot be served within this Commonwealth, a publication thereof, as directed by the 1st section of the act of the 26th day of March, 1808, relating to notice of partitions, shall be deemed an effectual service; and upon return and proof thereof, and upon refusal or neglect to comply with the said rule, the court may enforce the same by ordering a sale of such share or shares, for the purposes aforesaid, as in other cases of sales, under the act of March 29, 1832."

72. Proceedings when estate is divided into fewer parts than there are heirs.

Section 7 of the act of April 7, 1807, provides:

"Where the estate of an intestate is divided into a fewer number of parts than there are children or representatives, and any one or all of the said parts is or are refused to be taken by the children or representatives, the like proceedings shall be had to sell the parts so refused, as is directed in case of an appraisement of the whole, in and by an act passed April 2, 1804. * * *"

The guardian of a minor may purchase it at the sale for his ward who is bound thereby.⁷

73. Rule to show cause why the land should not be sold.

Section 42 of the act of March 29, 1832, P. L. 190, provides:

"Upon an appraisement or valuation of real estate made as is hereinbefore provided, should all the heirs neglect, after due notice, or refuse to take the same at the valuation, the court shall, on the application of any one of the heirs, grant a rule upon the other heirs and others interested, to show cause why the estate so appraised should not be sold, which rule shall be returnable at the next regular session of the court, or at such subsequent period as the court, having respect to the circumstances of the case, may direct, and notice of such rule shall be given in the manner provided in this act for other notices to heirs; on the return of such rule, the court may, on due proof of notice to all persons interested, make a decree authorizing and requiring the executor or administrator, as the case may be, to expose such real estate to public sale, at such time and place, and on such terms, as the court may decree."

The executor or administrator, and no other, is required to make the sale.⁸

74. When rule to show cause may be dispensed with.

Section 42 of the act of 1832, *supra*, provides:

"The rule to show cause herein directed may be dispensed with by the court, on the application of all the heirs, if of full age, and of the guardians of such as are minors, for such decree, and notice of such sale shall be given by the executor or administrator, in the manner provided in this act for other notices of sale."

⁷ Bowman's Ap., 3 Watts, 369.

⁸ Hanbest's Est., 11 D. R. 418; Taylor's Ap., 119 Pa. 297.

Such sale is a judicial sale.⁹ It cannot be ordered until all the parties entitled have neglected or refused to take at the appraisal.¹⁰ Such sale passes the entire interest of the heirs and discharges all liens, including a first mortgage. A return of *nihil habet*, in partition, where a minor is defendant is in effect that there is no one in the county upon whom service of the writ as against the minor can be made.¹¹ In such sale the debtor is entitled to his exemption out of his share against the lien creditor.¹²

75. Sale of purparts left over.

If none of the heirs bid or elect to take any or all the purparts at the valuation, after due proof of notice given to all the parties in interest as required by law, the court may make an order directing the legal representatives to sell the real estate so left over, whether the whole or any part, at public sale, at such time and place, and on such terms as it may deem proper.

Section 44 of the act of February 24, 1834, P. L. 81, provides:

"The Orphans' Court are hereby authorized and required, in case of the neglect or refusal of the executor or administrator, to execute such order, or in case there be no executor or administrator, to appoint some suitable person trustee for the purpose of making such sale, who shall be subject to the same restrictions, and have the same powers, and whose proceedings shall have the same effect, to all intents and purposes, as are provided in the case of such sales by executors or administrators."

In a recent case it was held where there is a legal representative he is entitled to make the sale.¹³

76. Form of petition for sale of purpart.

Estate of Charles Wynne, { In the Orphans' Court of Bucks County.
Deceased.

To the Hon'ble ———, President Judge of the said Court.

The petition of Jennie Wynne, one of the heirs at law of Charles Wynne, deceased, respectfully represents:

That on the ——— day of ———, A. D. 19—, this honorable court awarded an inquest in partition on the estate of said decedent; that on the ——— day of ———, A. D. 19—, ———, Esq., high sheriff of said county, together with the jurors upon said inquest, made return that said real estate could not be divided without prejudice to or spoiling the whole and valued the same in three purparts; that the return of said inquest was on the ——— day of ———, A. D. 19—, confirmed absolutely; that purparts one and two were accepted and allotted to two of the heirs and that purpart three was not accepted, but the said heirs neglected and refused to take it and it remains undisposed of.

Your petitioner therefore prays the court to make a decree authorizing and requiring John Wynne, administrator of the said Charles

⁹ Sackett v. Twining, 18 Pa. 199; Robinson's Ap., 62 Pa. 213.

¹⁰ Gregg's Ap., 20 Pa. 148.

¹¹ Girard, Etc., Co. v. Farmers', Etc., Bank, 57 Pa. 388.

¹² Reed v. Hollibaugh, 3 C. C. 20.

¹³ Taylor's Ap., 119 Pa. 297; Arble's Est., 161 Pa. 373.

Wynne, deceased, to expose such part of the real estate not accepted as aforesaid, to be sold agreeably to the provisions of the act of Assembly in such case made and provided, and on his default thereof, to appoint some suitable person trustee for the purpose of making such sale.

And she will ever pray.

Jennie Wynne.

Sworn to, etc.

It was early held that before a sale can be ordered all the heirs must have refused or neglected to take at the appraisement.¹⁴ The time of sale is discretionary with the court¹⁵ and the rules of court will be liberally construed to effectuate the purpose.¹⁶ The court has power under the act of March 18, 1875, P. L. 29, to adopt a rule regulating notice by publication in newspapers and the legal journal.¹⁷ As stated above, where there is no legal representative, or where he refuses or declines, the court may appoint a trustee to make the sale and fix the security required,¹⁸ but he should be a resident.¹⁹ An order for security of the sum, is not an order to pay the heirs presently.²⁰ It has been held that a defendant in partition may waive the inquisition and consent to an immediate sale of the land.²¹

77. Form of order appointing trustee to make sale.

When the legal representative has declined to make sale or for some reason cannot do so, the court, upon being informed of the fact, will appoint a trustee as follows:

Estate of Charles Wynne, } In the Orphans' Court of Bucks County.
Deceased.

In matter of partition of the real estate of said decedent.

Now, — day of —, A. D. 19—, due proof of service of the rule to accept or refuse, etc., upon all the heirs and other interested parties having been made and adjudged sufficient, and all the parties interested having neglected to accept the land described as purpart number three in the writ of partition, or bid on the same, or show cause why the same should not be sold, the court order and decree that the same be sold according to law; and John Wynne, administrator of said decedent's estate, having declined, in writing, to give bond and make sale of said land, the court appoint Wynne James a trustee for the purpose of making the sale; and he is hereby authorized and required, after due and legal notice thereof, agreeably to the act of Assembly in such case made and provided, to expose the real estate, valued and appraised in these proceedings, to-wit, purpart number three, bounded and described as follows (here give

¹⁴ Gregg's Ap., 20 Pa. 148.

¹⁵ Neel's Est., 45 Pitts. L. J. 395.

¹⁶ Guido's Est., 10 Kulp, 150.

¹⁷ Adolph's Est., 11 Phila. 157.

¹⁸ Baughman's Est., 4 Lanc. Bar, No. 19.

¹⁹ Culp's Est., 5 C. C. 582.

²⁰ Robinson's Ap., 62 Pa. 213.

²¹ Schellinger's Est., 16 Phila. 376.

a description of the real estate), to public sale, at public vendue or outcry, on the premises, on — the — day of —, A. D. 19—, at — o'clock — M.; that in the event of not being able to obtain a sufficient bid for the said premises, the said trustee is authorized to adjourn the sale of the said land to some other time, not exceeding — days, and to such other place as shall seem to him most to the advantage of said estate, and at such adjourned time and place to expose again at public sale the said real estate and sell the same on the following terms, to-wit: The amount to be set apart to secure the widow's interest, to be and remain a lien upon the premises, as required by law; the interest thereof to be paid to her semi-annually, from and after the date of confirmation, during her life, and the principal thereof to be paid at her death to the parties legally entitled thereto; fifteen per cent. of the whole purchase-money down at the time of sale, eighteen and one-third per cent. on the confirmation of sale, and the balance, with interest, from the confirmation, in one year from the day of confirmation. The payments to be made after the confirmation to be secured by a bond and mortgage on the premises. Said order of sale not to issue or become operative until said trustee files a bond in the sum of four thousand dollars, with surety to be approved by the court.

By the Court.

[For form of bond see Sales of real estate, etc.]

78. Return days of writs or orders of sale.

Section 2 of the act of March 29, 1824, P. L. 159, provides:

"It shall and may be lawful for the several courts of this Commonwealth, having jurisdiction in cases of partition of real estate, to fix a day certain for the return day of writs or orders of sale, in cases where the parties refuse to take the estate at the valuation."

79. Form of notice by publication.

Estate of Charles Wynne, } In partition in the Orphans' Court of
Deceased. } Bucks County.

By virtue of an order of the Orphans' Court of Bucks County, the undersigned will expose to public sale on the premises, on the — day of —, A. D. 19—, at ten o'clock A. M., all that parcel and tract of land situate in — Township, said county, bounded and described as follows: [Give full description], being purpart number three in the partition of said decedent's estates; and he will sell the same to the highest and best bidder, on the following terms [state terms as in the order of court]; the interest on the remaining one-third, to be paid semi-annually to Edith Wynne, widow of Charles Wynne, and at the decease of said widow the principal sum thereof to be paid to the parties then legally entitled thereto. Deferred payments to be secured by bond and mortgage.

Wynne James,
Trustee.

80. Form of return of sale.

To the Hon'ble — —, President Judge of the Orphans' Court of Bucks County:

The undersigned trustee appointed by your honorable court to make

sale, pursuant to proceedings in partition, of, the real estate of Charles Wynne, fully described in the order of sale hereto attached, respectfully represents:

That under and by virtue of an order of sale, bearing date the — day of —, A. D. 19—, hereto attached, having first given due and timely notice by advertisement and hand-bills, during at least twenty days, as required by law and the rules of court, he did, on the — day of —, A. D. 19—, at ten o'clock A. M. on the premises, expose to public sale and sell the real estate, in said order described, situate [here describe same fully as in the order], to Reuben M. Magee, for the price of — dollars, on the terms in the said order set forth, he being the highest and best bidder, and that the highest and best price bid for the same: Which sale he prays may be confirmed by your honorable court.

Wynne James,
Trustee.

[Append affidavit of truth.]

To this should be added an affidavit of the publisher, for form of which, see *supra*; and also an affidavit of notice by hand-bills.

The return will be confirmed *nisi*, and after the time fixed by the rules of court, will be confirmed absolutely in the form given, *supra*.

81. Title not to be affected by revocation of letters.

Section 16 of the act of April 9, 1849, P. L. 527, provides:

"In all cases of *bona fide* sales under the order of, and confirmed by the Orphans' Court, the title of the purchaser shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sales. And purchasers of real estate sold under orders of the Orphans' Court shall, after the confirmation of the sale and the execution and acknowledgment of the deed, have a right to proceed to obtain possession of the purchased premises, in the same manner as is now provided in relation to purchasers at sheriff's sales."

82. Widow's share of purchase money to be charged on the land.

Section 43 of the act of 1832, *supra*, provides:

"Where a decree for the sale of real estate shall be made by the Orphans' Court, in the event provided for in the preceding section, the court shall direct that the share of the widow, if there be one, of the purchase money, shall remain in the hands of the purchaser during the natural life of the widow, and the interest thereof shall be annually and regularly paid to her by the purchaser, his heirs and assigns, holding the premises, to be recovered by distress or otherwise as rents are recoverable in this commonwealth, which the said widow shall accept in full satisfaction of her dower in such premises, and at her decease, her share of the purchase money shall be paid to the persons legally entitled thereto."

The officer making the sale has nothing to do with the distribution of the money.²²

²² Lucas' Ap., 53 Pa. 404.
VOL. 3 PRACTICE—23

Section 2 of rule 11, Philadelphia, requires the clerk of the court to see that section 43 of the act of 1832 is complied with.

83. Valuation and charge of the widow's interest.

The widow's interest, commonly called dower, is an interest in the land itself and, as such, is insurable.²³ There must be a lawful marriage to germinate the right, and once sprung up, only her deed, an absolute divorce or death will destroy it. By the English statute of Westminster, if a woman deserted her husband and lived with her *avouterer*, she lost her dower, unless her husband condoned the wrong and waived the taint by voluntarily becoming reconciled to her. But in Pennsylvania, neither desertion nor adultery will bar dower.²⁴ As stated above, death, absolute divorce, deed or articles of separation equivalent to a deed, will take away the statutory right.

"Tenant in dower is where the husband of a woman is seised of an estate of inheritance and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life."²⁵

Section 6 of the act of April 7, 1807, 4 Sm. L. 398, following earlier laws, provided:

"When partition is made of an intestate's real estate, and a part is allotted to each of his children or representatives, in case there be a widow of the intestate living and entitled to a part of the said real estate during her life, it shall be the duty of the inquest or referees making partition to estimate the value of the said part, and to apportion the same among the respective shares of the children or representatives; and upon confirmation thereof by the Orphans' Court, the same shall remain as a charge upon the said shares, and the interest thereof shall be annually and regularly paid to such widow, and may be recovered by action of debt, or by distress, as rents are usually recovered in this commonwealth; and where the estate of the intestate is divided into fewer parts than there are children or representatives, the same proceedings shall be had to estimate and apportion the widow's purpart among the said parts, which shall remain a charge thereon, and the interest thereof shall be paid and may be recovered as aforesaid; and upon the decease of any such widow, the whole value of the said purpart shall be distributed among all the said children or representatives in proportion to their respective shares, according to law."

The widow's share is an estate in the land and will not be discharged by a sheriff's sale of the land.²⁶ The above section does not govern where the estate is equally divided.²⁷

²³ Zehring's Est., 3 Supr. C. 243.

²⁴ Reel v. Elder, 62 Pa. 308; Nye's Ap., 126 Pa. 341; Holbrook's Est., 20 W. N. C. 79; Drinkhouse's Est., 151 Pa. 302.

²⁵ 2 Blackstone's Com. 129.

²⁶ Zeigler's Ap., 35 Pa. 173; Schall's Ap., 40 Pa. 170.

²⁷ Williams v. White, 35 Pa. 514.

84. The widow's share to remain a charge.

Section 41 of the act of 1832, *supra*, provides:

"Should the widow of the decedent be living at the time of the partition, she shall not be entitled to payment of the sum at which her purpart or share of the estate shall be valued, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one child or other descendant of the deceased, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be annually and regularly paid, by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said widow, during her natural life, in lieu and full satisfaction of her dower at common law, and the same may be recovered by the widow by distress or otherwise, as rents in this commonwealth are recoverable; on the death of the widow the said principal sum shall be paid by the children, or other lineal descendants, to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled."

This section is almost identical with section 4 of the act of March 23, 1764, 1 Sm. L. 262, and section 22 of the act of April 19, 1794, 3 Sm. L. 143, and the interpretation given these is applicable.²⁸

The heir cannot eject the widow without making provision for her.²⁹ Her share is real estate, as against her husband,^{29a} and is subject to execution.³⁰ Her right to distrain is not assignable and she must distrain for all.³¹ Her executor can distrain only for what was due at her death.³² Where the land is sold on a judgment against the *terre-tenant*, and the dower interest is in arrear such arrears must be paid out of the fund, as the sale discharges them.³³

85. Status of the dower interest.

"During the life of the wife, the ownership of the fund is vested in her, subject to her husband's possible title by the curtesy. At her death the ownership descends to those of her heirs who would have inherited the land itself had it remained unsold, but in their hands it loses its character as land and becomes personalty for all purposes."³⁴

The amount due a married woman on a recognizance in partition, at her death descends to her children subject to their father's life estate; and on the death of one of the children its interest will go to the father as personalty;³⁵ and a bequest of her interest so due will go to the legatee subject to the husband's tenancy. It can-

²⁸ Evans v. Ross, 107 Pa. 231.

²⁹ Gourley v. Kinley, 66 Pa. 270.

²⁹ Miller v. Leidig, 3 W. & S. 456.

³⁰ Shaupe v. Shaupe, 12 S. & R. 9.

³¹ Shouffler v. Coover, 1 W. & S. 400; Turner v. Houser, 1 Watts, 420; Baker v. Leibert, 125 Pa. 106.

³² Hay's Ap., 52 Pa. 449.

³³ Dickinson v. Beyer, 87 Pa. 274.

³⁴ Rhone, P. J., vol. 3, p. 213; Hay's Ap., 52 Pa. 449.

³⁵ Hay's Ap., *supra*.

not go to him without her consent.³⁶ When a married woman's interest is paid her, therefore, her husband must join in the release.³⁷ If the husband accepts the land at the valuation, in right of his wife it becomes hers, and he has no greater than a life estate subject to the recognizance.³⁸ The reason is plain: the husband has no standing as such to accept or refuse. The proper practice is to allot land to the wife and have him join in the recognizance.³⁹ But if he does not join, her own recognizance is valid.⁴⁰ She is, however, bound by a sheriff's sale of the purpart in his name, made under the recognizance.⁴¹

86. Assignment and proceeding on recognizance.

Parties who have an interest in the land as secured by recognizance may assign their interest and it will be equitably enforced.¹ A mortgage may operate as an equitable assignment.² The wife having authorized her husband to accept in her right, and who gives a recognizance for owelty, will be bound by his act, and a sale on the recognizance will pass her entire interest.³ When an heir is sued on the recognizance he cannot defend on the ground that there was a deficiency in the acreage, because the valuation was per acre and per whole.⁴ Where a lunatic dies the recognizance having been given by his committee, his administrator must bring suit on the bond of the committee and not on the recognizance.⁵

87. Payment into court, release and set-off.

The owner of land charged with dower, may pay the principal sum into court, under section 2, of the act of May 17, 1866, P. L. 1096, on the death of the widow.⁶ This he does on petition for leave setting forth the facts. An order to pay into court is a sufficient answer to an attachment execution.⁷ A party accepting a purpart may set off against the sum he owes, upon the claims of other owners, what they owe him on his purpart;⁸ but he cannot set off improvements and taxes paid prior to partition.⁹ A release of a part of the land bound by a recognizance releases only so much and not the whole.¹⁰ Trusteeship by an attorney, for all the heirs, cannot be set up against a recognizance.¹¹

³⁶ Nissley v. Heisey, 78 Pa. 418.

³⁷ Johnson v. Fritz, 44 Pa. 449.

³⁸ McMillan's Ap., 52 Pa. 435.

³⁹ Leibert's Ap., 119 Pa. 517; Snively's Est., 129 Pa. 250.

⁴⁰ Snively's Est., *supra*.

⁴¹ Barkley v. Adams, 158 Pa. 396.

¹ Grove's Ap., 103 Pa. 562; Dutton's Est., 181 Pa. 426.

² Potter v. Burd, 4 Watts, 15.

³ Barkley v. Adams, 158 Pa. 396.

⁴ Nichols v. Rummel, 3 P. & W. 195.

⁵ Comth. v. Royer, 161 Pa. 351.

⁶ Mount's Est., 7 D. R. 713.

⁷ Atkinson v. Hines, 5 Phila. 16.

⁸ Machette's Est., 4 W. N. C. 371.

⁹ Beatty v. Smith, 4 Yeates, 102; P. & L. Dig., vol. 15, cols. 25477-8.

¹⁰ Reigart v. Ellmaker, 14 S. & R. 121; Crawford v. Crawford, 2 Watts, 339; Jones' Ap., 14 W. N. C. 213; P. & L. Dig., vol. 15, col. 25482.

¹¹ Comth. v. Kreager, 78 Pa. 477.

88. The widow's interest, when the estate consists of more than one tract.

Section 1 of the act of January 7, 1867, P. L. 1367, provides:

"When the real estate of any decedent shall consist of several different tracts or pieces of land, and the same shall be adjudged to any of the parties entitled thereto, or ordered to be sold by any of the Orphans' Courts of this commonwealth, such court shall have authority to decree that the share or purpart of the widow of such decedent, in the whole of said real estate, together with the interest thereof, shall be and remain charged on one or more of the said tracts or pieces of land, in the manner and for the purposes now provided by law, and that the remaining tracts or pieces of land shall be wholly discharged from the share or purpart of such widow, or any part thereof: *Provided*, That the pieces or tracts of land, upon which such purpart or share shall be so charged, as aforesaid, shall, in the opinion of such court, be fully sufficient to secure the payment of the principal and interest of such purpart or share: *And provided further*, That such widow, and the parties entitled to such purpart or share at her death, shall have the same remedies for enforcing and recovering their respective interests in the same, as they now have by law."

89. Widow's share held in common before partition.

Section 8 of the act of April 24, 1834, P. L. 359, provides:

"In all cases in which the widow of an intestate now is or hereafter shall be entitled, under the intestate laws, to a share of or interest in the real estate of her deceased husband, to which he was entitled at the time of his death, in common or in coparcenary with any other person or persons, if the cotenants of the estate shall fail to make or obtain partition among themselves, so as to set out in severalty the portion appertaining to the intestate's estate, within one year after this act and in all future cases, within one year after the estate of the intestate shall come to the possession of his representatives, the several Orphans' Courts in this commonwealth shall have authority, on the application of the widow, to call before them all parties having interest in the premises, and to order an inquest to value the share or interest of the widow in the same, having reference to the intestate's purpart; and upon return of the said inquest and confirmation thereof, the said valuation and the interest thereof shall be and remain charged upon the premises until partition shall be made as aforesaid; and the legal interest shall be annually and regularly paid to the said widow, until such partition during her natural life, by the person or persons holding such real estate, and may be recovered by distress or otherwise, in like manner as in the case of a widow's share or purpart, charged upon real estate upon a partition in the Orphans' Court."

90. Widow's share may be charged on part of the land.

Section 8 continues:

"When partition of the said estate shall be thereafter made so as to set out in severalty the part or share appertaining to the said intestate's estate, the said Orphans' Court, on the application of

the widow, or any person concerned, shall have authority by their decree, to charge the said valuation in such manner as they shall deem just and equitable, upon the part or parts of the premises allotted in severalty, which appertained to the intestate's estate, and to discharge all other parts of the premises therefrom; and the said charge shall thereafter have the like force or effect upon the share of the estate which appertained to the intestate, and upon the holders thereof, and shall be payable and recoverable in like manner during the natural life of the widow, as if the said valuation had been charged upon the said real estate upon a partition in the Orphans' Court. And in all cases in which any partition among such cotenants shall result in a sale, the share and interest of the said widow in the money arising from such sale, shall be entitled to the same protection as the share of intestates' widows is now entitled to by law."

Section 48 of the act of March 29, 1832, requires that no share of a married woman shall be paid to her husband until he shall have given security to the satisfaction of the court. Since the acts of 1887 and 1893 have emancipated a married woman entirely as to her own estate, the money should be paid direct to her, on her refunding receipt or bond in which he should join.¹²

Section 46 of the act of 1834, *supra*, provides:

"In the case of a sale of real estate under proceedings in partition in the Orphans' Court, the share of any tenant for life shall not be paid to him or her, but shall remain charged on such or other real estate, according to the directions of such Orphans' Court; and in the case of a sale for the payment of debts, such tenant for life shall not be entitled to receive his share of the surplusage until he shall have given such security, under the direction of the Orphans' Court, as shall sufficiently provide for the interests of the persons entitled in remainder."

This section does not apply to life interests created after the death of the decedent, but only such as are created in the estate by the decedent himself or by act of law.¹³ Whether this section was intended to cover a tenant by the curtesy, who is a life tenant, has not been declared. Judge Rhone was of the opinion that no statute covered the case unless the equalizing statute of May 4, 1855, which will be discussed under "Inheritance."¹⁴

A judgment confessed fraudulently to defeat dower or tenancy by the curtesy will be opened and proceedings stayed.¹⁵

91. Widow's election of dower — Citation to elect.

Section 35 of the act of March 29, 1832, P. L. 190, provides:

"In every case of a devise or bequest to a widow, which by force of any last will and testament, or by operation of law, will bar such widow of dower, subject to her right of election of dower, or of the property devised or bequeathed, it shall be lawful for

¹² See Abraham's Est., 19 W. N. C. 451, on the act, *supra*.

¹³ Field's Est., 14 Phila. 304.

¹⁴ See Walker v. Dilworth, 2 Dallas, 257; Seiders v. Giles, 141 Pa. 93, which held that he cannot sue the remaindermen in partition.

¹⁵ Bramberry's Est., 156 Pa. 628.

the Orphans' Court, on the application of any person interested in the estate of the decedent, to issue a citation, at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time not less than one month thereafter, in the said court, to make her election, either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower, of which election a record shall be made, which shall be conclusive on all parties. If the widow shall neglect or refuse to appear upon such citation, then, upon due proof to the court, of the service thereof, the said neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower, of which a record shall be made, which shall be conclusive on all parties concerned."

92. Forms of petition for citation to elect.

To the Hon'ble — —, President Judge of the Orphans' Court of Delaware County.

The petition of Urbane Bosard, a resident of the city of Chester, in said county, respectfully represents:

That he is one of the legatees under the will of Jacob Bosard, deceased. That by the said will certain personal estate was bequeathed (or real estate devised) to Florence H. Bosard, the now widow of said decedent; that said decedent has been dead longer than twelve months, and the said Florence H. Bosard has not made her election to take or refuse the said bequest.

The petitioner therefore prays the court to award a citation directed to the said Florence H. Bosard, commanding her to appear and make her election, either to accept such (devise) (or bequest) in lieu of dower, or waive such devise or bequest, and to take her dower, pursuant to the direction of the 35th section of the Act of 29th March, 1832. And he will ever pray, etc.

Urbane Bosard.

(Affidavit of truth.)

93. Form of citation.

Delaware County, ss.

The Commonwealth of Pennsylvania.

To Florence H. Bosard, widow of Jacob Bosard, deceased.

We command you, that laying aside all business and excuses whatsoever, you be and appear in your proper person, before our justices of the Orphans' Court, at an Orphans' Court to be held at —, for the County of —, the — day of —, 19—, then and there to make your election, either to accept the bequest made you by your late husband, in lieu of your dower, or to waive such bequest and accept your dower, and hereof fail not.

Witness the Honorable, etc.

[Seal]

—, —,
Clerk of the Orphans' Court.

The citation having been served upon the widow and due proof of service made, on the return thereof, if she fails to appear and make her election, the court may order as follows:

In the matter of the estate of Jacob Bosard, deceased.

Now, — day of —, 19—, due proof having been made before

the court of the service of a citation directed to Florence H. Bosard, widow of Jacob Bosard, deceased, commanding her to be and appear before an Orphans' Court, holden this day, and to make her election either to accept the bequest made to her by her late husband, in lieu of her dower, or to waive such bequest and accept her dower. And the said Florence H. Bosard not having appeared, the court, pursuant to the act of Assembly in such case made and provided, doth order and decree that the said Florence H. Bosard be deemed to have accepted the said bequest, and that such acceptance be taken as a bar of her dower, and that a record may be made thereof accordingly.

By the Court.

94. Form of election for or against.

If the widow answers she will either accept or refuse under the will. If she elects to retain her dower, she refuses the bequest. No particular words are necessary. She may do so in brief as follows: To the Honl. Isaac Johnson, President Judge of the Orphans' Court of Delaware County.

In response to your citation I beg to notify your Honorable Court that I prefer to retain my dower rights and therefore refuse the bequest in the will of my late husband, Jacob Bosard.

Florence H. Bosard.

Chester, Pa., January 31, 1910.

Thereupon the court will order as follows:

In the matter of the estate of Jacob Bosard, deceased.

Now, — day of —, 19—, Florence H. Bosard, widow of Jacob Bosard, deceased, appears in open court, and refuses to accept the bequest made by her late husband, in lieu of her dower, and claims that she may have her dower as she is by law entitled thereto; and the said refusal is by order of the court entered of record.

By the Court.

95. Dower interest — Collection of.

The act of April 28, 1899, P. L. 120, provides:

"Whereas, difficulties arise in the collection of the dower interest due to widows, owing to the absence or non-residence of the owners of the land in which the dower is charged:

Section 1. Be it enacted, etc. That in all cases in which by proceedings in the Orphans' Court of any county, any money has been charged upon real estate, the interest on which is payable to any widow, she may as often as the same becomes due and payable apply by bill or petition to said Orphans' Court for payment of the same; whereupon such court, having caused due notice to be given to the owner of such real estate by personal notice if the same can be had, otherwise by publication, shall proceed according to equity to make such decree or order for the payment of the said interest out of such real estate as shall be just and proper: *Provided, however,* If the said real estate be sold on a judgment *de terris* for the recovery of said interest, that such sale shall not divest the lien of said dower."

This is in addition to her other remedies. Under section 6, of the act of April 7, 1807, 4 Sm. L. 398, she has a remedy by

action or by distress as for rent, and it was held that where the personal property on the premises is sold by the sheriff she may claim one year's interest due in arrear out of the proceeds as preference.¹

This right is personal and cannot be exercised in relief of other owners of purparts.² It has been held under section 14 of the act of March 29, 1832, P. L. 190, on the same subject that the right of distress also belongs to the widow of an heir, where the proceedings were instituted on the petition of all the parties and her interest charged upon the land.³ This right existed at the common law, before the statutes *supra*, were passed. She may bring an action in assumpsit against the purchaser of the land charged, for her annual interest in arrear, and this action being transitory, the judgment may be enforced in the court having jurisdiction of the person of the purchaser.⁴

96. Sale of dower interest, by vend. ex.

Whether the interest of a widow charged on land be called a mere "interest in lieu of dower" or a "dower," the courts have settled that under the various acts quoted, *supra*, the right is an interest in land and as such is capable of being sold on a *vend. ex.* But section 4, of the act of January 24, 1849, P. L. 676, provides "that the writ of *venditioni exponas*, as authorized by the third section, shall not be issued in any case wherein the annual rent, found by the jury aforesaid, shall be sufficient to pay the interest on the debts entered of record: *And provided also*, That no such writ shall be issued unless by the direction of the proper court; and on the application of any lien creditor for a writ of *venditioni exponas*, the tenant for life shall have at least ten days' notice of the application for such writ." This act applies to a dower tenant.⁵

97. Notice to nonresident life tenant.

The 4th section, *supra*, was amended by act of June 4, 1901, P. L. 426, by adding to it the following:

"But if the tenant for life be a nonresident of the Commonwealth of Pennsylvania, and his whereabouts cannot be ascertained after diligent inquiry, upon the presentation to the court by petition of any lien creditor, setting forth such facts, the court is hereby directed to grant an order of publication, in at least two weekly newspapers in the county where the life estate is located, for a period of four weeks, and the mailing of a copy of each of such publications to the life tenant's last known place of residence shall have the full force and effect as if the life tenant had received personal notice and shall entitle any lien creditor to a writ of *venditioni exponas*."

¹ Knight v. Banes, 2 Miles, 69; Turner v. Hauser, 1 Watts, 420.

² Shouffler v. Coover, 1 W. & S. 400.

³ Baker v. Leibert, 125 Pa. 106.

⁴ Kunselman v. Stine, 192 Pa. 462; Penna. Annuity Co. v. Vansyckel, 2 Pitts. 535. (See authorities in S. B. Boyer's Brief, Kunselman v. Stine, *supra*.)

⁵ Kunselman v. Stine, 183 Pa. 1; Kintz v. Long, 30 Pa. 501.

98. Satisfaction when presumption of payment has arisen.

The act of June 8, 1893, P. L. 356, provides the manner of proceeding to satisfy dower or legacy charged upon land when the presumption of payment has arisen. For this, see charges on land.

99. Executor, etc., to give security before sale.

Section 43 of the act of February 24, 1834, P. L. 70, provides:

"No executor or administrator shall have power to execute any order or decree of the Orphans' Court for the sale of any real estate, for the purpose of distribution or otherwise, nor to receive the proceeds of the sale of any of the real estate of the decedent made by authority of law, until he shall have given security to be approved of by the Orphans' Court having jurisdiction of his accounts, for the faithful application of the proceeds of such real estate according to law."

100. Sale may be public or private.

The act of May 22, 1895, P. L. 114, authorizes any court having jurisdiction, when it shall order or has ordered any such real estate or any purparts thereof to be sold, to decree and approve a private sale thereof or to approve, ratify and confirm a private sale thereof made under an order for a public sale, if in the opinion of the court, under all the circumstances a better price can be obtained at a private sale than at a public sale thereof; but no such sale shall be confirmed absolutely until security be given to be approved by the court in at least double the value of the interest sold."

Whether the sale be made by a legal representative or a trustee specially appointed by the court, he is bound to follow the terms of sale as fixed by the court under the authority given by the act of April 2, 1804, 4 Sm. L. 183.⁶ But if all the heirs consent to give a year's time, the court may subsequently ratify the change.⁷ The purchaser who makes a verbal stipulation with the auctioneer, not known to the trustee, cannot set it up against a rule on him why the land should not be resold at his risk and costs.⁸ It is no objection that an heir procures some one to bid for him at the sale.⁹ Having authorized another to bid for him, he is bound by it.¹⁰ An administrator *d. b. n.* appointed more than 21 years after the death of decedent, without leave of court is not entitled, as of right, to make a sale and a trustee will be appointed for that purpose;¹¹ and, in appointing such trustee the court will consider the requests of persons whose interests preponderate.¹² Where the court has awarded separate orders, the administrator should sell separately and not as a whole, or the sale will be set aside. The rule as to sheriff's sales, that inadequacy of price is not sufficient

⁶ Eshelman v. Witmer, 2 Watts, 263; Schneider's Est., 11 Kulp, 201.

⁷ Newlin v. Britton, 38 Leg. Int. 338.

⁸ Stewart's Est., 26 Pitts. L. J. 53.

⁹ Miller's Ap., 1 W. N. C. 242.

¹⁰ Lowrie's Est., 46 Pitts. L. J. 74.

¹¹ Hanbest's Est., 21 Supr. C. 427, reversing 11 D. R. 418, *supra*.

¹² Hanbest's Est., 12 D. R. 114.

to set aside the sale does not obtain in the Orphans' Court.¹³ The court is bound to see that the best price possible is obtained.¹⁴

If the purchaser fails to comply with the terms within a year the sale will be set aside.¹⁵ A rule to set aside a sale more than a year after delivery of deed, without notice to the purchaser will be refused.¹⁶

101. Ascertainment of liens against heirs.

An auditor to ascertain whether any of the heirs have incumbered their interests, may be appointed on the application of the trustee. Section 49 of the act of March 29, 1832, P. L. 190, is not compulsory, but authorizes the court to appoint an auditor,¹⁷ on the application of a party in interest¹⁸ which should be made before the confirmation of the sale.¹⁹ But if a just claim appears the court may act after confirmation as well.²⁰ The sole purpose of this act is to sever possession, and the appointment of an auditor is in aid of it.²¹

102. Confirmation of sale.

The final confirmation of a sale is not complete until the terms have been complied with, purchase money paid, deed acknowledged and delivered.²² Until then any one interested in the estate, or in realizing a higher price may move to set it aside.²³

If the price of some parcels was inadequate the sale will be set aside only as to these.²⁴ The right of the petitioner to petition cannot be challenged on a motion to set aside.²⁵ If the trustee appointed fails to give security, on exception, the sale will be set aside.²⁶ For variation of the terms a sale may be set aside before but not after confirmation.²⁷ A purchaser must beware and he cannot have the sale set aside for mere disappointment as to the quantity or character of decedent's interest, when he shows no fraud or misrepresentation;²⁸ but the court may relieve him where the title is not good,²⁹ or where the sale was made free of incumbrance, and there was a right of way over it.³⁰ The heirs will be protected against a sale for a grossly inadequate price,³¹ or

¹³ Sander's Est., 18 Montg. Co. 117. Solly, P. J.

¹⁴ Grew's Est., 14 D. R. 225.

¹⁵ Bode's Est., 14 D. R. 440.

¹⁶ Breban's Ap., 13 Leg. Int. 173.

¹⁷ Lucas' Ap., 53 Pa. 404; Wistar's Ap., 125 Pa. 526.

¹⁸ Zittle's Est., 4 Lanc. L. R. 163.

¹⁹ Hummel's Ap., 5 Atl. 669; Stoner's Est., 8 York, 26.

²⁰ Kerr's Est., 4 Phila. 182; Wilson's Est., 2 Chester Co. 217.

²¹ Hawkins, P. J., in Beynon's Est., 48 Pitts. L. J. 381.

²² McRee's Est., 6 Phila. 75.

²³ Hamilton's Est., 51 Pa. 58.

²⁴ Riley v. Buckley, 1 W. N. C. 167; Baum's Est., 31 Pitts. L. J. 197.

²⁵ Taylor's Est., 16 D. R. 95.

²⁶ Guido's Est., 10 Kulp, 150.

²⁷ Stewart's Est., 26 Pitts. L. J. 53.

²⁸ Rush's Est., 1 Phila. 404.

²⁹ Bell v. Fulmer, 1 Phila. 43.

³⁰ Whiteman's Est., 13 Phila. 249.

³¹ Allen's Est., 11 Phila. 48.

where a higher price can be obtained.³² The court has power to enforce specific performance of its sale,³³ but it will not do so when the title is dubious.³⁴

103. Rights and duties of purchaser.

The guardian of a minor may purchase at the sale;³⁵ or the wife of an administrator;³⁶ or the executor when a trustee is appointed to make the sale,³⁷ or at his own sale if leave is given under the act of 1878. A distributee who becomes purchaser may be permitted to hold back part of the purchase money.³⁸ On a void proceeding *ab inito*, the purchaser may not recover the part applied to decedents' debts.³⁹ Where the land is assessed for taxation between confirmation and delivery of the deed the purchaser is liable for the taxes.⁴⁰ Where the taxes were assessed before sale but after the death of decedent the heirs and not the administrator, are liable, and if the purchaser is compelled to pay them he should recover from them.⁴¹ The purchaser is under no duty to see to the application or distribution of the purchase money.⁴² He is entitled to obtain possession in the manner provided by act of April 20, 1905, P. L. 239.⁴³

104. Purchaser to give recognizance.

Section 1 of the act of May 23, 1871, P. L. 274, provides:

"The purchaser or purchasers shall enter into recognizance in the Orphans' Court, with sufficient surety, to be approved of by said court, for the payment of the balance of the purchase money to the widow and heirs, or legatees, who may be entitled to the same."

105. Before suit on recognizance, refunding bond to be given.

Section 2 of the same act, *supra*, provides:

"Before any suit or action shall be commenced on any recognizance entered into as aforesaid, the person or persons entitled to receive the money secured thereby shall respectively give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, or a judge of said court, when the court is not in session, with condition, that if any debt or demand shall be afterward recovered against the estate of the decedent, or otherwise be duly made to appear, they will respectively refund the ratable part

³² Hamilton's Est., 51 Pa. 58.

³³ Hore's Est., 11 Phila. 63.

³⁴ Howe's Est., 3 D. R. 267.

³⁵ Bowman's Ap., 3 Watts, 369.

³⁶ Armstrong's Ap., 68 Pa. 409.

³⁷ Reid v. Clendenning, 193 Pa. 496.

³⁸ Bloodgood's Est., 8 C. C. 545.

³⁹ Perrine v. Kohr, 20 Supr. C. 36, affirmed (Supreme Court), 205 Pa. 602.

⁴⁰ Evan's Est., 2 Woodward, 166.

⁴¹ Henry v. Horstick, 9 Watts, 412.

⁴² McGinnis v. Davis, 29 Pitts. L. J. 310.

⁴³ For Practice complete see vol. 2, p. 504.

of such demand, and the costs and charges attending the recovery of the same, so far as such real estate would have been liable to such demand, if it had remained unsold; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, as directed in the 41st section of the act of February 24, 1834."

Although administration accounts should not be blended with distribution, when it is so done, and confirmed by the court, it does not relieve the administrator from the duty of taking refunding bonds.⁴⁴

106. Lien of recognizance.

Section 3 of the act *supra*, provides:

"The recognizance aforesaid shall be a lien on the real estate so as aforesaid sold, until fully paid or satisfied."

107. Appointment of auditor to ascertain liens, etc.

Section 49 of the act of March 29, 1832, P. L. 190, provides:

"In all cases where, in consequence of proceedings, in partition, the share or any part thereof of an heir in real estate shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale or otherwise, the Orphans' Court, before making a final decree confirming the partition or sale as aforesaid, may appoint a suitable person as auditor, to ascertain whether there are any liens or encumbrances on such real estate, affecting the interests of the parties; and if it shall appear by the report of such auditor or otherwise, that there are such liens, the said court may order the amount of money which may be payable to any of the parties against whom liens exist, to be paid into the court, and shall have the like power as to the distribution thereof among lien creditors or others, as is now exercised by the courts of common law, where money is paid into court by sheriffs or coroners; and where recognizances or other security shall be given for the payment of money, the court may make an order on the party giving such recognizances or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition."

The parties must apply for an auditor, if they wish one.⁴⁵

108. Calculation of amounts due parties.

Section 1 of the act of April 12, 1855, P. L. 214, provides:

"Hereafter in all cases of partition in the Orphans' Court, where said court shall order and decree any party taking any portion of the estate at the appraisement to give any recognizance for the payment of any part of the valuation, it shall be the duty of the clerk of said court, in all cases in which an auditor has not been, or may not be appointed by the said court, for the purpose of ascertaining advancements and making distribution among heirs and parties in interest, to make a calculation exhibiting the amounts due the

⁴⁴ Louise Jones' Ap., 99 Pa. 124.

⁴⁵ Lucas' Ap., 53 Pa. 404.

respective parties in interest, and to record said calculation, when approved by the court, upon the docket of said court, as a part of the proceedings in each case, for which services the clerk shall be entitled to a fee of one dollar."⁴⁶

Rents accruing before partition belong to the co-tenants *pro rata*.⁴⁷

109. Payment into court.

The act of April 28, 1868, P. L. 105, so amends the act of March 27, 1865, P. L. 45, *supra*, "that the court may in its discretion require such payment [into court] or may make such order as may be just in the premises."

"Where two parties are alone interested and one should become the purchaser of the real estate sold," it is unreasonable that he should pay into court the entire amount of his bid in cash, when upon settlement of the account he would be entitled to repayment of one-half."⁴⁸

110. Payment into court — Depository, Philadelphia.

Rule 7, Philadelphia Orphans' Court, provides:

"The Pennsylvania Company for Insurances on Lives and Granting Annuities shall be the depository of this court. All moneys which heretofore have been or shall hereafter be directed to be paid into court, shall, upon the receipts thereof by the clerk, be immediately deposited by him with the said company to the credit of the court, in the particular estate or proceeding to which they may respectively belong; and the said company shall keep a separate account of said payments, designating the same by the name of said estate or proceeding. No money shall be paid out of court by said company, except on the checks of the clerk, accompanied by a certificate, endorsed on said checks, under the hand of the clerk and the seal of the court, that the money was ordered to be paid, and countersigned by one of the judges of this court. Whenever ordered by the court, the clerk shall have his bank or deposit book settled in said company, and make and present to the court an account of the moneys paid into and out of court and exhibit his deposit book as a voucher for the correctness of said account."

111. Title acquired by sale.

The purchaser takes no greater title than that vested in the parties to the proceeding.¹ An incumbrance placed upon the estate by an heir after the death of the intestate does not diminish the title; it only affects the heir's interest in the proceeds.² The entire interest of an heir sold at sheriff's sale passes, which includes the share of the dower interest as well.³ All parties in interest may waive inquisition and have the court appoint a trustee to sell.⁴

⁴⁶ As to recognizance and interest see Meyer's Est., 179 Pa. 157.

⁴⁷ Carr's Est., 24 Pitts. L. J. 140.

⁴⁸ Bloodgood's Est., 20 Phila. 1.

¹ Allen v. Gault, 27 Pa. 473.

² Steel's Ap., 86 Pa. 222; Bigley v. Jones, 114 Pa. 510.

³ Haines v. Eshelman, 19 Lanc. L. R. 257; 25 Supr. C. 381.

⁴ Scherr's Est., 19 W. N. C. 64.

112. Completion of title after death of trustee.

Section 4, of the act of April 9, 1849, P. L. 524, provides:

"In all cases of sales heretofore made, as well as in all cases of sales hereafter made, by a trustee appointed by the Orphans' Court, of any county within this commonwealth, to make sale of real estate after proceedings in partition, and where such sales have been or shall be held under such order, and the said trustee shall be removed by the court, or has died or shall die or become insane, or otherwise incapable of acting, before a conveyance is made to the purchaser, on the purchaser or the succeeding administrator of such decedent, or on the administrator of such trustee petitioning the court, it shall be lawful for the administrator of the decedent, whose estate was sold, or for the administrator of the trustee, after giving security, to be approved of by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; but if within three months there be no succeeding administrator or administrators of such trustee, having given security as aforesaid, it shall be the duty of the Orphans' Court, on the petition of the purchaser, to direct the clerk of the Orphans' Court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and delivering to the clerk the securities required by said terms and conditions, which moneys and securities shall remain subject to the disposition of the court. Every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property therein described in the grantee⁵ as fully and effectually as if the same had been made by the persons who may have sold any such estate circumstanced as aforesaid."

113. When estate not to be liable for debts of decedent.

Section 42 of the act of February 24, 1834, P. L. 70, provides:

"Whenever the real estate of a decedent, or any part thereof, shall be sold by an executor or administrator, by virtue of an order of an Orphans' Court having jurisdiction under proceedings in partition, such real estate shall not be liable, in the hands of the purchaser, to the debts of the decedent, provided such sale be made after the expiration of two years from the granting of letters testamentary or of administration."

Section 1 of the act of March 27, 1865, P. L. 45, provides that "the 19th section of the act of February 24, 1834, shall be extended to all sales of real estate of decedents, made by virtue of an order of an Orphans' Court, under proceedings in partition, whether the said sales be made before or after the expiration of two years from the granting of letters testamentary or of administration and that the moneys arising from such sales shall be paid into court and distributed according to law."

While a sale within two years does not divest the lien, the parties

⁵ Printed "grantor" in the act.

must come into court and participate in the distribution, the liens taking priority.⁶

If there be but two parties, one the purchaser, interested, the whole amount need not be paid in, but only so much as will cover the costs, liens and share.⁷ When the land is sold before the two years have expired, as provided by the act of 1909, an agreement of all the heirs and parties in interest may be entered into, to the effect that the proceeds of the sale shall stand for the debts and the land be discharged in the hands of the purchaser.

114. Distributees must give security to refund.

Section 45 of the act of 1834, *supra*, provides:

"Before any distribution of the proceeds of such real estate shall be made among the kindred of the decedent, the persons entitled to receive the same, shall, respectively, give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, with condition that if any debt or demand shall be afterwards recovered against the estate of the decedent, or otherwise be duly made to appear, they will respectively refund the ratable part of such demand, and the costs and charges attending the recovery of the same, so far as such real estate would have been liable to such demand, if it had remained unsold; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, as directed in the 41st section of this act."

115. Administrator or trustee to file account, after sale.

Section 1 of the act of April 11, 1863, P. L. 341, provides:

"In all cases hereafter, upon the sale of any real estate by an administrator or trustee, after proceedings in partition in the Orphans' Court, it shall be the duty of the said administrator, or trustee, to file in the office of the register of the proper county an account of his said administration, or trusteeship, in the same manner as is now, by law, required in the settlement of the estates of decedents."

The purpose is to bring the fund into court for distribution,¹ and when so accounted for and the money actually paid over to the guardians of the minor heirs and releases taken, it is payment to such minors.²

Section 1 of the act of March 27, 1865, P. L. 45, required the moneys to be paid into court to be distributed but section 1 of the act of April 28, 1868, P. L. 105, made it discretionary with the court to "require such payment or make such order as may be just in the premises." It is not the business of the fiduciary making the sale to distribute the money.³ But if he undertakes to do so and blends distribution with his account, he will not be held liable as for a *devastavit*.⁴ The trustee and his bondsmen will be liable

⁶ Parkinson's Est., 1 Del. Co. 349.

⁷ Bloodgood's Est., 8 C. C. 545.

¹ Robinson's Ap., 62 Pa. 213.

² Kann's Est., 69 Pa. 219.

³ Culver's Est., 7 Kulp, 219.

⁴ Transue's Est., 141 Pa. 170; Lucas' Ap., 53 Pa. 404.

for settlement with the heir, when he paid without refunding bonds, and left a mortgage by the heir unpaid.⁵ Receipts from the heir on account of his share, prior to accounting may be referred without notice of special matter, in a suit by the heir for his distributive share.⁶ If the trustee erroneously charges himself in his account with the widow's interest charged on the land, it may be corrected by bill of review.⁷ But he should avoid mixing up with the proceeds of the sale such items as rents and products of the real estate.⁸ The sureties have no standing to appeal from the confirmation of such account.⁹ A discharge of the trustee is not conclusive as against a lien creditor who had no notice of the filing of the account.¹⁰

116. Discharge of liens by sale.

It has already been stated that the general rule is that the sale in partition divests the lien created by a tenant in common and continues it upon the fund produced by the sale.¹¹ But this does not apply to the debts of the decedent which remain a lien for two years after his death by act of May 3, 1909, P. L. 386,¹² and if the land is sold and the sale confirmed within two years from his death the purchaser takes it subject to the lien of such debts.¹³ Now, if the heirs would confer a good title free from the lien of decedent's debts they must all sign an agreement when the sale is ordered that all just liens shall be paid out of the proceeds of the sale.¹⁴ This statute does not cover the interest of a deceased heir, so that one having a claim thereon must look to the fund.¹⁵ Mortgages are excepted under the act of May 19, 1893, P. L. 110, as amended by act of May 8, 1901, P. L. 141, and will not be discharged unless the mortgagee joins in the proceeding as required by the first act.

117. Distribution and marshaling.

Upon distribution the Orphans' Court has jurisdiction to decide all questions necessary thereto, such as arise between adverse claimants to the fund.¹⁶ It has exclusive jurisdiction and an action at law cannot be maintained, in such case.¹⁷ It has exclusive jurisdiction to decide questions of advancements.¹⁸

"Where there has been no actual partition, but a part or the

⁵ Comth. v. Rodgers, 6 Supr. C. 284.

⁶ Comth. v. Shipman, 3 Atl. 856.

⁷ Yoder's Ap., 45 Pa. 394.

⁸ Zerphy's Est., 13 Lanc. L. R. 164.

⁹ Hise's Est., 5 Watts, 157.

¹⁰ Krug v. Keller, 8 Supr. C. 78.

¹¹ Comth. v. Rodgers, 6 Supr. C. 284.

¹² Miller's Est., 9 D. R. 510.

¹³ Bricker's Est., 22 Supr. C. 12; Wilson's Ap., 45 Pa. 435.

¹⁴ Bierly on Procedure by Petition and Rule, p. 236.

¹⁵ Stoner's Est., No. 2, 8 York, 27.

¹⁶ King's Est., 215 Pa. 59; Dickinson's Est., 148 Pa. 142.

¹⁷ Fromberger v. Greiner, 5 Wharton, 350.

¹⁸ Datt's Est., 34 Pitts. L. J. 349; Harris' Ap., 10 Atl. 135; P. & L. Dig., vol. 15, col. 25529.

whole of the land has been taken at the valuation, the accepting heir will owe something to the other owners, and, in such case, the usual practice is to have an auditor appointed to adjust the matter, although the parties may make the adjustment by agreement, when the clerk of the court will file the same of record, provided the costs and expenses of the partition be also adjusted and paid.¹⁹

Section 49 of the act of 1832, *supra*, provides:

"In all cases where, in consequence of proceedings in partition, the share, or any part thereof, of an heir in real estate shall be converted into money, either by reason of the impracticability or inequality of partition or by virtue of a sale or otherwise, the Orphans' Court, before making a final decree confirming the partition or sale as aforesaid, may appoint a suitable person as auditor to ascertain, whether there are any liens or other incumbrances on such real estate affecting the interests of the parties; and if it shall appear, by the report of such auditor or otherwise, that there are such liens, the said court may order the amount of money, which may be payable to any of the parties against whom liens exist, to be paid into the court, and shall have the like power, as to the distribution thereof among lien creditors or others, as is now exercised by the courts of common law, where money is paid into court by sheriffs or coroners; and where recognizances or other security shall be given for the payment of money, the court may make an order on the party giving such recognizances, or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition."

118. Effect on liens and titles.

As the primary purpose of partition was division of the land and not to raise money to squander, as is the rule of this money-mad age, the heir will get his money only when he cannot be invested with his share of the land.²⁰ If one of the tenants in common has an incumbrance against him, if he takes a purpart, its lien will follow that purpart.²¹ But if the heir be indebted to the estate in a sum equal to or greater than the debt he owes to another, his creditor can take nothing;²² and he is entitled to claim his \$300 exemption before the auditor.²³ Where a mortgage was divested by the sale the creditor followed the fund into court.^{23a} The purchaser of the land is personally liable for the annual interest due the widow.^{23b} For jurisdictional defects in the proceedings, such as leaving out persons interested and not giving proper notice, the purchaser must suffer. So a creditor of the trustee for the children, who is not notified of an amicable partition, may move to have the decree

¹⁹ Rhone's O. C., vol. 3, p. 216, act April 12, 1855.

²⁰ Wentz's Ap., 126 Pa. 541.

²¹ Wright v. Vickers, 81 Pa. 122.

²² Dickinson's Est., 148 Pa. 142.

²³ Strouse v. Becker, 38 Pa. 190; Lines' Ap., 3 Grant, 197; Kranter's Est., 150 Pa. 47; Hill v. Johnston, 29 Pa. 362.

^{23a} Comth. v. Rogers, 6 Supr. C. 284.

^{23b} Kunselman v. Stine, 192 Pa. 462.

vacated.^{23c} Contingent interests given by a will to persons then living and others then unborn will not be divested by proceedings in partition, unless those living be made parties and the interests of those unborn be represented before the court and protected. A marketable title will not be conferred.^{23d} And where the proceedings are initiated by an illegitimate child, the title given will not stand against the action by the legitimate children, who had no other notice than the constructive notice and were not parties.²⁴ A purpart allotted to one under agreement takes such an equitable title, if he enters into possession, as will be bound by a judgment, against him, even before entering into a recognizance.²⁵ Where a purpart is awarded to the purchaser of an heir's interest at sheriff's sale, on the setting aside of the sale, the decree will be vacated.²⁶ Proceedings in partition will not prevent a mortgagee from prosecuting his *sci. fa.* to judgment.²⁷ Although the proceedings are erroneous, a widow who has joined in them, and has not appealed, cannot object to the payment of owelty.²⁸ An allottee having become insane and his committee, being an heir also, takes charge and give bond, the administrator of the lunatic has no recourse against the consors in the bond; he must proceed against the committee or his sureties.²⁹ An issue as to title will not be granted where the petitioner has no proofs, conveyances, etc., to sustain it.³⁰ After the lapse of many years a purchaser is protected by the presumption of law from an unsatisfied recognizance.³¹ Where a will gives a power to partition, it carries with it the right to allot a portion to a child. The Orphans' Court will not confirm a conveyance by an executor or trustee, unless there be some omission in the power.³² If after partition, the land is sold for the payment of the ancestor's debts which were liens, the purchaser at such sale takes the title from the heir.³³ The decree cannot be collaterally attacked for a mere irregularity, and particularly by one not directly interested, but a stranger to the title by descent.³⁴

Recognizances taken to secure owelty and dower or other interests are liens until paid and as such are notice to subsequent lien creditors and purchasers without being indexed as a judgment in the common pleas, for they lie in the line of the proceedings in partition through which the title passes.³⁵

119. Modes and rules of distribution.

The court itself may adjudicate and make distribution without ap-

^{23c} *Krug v. Keller*, 8 Supr. C. 78.

^{23d} *Holmes v. Woods*, 168 Pa. 530.

²⁴ *Perrine v. Kohr*, 205 Pa. 602.

²⁵ *Robisson v. Miller*, 158 Pa. 177.

²⁶ *Evans' Est.*, 150 Pa. 528.

²⁷ *Lawrence v. Korn*, 184 Pa. 500.

²⁸ *Donaghy's Est.*, 152 Pa. 92.

²⁹ *Reeder v. Rogers*, 161 Pa. 351.

³⁰ *McCorkle's Est.*, 184 Pa. 626.

³¹ *Smith's Est.*, 152 Pa. 102; *Osborne's Est.*, 149 Pa. 412.

³² *Schwartz' Est.*, 168 Pa. 204.

³³ *Dresher v. Allentown Water Co.*, 52 Pa. 225.

³⁴ *Lair v. Hunsicker*, 28 Pa. 115.

³⁵ *Holman's Ap.*, 106 Pa. 502.

pointing an auditor.³⁶ When an auditor is appointed his duties are confined to the real estate and its proceeds and not the personal estate; but he may decide on sufficient evidence that the heir has been advanced more than his share in the realty, he need not bring the personalty into "hotch potch," as it were.³⁷ Advancements are to be taken into account and the auditor is not concluded by the petition and decree in obtaining the inquest.³⁸ In partition proceedings the first transmission is treated as realty, the second as personalty. If one of the heirs in partition dies his share descends as real estate.³⁹ The administrator who made the sale may apply a portion of the proceeds to the debts of the decedent which are still a lien.⁴⁰ The court may order enough of the fund paid into court to satisfy such debts as are liens.⁴¹ If the creditor be dead, it should be ordered paid to his legal representative.⁴² If the purchaser has bid on the representation that it was clear of incumbrances, the court may permit him to deduct the amount of the mortgage which is a lien.⁴³ The cost of improvements since the death of decedent, cannot be claimed out of the fund by the heir.⁴⁴ Proper liens for taxes and municipal assessments may be paid out of the fund.⁴⁵ Interest on a mortgage given by the parties to the proceeding is payable to the day of distribution.⁴⁶ A devisee who is also executor, and has wasted the estate may have forfeited his right to any portion of the fund.⁴⁷ When a lien for municipal improvements is entered between the inquest and allotment against a part of the estate the allottee is entitled to reimbursement or contribution.⁴⁸ A tenant by the curtesy initiate is entitled to allowance for improvements.⁴⁹

The act of June 24, 1895, P. L. 237, provides as to tenants in common that in case of partition "the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their cotenant or tenants shall be entitled," which applied to cases then pending in the Common Pleas.⁵⁰ The court may equitably marshal the purparts so that some who have advantages by delay in allotment shall contribute to the others who are delayed.⁵¹ A debt of one of the heirs to the estate gives priority over a stranger's claim against the heir.⁵² While in an action at law the declaration is conclusive as to the interest of a party,²

³⁶ Wistar's Ap., 125 Pa. 526.

³⁷ Lewis' Ap., 127 Pa. 127.

³⁸ Summerville's Est., 129 Pa. 631; Dutch's Ap., 57 Pa. 461.

³⁹ Walker's Est., 22 Montg. Co. 17.

⁴⁰ Comth. v. Pool, 6 Watts, 32; Lentz's Acs., 5 Pa. 103; Shoop's Est., 1 Leg. Gaz. 71.

⁴¹ Heller's Est., 8 Luz. L. R. 294. Rhone, P. J.

⁴² Anderson v. Anderson, 183 Pa. 480.

⁴³ Hagan's Est., 50 Pitts. L. J. 49.

⁴⁴ Devlin's Est., 4 D. R. 751; McCrystal's Est., 6 D. R. 504.

⁴⁵ Sneathen's Est., 49 Pitts. L. J. 197; 22 Supr. C. 45.

⁴⁶ Butler's Est., 37 Pitts. L. J. 442.

⁴⁷ Armstrong v. Walker, 150 Pa. 585.

⁴⁸ Robinson's Est., 23 Pitts. L. J. 65.

⁴⁹ Kelsey's Ap., 113 Pa. 119.

⁵⁰ Lancaster v. Flowers, 208 Pa. 199. (See 198 Pa. 614.)

⁵¹ Neel's Est., 45 Pitts. L. J. 395.

⁵² Heister's Est., 26 C. C. 49.

in the Orphans' Court the rule is different.² The widow is entitled to her share of the improvements after the death of decedent and before partition.³

120. Claims upon distributive shares.

As seen above, if the distributee is indebted to the estate and to strangers the claim of the estate on his share has priority.⁴ If a claim has been established in a court of law against the distributee, the Orphans' Court will not question the judgment.⁵ If the share has been attached legally the creditor is in the place of the distributee. For practice, see "Attachment execution," Vol. II, p. 415.

A creditor is not in default, who had no notice, if he fails to petition for a citation within a year after filing and auditing an account.⁶ In the case of one presumed to be dead before the death of his father, the grandchildren inherit immediately and the creditors of their father have no standing as against them.⁷ A distributee is entitled to claim his exemption against his creditors.⁸ If a cotenant removes fixtures which passed to the purchaser, the value will be deducted from his share.⁹ But if the distributee bid at a former sale and there was a loss at the resale, the difference, if undetermined, cannot be deducted from his share, it seems.¹⁰ But, if a judgment were obtained or the claim made against the administrator the rule would be different.¹¹ A distributive share is liable to attachment in the hands of a master.¹²

121. Certificates of searches for liens.

Certificates of searches for liens should cover the period of twenty years prior to the date of conversion, unless decedent acquired title in a shorter period, then for such period; and as to heirs and devisees from the date of decedent's death unless that occurred more than twenty years prior; for that is the period in which the presumption of payment is recognized.¹³ The cost of searches and certificates of liens is payable out of the fund.¹⁴ A decree will not be reversed where the master made careful searches for liens and awarded part to the objecting claimant.¹⁵ The necessity of taking refunding bonds or receipts has been commented upon, *supra*. But the court has

¹ *Fulton v. Miller*, 192 Pa. 60.

² *Summerville's Est.*, 129 Pa. 631.

³ *Carr's Est.*, 38 Pitts. L. J. 343; *Janney's Est.*, 2 D. R. 408; *Gannon v. Widman*, 3 D. R. 835.

⁴ *Dickinson's Est.*, 148 Pa. 142.

⁵ *Landis' Est.*, 2 Phila. 217.

⁶ *Krug v. Keller*, 8 Supr. C. 78.

⁷ *Esterly's Ap.*, 109 Pa. 222.

⁸ *Reed v. Hollibaugh*, 3 C. C. 20.

⁹ *Williams' Ap.*, 1 Mona. 274.

¹⁰ *Landis' Est.*, 2 Phila. 217.

¹¹ *Guier v. Kelly*, 2 Binney, 299; *Earnest v. Earnest*, 5 Rawle, 213.

¹² *Piper v. Piper*, 7 D. R. 135.

¹³ *Phillip's Est.*, 47 Pitts. L. J. 77. Over., J.

¹⁴ *Newell v. Clark*, 15 W. N. C. 157.

¹⁵ *Monroe v. Monroe*, No. 1, 26 Supr. C. 47.

ordered a distribution without taking them, which is a dangerous practice,¹⁶ as the case of *Rastaetter's Est.* proves.¹⁷

122. Conversion.

In the distribution of an estate to the heirs of a distributee the doctrine of conversion is important and not always free from difficulty in the application to cases, which must be studied in their severalty.¹⁸ The rule is that the fund goes to the administrator, unless assigned.¹⁹ If a minor heir dies without issue his share in owelty goes to his parents and not brothers and sisters.²⁰ The heir's interest, in case of sale remains realty until the sale is completed;²¹ and so if a married woman dies before the sale is confirmed and the deed delivered her husband is not entitled to take as personalty, but has only his tenancy by the curtesy in her interest, although he be her administrator.²² In case the sale is completed by delivery of the deed, conversion is complete, and the fund goes to the personal representative.²³ So also of owelty.²⁴ The estate of a married woman, at her death does not go to the adopted child of her husband alone.²⁵

123. Conclusiveness of proceedings.

Section 2 of the act of March 29, 1832, P. L. 190, provides that the proceedings and decrees of the Orphans' Court in all matters of which it has jurisdiction "shall not be reversed or avoided collaterally in any other court." Proceedings in partition cannot be attacked on the adjudication of the account of the executor, even, in the same court;²⁶ or in a court of Equity.²⁷ It matters not in what form the attack is made if the court had jurisdiction.²⁸ But this does not apply where a claim of title is made adverse to the decedent.²⁹

The Orphans' Court has power to decree that a forged mortgage be delivered and canceled and the record of it be expunged.³⁰

124. Trustee for parties unknown, etc.

Section 1 of the act of April 3, 1903, P. L. 151, provides:

"That in all cases of partition, either in the courts of Common Pleas or in the Orphans' Court, the courts having jurisdiction there-

¹⁶ *McAvoy's Est.*, 8 D. R. 233.

¹⁷ 15 Supr. C. 549.

¹⁸ See P. & L. Dig., vol. 15, cols. 25558-61.

¹⁹ *Key's Est.*, 137 Pa. 565.

²⁰ *Swab's Est.*, 2 Pearson, 483.

²¹ *Wither's Ap.*, 14 S. & R. 185.

²² *Ferree v. Comth.*, 8 S. & R. 312; *Biggert's Est.*, 20 Pa. 17, explaining *Biggert v. Biggert*, 7 Watts, 563.

²³ *Scott's Est.*, 137 Pa. 454.

²⁴ *Wentz's Ap.*, 126 Pa. 541.

²⁵ *Kingan's Est.*, 49 Pitts. L. J. 219.

²⁶ *Samson's Est.*, 22 Supr. C. 93.

²⁷ *Simon v. Kessler*, 12 D. R. 781.

²⁸ *Snively's Est.*, 129 Pa. 250; P. & L. Dig., vol. 15, col. 25604.

²⁹ *Mehaffey v. Dobbs*, 9 Watts, 363; P. & L. Dig., vol. 15, col. 25615, *et seq.*

³⁰ *Raeyling's Est.*, 13 D. R. 63.

of are empowered, whenever it shall appear that the party or parties in whose favor a lien exists until payment be made to them of their respective shares of the money due from the party or parties electing to take the land, are unknown or cannot be found, to appoint a trustee to whom the shares of money due said unknown or other party may be paid, with power in said trustee, upon payment to him of said money, to satisfy said lien upon the proper records, whereupon the said land shall be freed and discharged from said lien: *Provided, however,* That said trustee shall first file a bond with sureties, to be approved by the court conditioned for the faithful application of the money to him so paid, as aforesaid, according to the trust and order of the court: *And provided further,* That it shall be the duty of the said trustee to invest the said monies in securities authorized by law."

125. Validating acts.

On account of various irregularities of procedure in partition under the various acts, not to be marveled at, when the courts themselves differed as to their meaning and application, prior partitions were validated by the acts of April 13, 1840 (section 3), P. L. 319; April 25, 1850 (sections 4 and 5), P. L. 569; April 17, 1856 (section 3), P. L. 386; May 13, 1876, P. L. 172, and June 16, 1893, P. L. 464.

126. Partition docket.

Section 1 of the act of April 4, 1889, P. L. 23, provides:

"It shall be the duty of the clerks of the Orphans' Courts of the several counties of this Commonwealth, and they are hereby required to enter in a book to be procured for that purpose, to be called a partition docket, all the proceedings in partition in every case in their respective courts, from the commencement to the final judgment and decree thereon, and which shall be and the same is hereby made the record of said court. For which service, such clerks shall be entitled to receive the same fees as the recorders of deeds receive for recording, to be taxed and paid as part of the costs of such proceedings."

127. Fees of sheriff and jurors.

Section 2 of the act of April 17, 1856, P. L. 386, provides:

"The sheriff holding inquisition upon the real estate of any decedent as aforesaid, where such real estate is situate in two or more counties, shall receive for his services, where engaged more than one day, two dollars per day for each day after the first; and the jurors in all cases of partition shall each receive one dollar per day for each day engaged in making such partition and valuation, and shall also receive in addition to their daily pay three cents per mile circular," etc.

The act of July 11, 1901, P. L. 663, provides a fee bill for sheriffs which covers writs of partition, inquisition and possession, but does not specify juror's fees.

128. Costs in partition generally.

Section 1 of the act of April 27, 1864, P. L. 641, provides:

"The costs in all cases of partition in the Common Pleas, or

the Orphans' Court of this Commonwealth, with a reasonable allowance to the plaintiffs, or petitioner, for counsel fees, to be taxed by the court, or under its direction, shall be paid by all the parties in proportion to their several interests."

This allowance is made to the plaintiff and the attorney has no standing to insist upon it¹ and does not extend to others though in sympathy with and supporting the proceeding, if not parties.²

The "reasonable allowance" comes out of the entire estate and not a part only,³ and where a life estate is concerned, its proportion is one-third of the entire fee.⁴ The costs include not only the docket costs according to the equity fee bill, and a reasonable attorney's fee to the plaintiff, which does not mean the defendant's counsel, but compensation for such professional services as are usual and necessary in guiding the partition to a successful termination.⁵ The order is a judgment reviewable on appeal.⁶

All the costs follow the final decree, although the rule concluded "at the costs of the petitioner."⁷ Where an estate is sold in parts the clerk is entitled to a fee of three dollars for each sale.⁸

Section 2, rule 14, Allegheny County, provides:

"In all cases in partition the attorney for petitioner shall give the parties interested notice in person, not less than five days, or by registered letter, mailed at least ten days, to the last known address of any of the parties, before application, of his intention to make application to this court, on a day named, to have his fees fixed as provided by law in such case, stating the amount claimed by him, and shall at the time file proof of such notice with the clerk of this court."

129. Costs may be ordered paid out of the estate.

Section 1 of the act of May 23, 1871, P. L. 274, provides:

"In all cases of sales of real estate, in proceedings on writs of partition and valuation in the Orphans' Court, it shall and may be lawful for the court to order and decree that the costs and expenses upon said proceedings, including a reasonable compensation to the executor, administrator or trustee, by whom said sales shall be made, shall be paid, on the confirmation of such sale by the court."

The subject of "Costs" is fully discussed in Vol. II, p. 79, and Attorney's fees in Vol. I, p. 253.

130. Right of appeal.

Neither a citation to an executor to file an inventory nor an order awarding an inquest to make partition is a final decree from which

¹ Pereyra's Ap., 126 Pa. 220.

² Bile's Ap., 119 Pa. 105.

³ Snyder's Ap., 54 Pa. 67.

⁴ Boyer's Est., 8 C. C. 177.

⁵ Fidelity Trust Co.'s Ap., 108 Pa. 339; Luzerne, Etc., Ass. v. Savings Bank, 142 Pa. 121; Graham's Est., 25 W. N. C. 111; Homiller's Est., 18 Phila. 70; Culp's Est., 26 W. N. C. 78.

⁶ Grubb's Ap., 82 Pa. 23.

⁷ Playford's Est., 7 Supr. C. 325.

⁸ Griel's Est., 171 Pa. 412. Where the lower court is affirmed by a divided upper court, *stare decisis* must not be invoked.

an appeal lies.¹ A decree of confirmation upon a return of inquisition, however, is a final judgment from which an appeal will lie.² So is an order confirming a sale,³ and in some cases an order of sale.⁴

131. Form of petition to sell in order to satisfy a recognizance.

To the Honorable ———, President Judge of the Orphans' Court of Montgomery County.

The petition of William Berry respectfully represents that he is the grandson of Peter Berry, who died on the ——— day of ———, A. D. 19—, intestate, seized of certain real estate, situate in ——— County, this state, bounded and described as follows (here follows description), proceedings for the partition of which were commanded in the Orphans' Court of said county at ——— Term, 19—.

2d. That the inquest returned that the said real estate could not be divided, and valued the same at \$70,000, and that Jesse Berry, a son of the said decedent, took the property at such valuation, and entered into a recognizance conditioned for the payment of \$17,500 ——— day of ———, 19—, with interest, from the ——— day of ———, 19—, to your petitioner.

3d. That no part of the interest or principal of said sum has been paid to your petitioner.

Your petitioner therefore prays the court to issue a citation to the said Jesse Berry commanding him to appear and show cause why he shall not forthwith pay the said sum of money, with interest, to your petitioner, and, in default thereof, why an execution shall not be issued by the court to enforce the collection of the same, agreeably to the Act of 17th May, 1866. And he will ever pray, etc.

William Berry.

Affidavit to truth of petition.

132. Form of petition to obtain satisfaction of recognizance in partition.

To the Honorable, etc.

The petition of Samuel Hewit respectfully represents:

That in the proceedings in your said court, for partition of the lands of Abram Hewit, deceased, he accepted a lot or purpart, numbered one, and entered into a recognizance before your said court to secure the shares of the other heirs of said decedent, of whom John Hewit was one.

That subsequently, to-wit, on the ——— day of ———, 19—, it was determined by your said court, that the sum due said John Hewit was ——— dollars.

That your petitioner, before the ——— day of ———, 19—, paid the said John Hewit the full amount of said sum, with interest, and that

¹ Tressler's Est., 228 Pa. 281; Allen's Est., 20 Supr. C. 32; Palethorp's Est., 160 Pa. 316; Christy's Ap., 110 Pa. 538; Wistar's Ap., 115 Pa. 241; Gesell's Ap., 84 Pa. 238.

² Christy's Ap., 110 Pa. 538.

³ Robinson v. Glancy, 69 Pa. 89; Snodgrass' Ap., 96 Pa. 420. Sharswood, C. J.

⁴ Rawles' Ap., 119 Pa. 100; Taylor's Ap., 119 Pa. 297.

he has requested him to enter satisfaction of the same of record, or to give to your petitioner a release of any further claim on account of the same, but that he has neglected and refused to do as requested.

That the said John Hewit now resides in the county aforesaid.

Your petitioner therefore prays the court to issue a citation to the said John Hewit, commanding him to show cause why he shall not enter satisfaction of said recognizance as it is his duty to do, and on his default to enter the same, that the court will proceed to cause satisfaction to be entered for him, as provided by the Act of Assembly of 29th March, 1832, and its supplements.

And he will ever pray, etc.

Samuel Hewit.

(Affidavit of truth.)

133. Form of release of a claim on a recognizance given in partition to secure the interest of an heir.

Know all men by these presents: That whereas in the proceedings for partition of the real estate of my father, Abram Hewit, deceased, John Hewit accepted share or purpart numbered one, and to secure the payment of the money due, he entered into a recognizance before the Orphans' Court of — County, with Samuel Smith as surety.

And whereas, the said John Hewit has heretofore paid me the sum of — dollars, which is the full amount due me on said recognizance. Now, therefore, I do hereby acknowledge full satisfaction of all claims or demands for or on account of said recognizance, and I do hereby release and forever discharge him, the said John Hewit, his heirs, executors, administrators, and sureties, as also the land accepted by him as aforesaid, and bound by the said recognizance, from any and all further liability for or on account of the same.

Witness my hand and seal, this — day of —, 19—.

Henry Hewit. [Seal.]

In presence of,

[Acknowledgment in usual form.]

134. Form of deed after sale in partition.

This indenture made the — day of —, in the year of our Lord one thousand nine hundred and —, between John Law, a trustee appointed by the Orphans' Court of Luzerne County, Pennsylvania, in the matter of the partition of the real estate of Richard Roe, deceased, of the one part, and Abram Banker, of the Borough of Pittston, said county and state, of the other part.

Whereas, on the — day of —, A. D. 19—, the petition of — was presented to the Orphans' Court of the said Luzerne County, praying for a partition of the real estate of Richard Roe, deceased, and a writ of partition was thereupon ordered and issued by said Orphans' Court; and whereas the return to the inquest held on said writ was filed in said court the — day of —, A. D. 19—, and duly confirmed by said court on the — day of —, A. D. 19—; and whereas on the — day of —, A. D. 19—, rule was granted on the heirs of said decedent to accept or refuse the real estate at

the valuation, etc.; and whereas said rule was returned the — day of —, A. D. 19—, duly served; and whereas said heirs neglected to accept said land or make bids on the same; and whereas on the — day of —, A. D. 19—, the administrator of said decedent's estate declined to make sale of said real estate; and whereas the said last-mentioned day said Orphans' Court appointed John Law a trustee, and ordered and directed him to make sale of said real estate at a time and place and upon terms fully set forth in said order of sale; and whereas said John Law, trustee, after duly advertising sale, did, on the — day of —, A. D. 19—, on the premises sell said real estate, hereinafter fully described, at public sale to Abram Banker for the sum of — dollars; and whereas return of said sale was duly made to said court by said trustee on the — day of —, A. D. 19—, and by said court duly confirmed on the — day of —, A. D. 19—.

Now this indenture witnesseth that the said John Law, trustee as aforesaid, for and in consideration of the sum of — dollars, etc. (as in common deeds), and by these presents, and by virtue of the proceedings and decrees above set forth, doth grant, bargain, sell, alien, release, and confirm unto the said Abram Banker, and his heirs and assigns, forever, all that piece or tract of land situate [describe same, and conclude as in common deeds].

135. Form of bond in partition.

Know all men by these presents, that I, Abram Banker, of the Borough of Pittston, in the County of Luzerne, and State of Pennsylvania, am held and firmly bound unto John Law, trustee, appointed by the Orphans' Court of —, to make sale of the real estate of — —, deceased, in the sum of — dollars, lawful money of the United States of America, to be paid to the said John Law, trustee, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal, and dated the — day of —, in the year of our Lord one thousand nine hundred and —.

The condition of this obligation is such, that if the said Abram Banker, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the said John Law, trustee, his successor, attorney, executors, administrators, or assigns, the just and full sum of — dollars, in manner following, to-wit: — dollars with interest, thereon on the — day of —, A. D. 19—, the interest on the balance to Mary Shoelock, widow, during her lifetime, semi-annually, on the — day of —, and — day of —, of each year, and on her death pay the balance to the said John Law, trustee, or to his successors or assigns, for the use of the persons then legally entitled thereto, without any fraud or further delay, then this obligation to be void, else to be and remain in full force and virtue.

Abram Banker. [Seal.]

Signed, sealed, and delivered in presence of,

— —.

136. Form of warrant.

The obligor above named does hereby authorize and empower any attorney of any court of record of the Commonwealth of Pennsylvania, to appear for him, and with or without a declaration filed in his name, to confess a judgment in favor of the above-named obligee, and against him for the amount of principal and interest then unpaid, together with five per cent. attorney's fees for collection, with costs, release of errors, etc.; and doth hereby, for value received, waive the benefit of any law of the State of Pennsylvania now in force, or hereafter to be passed, exempting property from levy and sale on execution, and further waive the right of inquisition of real estate, and consent that any real estate levied upon to pay said debt may be sold upon a *fi. fa.*

Witness my hand and seal this — day of —, A. D. 19—.

Abram Banker. [Seal.]

NOTE.— This bond and mortgage are to be delivered, and the deed to be made after the report of an auditor fixing the amount due the widow.

137. Form of mortgage accompanying bond in partition.

This indenture, made the — day of —, in the year of our Lord one thousand nine hundred and —, between Abram Banker, of the Borough of Pittston, County of —, and State of Pennsylvania, of the first part, and John Law, of Franklin Township, said county, appointed by the Orphans' Court of said county, trustee, to make sale of the real estate of — —, deceased, and — —, of the second part.

Whereas the said party of the first part by his certain obligation in writing, obligatory under his hand and seal, duly executed, and bearing even date herewith, stands bound unto the said party of the second part in the sum of — dollars, conditioned upon the payment of — dollars, as follows: — dollars, with interest thereon, on the — day of —, A. D. 19—, the interest on the balance to Mary Shoelock, widow, during her lifetime, semi-annually, on the — day of —, and — day of — of each year, and after her death the balance to the said party of the second part without any fraud or further delay, as in and by the said recited obligation and condition thereof, relation to the same being had may more fully and at large appear.

Now this indenture witnesseth that the said party of the first part, as well for and in consideration of the aforesaid debt or sum of — dollars, and for the better securing the payment thereof unto the said party of the second part, his executors, administrators, and assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, well and truly paid to the said party of the first part, by the party of the second part, at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, hath granted, bargained, sold, released, and confirmed, and by these presents doth grant, bargain, sell, release, and confirm unto the said party of the second part, his heirs and assigns, all that certain piece of land in the Township of Franklin, County of Luzerne, and State of Pennsylvania, bounded and described as follows:

(Here give a description of the real estate.)
and this day conveyed by the party of the second part to the party of the first part. This mortgage and the accompanying bond being given to secure the unpaid balance of purchase-money.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments, and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold the said hereditaments and premises above granted, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

Provided always, nevertheless, that if the said party of the first part, his heirs, executors, administrators, or assigns, do and shall well and truly pay, or cause to be paid unto the said party of the second part, his successors, executors, administrators, or assigns, the aforesaid debt or sum of — dollars, on the days and times hereinbefore mentioned and appointed for the payment thereof, together with the lawful interest for the same in like money, in the way and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made for or in respect of any taxes, charges, or assessments whatsoever, that then and from thenceforth, as well this present indenture, and the estate hereby granted, as the said obligation above recited shall cease, determine, and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary thereof in any wise notwithstanding.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

Abram Banker. [Seal.]

Signed, sealed, and delivered in the presence of,

State of Pennsylvania, County of Luzerne, ss.

Be it remembered that on this — day of —, A. D. 19—, before me, a —, in and for the county aforesaid, personally appeared Abram Banker, above named, who, I am satisfied, is the individual named in, and who executed the above deed or conveyance, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed.

Witness my hand and notarial seal.

A. B.,
Notary Public.

CHAPTER XVII.

ADMINISTRATION ACCOUNT.

1. Nature of.
2. When and where account must be filed.
3. Citation to file account.
4. Form of citation.
5. Answer to citation.
6. Duties of register.
7. No account to be confirmed without notice.
8. Notice to nonresident heirs.
9. Form of partial account.
10. Form of final, after partial account.
11. Examination by the court.
12. Practice on accounts filed.
13. Form of confirmation.
14. Exceptions.
15. Rules of court.
16. Form of exceptions.
17. Form of notice by register.
18. Form of certificate of register.
19. Form of certificate of balance due.
20. Transfer of balance to Common Pleas for lien.
21. Interest in account.
22. Effect of confirmation.
23. Jurisdiction of the Orphans' Court.
24. Jurisdiction to ascertain the claims of creditors.
25. Ascertainment of claims against distributees.

1. Administration accounts — Nature of.

Rhone says: "An administration account, strictly speaking, is one that exhibits no more than the net amount of cash in the hands of the accountant ready for distribution to the parties entitled thereto, whether creditors, heirs or legatees. The necessary fees, costs and expenses of settling the estate are proper items of distribution in any administration account, and these are the only proper ones in an account where the estate is insolvent. Where the estate is solvent, and the accountant has distributed the whole or some part of the assets to creditors, heirs or legatees, he usually claims credit for such items in his account, which is proper enough if the administration account is kept separate from the distribution account. Sometimes credit is only claimed for payment of debts and legal charges, and the distribution to heirs is reserved for audit by the court. Thus a distribution account always follows an administration account, and they ought never to be blended. Where the estate is solvent the confirmation of a distribution account following the administration account is the end of the whole matter, and the estate is settled at one stroke; but where the estate is insolvent the distribution, if excepted to, will be disregarded."¹

2. When and where account to be filed.

"Executors and administrators are trustees for creditors, heirs and all others interested in the estates entrusted to their care and management, and so it is presumed that, as a matter of course, they

¹ Rhone's O. C., vol. 3, p. 118.

will at some time render an account of their trusteeship. As their trust is a general one, their account ought to be a public one save in cases where all the parties interested are known and agree to a private account. Where it is not so agreed the account must be filed in that register's office from whence the letters were issued, and the law provides that this must be done within the year after the date of letters, unless for special reasons, a longer time is necessary to wind up the business."² Such is the requirement of the letters and the bond.

If a final account cannot be filed at the end of the year, the administrator should file a partial one; for, any creditor, heir or other person interested may then cite him to file one.³

3. Citation to file account.

Whenever a person, by petition under oath, shows his interest in the estate, its character, and that one year has elapsed since the granting of letters and yet no account has been filed, the court will award a citation.⁴ Upon such petition the court will direct a citation to issue to the administrator to file an account on a day fixed or appear and show cause why he cannot do so, and also why he should not pay the costs of the petition. This is the course, whether a first or final account is required, or a supplementary one.⁵ The first citation is a matter of right but a second one is discretionary with the court.⁶ In no case, however, will a petition for a supplementary account be made a substitute for a bill of review.⁷

Section 3 of rule 15, Allegheny County, provides:

"If executors, administrators, guardians, or other trustees do not file their respective accounts within the time required by law, a citation may be issued of course by the clerk, on application of any person interested, setting forth the necessary facts verified by affidavit."

4. Form of citation.

Lancaster County, ss.

The Commonwealth of Pennsylvania.

To Benjamin F. Shaub, Administrator of the Estate of John Owens, deceased.

At the instance of Elsie Owens, daughter of said decedent, you are hereby cited to be and appear in your proper person before the Judges of the Orphans' Court, at an Orphans' Court to be held at Lancaster, in and for said county, on the — day of —, A. D. 19—, at — o'clock — M. Then and there to exhibit and file a just account of the Estate of John Owens, late of Ephrata, said county, deceased, and make a true settlement thereof in the office of the Register of said county, and abide the judgment of the court thereon. Hereof fail not at your peril.

² Rhone's O. C., vol. 3, p. 119.

³ Comth. v. Bryan, 8 S. & R. 128; Melizet's Ap., 17 Pa. 449; Dickson's Est., 11 Phila. 86.

⁴ Peter's Est., 1 Phila. 581; Diaston's Est., 14 Phila. 310.

⁵ Hubley's Ap., 19 Pa. 138; Shaffer's Ap., 46 Pa. 131.

⁶ Harley's Est., 1 Phila. 511; Seeger's Est., 6 W. N. C. 369.

⁷ Groff's Ap., 45 Pa. 379.

Given under my hand and the seal of the Orphans' Court aforesaid, at Lancaster, the — day of —, 19—.

By the Court.

Attest:

_____,
Deputy Clerk Orphans' Court.

5. Answer to citation.

When cited it will be the duty of the fiduciary to comply and file an account, or show cause by formally answering the petition, stating under oath the reasons why he has not filed one and why he cannot. If he files no account and makes no answer, the court may on petition, showing his default, appoint an auditor to state an account at his cost, from such evidence as may be produced before him; or the court may enforce its order by attachment.⁸

It has been held that after a lapse of twenty years, the legal presumption is that an account has been filed, the assets distributed, and the money paid over; and in the absence of proof rebutting this presumption, an account will not be required.⁹

6. Duties of register, as to accounts.

Section 29 of the act of March 15, 1832, P. L. 135, provides that it shall be "the duty of every register, before he shall allow the accounts of any executor or administrator, to carefully examine the same, and require the production of the necessary vouchers, or other satisfactory evidence of the several items contained in it."

Section 30 of the same act provides that "every register having allowed and filed any account in his office, shall prepare and present a certified copy thereof to the Orphans' Court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing and allowance, of all which he shall give notice to all persons concerned, in the following manner, viz.: By an advertisement enumerating all the accounts to be presented at any one time to the said court, in at least two newspapers (if there be two) published in the respective county, or if there be but one newspaper published in such county, then in that one, or if there be none, then in one printed nearest to the said county, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented, setting forth in substance that the accountants (naming them and the character in which they respectively act) have settled their accounts in the office of the said register, and that the same will be presented to the Orphans' Court for confirmation, at a certain time and place (mentioning the same), and also by setting up conspicuously in his office, and in at least six of the most public places in the county, at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisements. And the actual expense of such advertisement, according to the usual rates of ad-

⁸ Witman's Ap., 28 Pa. 376.

⁹ Norris' Ap., 71 Pa. 106; Okeson's Ap., 2 Grant, 303; Bull v. Towson, 4 W. & S. 557; Gress' Ap., 14 Pa. 463.

vertising in such newspapers, and of the setting up of such notices shall be divided among all the accounts presented at the same court, and the proper proportion thereof only shall be charged in any of the said accounts, and allowed to the register as the cost of such advertisement and notices."

7. No account to be confirmed without notice.

Section 15 of the act of March 29, 1832, P. L. 170, provides that

"No account of an executor, administrator or guardian shall be confirmed and allowed by the Orphans' Court (except in the cases herein specially provided for) unless it shall appear on the presentation of such account that notice of such presentation has been given, conformably to the directions of the foregoing act."

8. Notice to nonresident heirs, etc.

Section 20 of the act of March 29, 1832, P. L. 190, provides that "when any of the heirs, legatees, distributees or creditors of a decedent reside out of this state or out of the United States, or from other circumstances it may be expedient that additional or further notice should be given of the account of an executor, administrator, guardian or trustee, or of the distribution of the assets or surplusage of the estate, it shall be in the discretion of the Orphans' Court to require such further or additional notice to be given by such accountant, as they may think proper, to appear in court, or before the auditors by them appointed, as the case may be, at such times as shall be fixed for the examination of such account, or for the distribution of the assets or of the surplusage of the estate."

9. Form of partial account.

First partial account of Jacob Wineman, administrator, of the goods and chattels, rights and credits which were of George H. Walsh, late of Mercer County, Pennsylvania, deceased.

The said accountant charges himself with all the cash actually received by him to date as follows: (here specify the items and whence received, giving dates).

Total charges on this account.....\$—— —

The said accountant claims credit for disbursements to creditors and expenses of administration to date, as follows: (here state only the items of cash actually disbursed, with fees and expenses to date, stating to whom the payments have been made and on what account, giving dates).

Total credits on this account.....\$—— —

Balance due the estate (or the accountant).....\$—— —

P. Catlin,
Administrator.

Mercer County, ss.

Jacob Wineman, the above-named accountant, being duly sworn, says the foregoing is a just, full and true account of his administration of the estate of George H. Walsh, deceased, to date.

Jacob Wineman.

Sworn and subscribed before me, etc.

10. Form of final account after partial one.

Second [or third] and final account of Samuel Brady, administrator of the estate of John Brady, late of Muncy Creek Township, Lycoming County, deceased.

The said accountant charges himself with moneys by him received belonging to the said estate, since the filing of his last account as follows: [Here give the year, month and day, the name and amount of each item.]

He further charges himself with the following items omitted from his former account, viz.:

[Here set them out if any.]

He claims allowance for the following disbursements, viz.:

[Give all the items, as shown by vouchers filed, date, name and amount.]

And also for expenses of administration, attorney's fees and costs of filing and passing this account and discharge.

[Here specify each item.]

Total balance due\$—— —

Samuel Brady,
Administrator.

[Affidavit to correctness.]

If the account be a first and final account, it will be so entitled, and embrace the entire administration of the estate.

11. Accounts to be examined by the court.

The act of April 14, 1835, P. L. 275, provides:

"All accounts presented to the Orphans' Court by executors, administrators, guardians or trustees, shall be examined by the court, and if not excepted to, shall, after due consideration, be confirmed; but if any person interested in the estate, shall except to the account, and all or any of the parties shall desire to refer the account to auditors, the court shall decide whether the matters contested call for such reference, and if they do, the court shall appoint three suitable persons; or where the parties are all present or duly represented, and competent to agree and desire a reference, they may appoint the auditors; and the persons so appointed shall be sworn or affirmed to perform their duty with fidelity, and shall have power to administer oaths and affirmations to parties and witnesses in all cases referred to them: *Provided*, The provisions of this act shall not extend to the City and County of Philadelphia."

The proviso is also effective in every county in which there is a separate Orphans' Court, since the judge or judges do the auditing in such jurisdictions.

Section 6 of the act of May 19, 1874, P. L. 206, provides that the accounts in such counties "shall be audited by the court, without expense to the parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may, in its discretion, appoint."

The act of 1835, *supra*, is a re-enactment of section 16 of the act of March 29, 1832, P. L. 190.

In practice, but one auditor is usually agreed upon by the parties, and under the act of April 1, 1909, P. L. 95, the court is obliged to

appoint him unless some sufficient reason appears why he should not be appointed.¹

12. Practice on accounts filed.

The account filed must be examined by the Orphans' Court, but it is not the custom to examine the legal representative filing it, except at the instance of one who has excepted or opposes it.² Where an executor who is also trustee sells real estate under a power in the will, he should file his account in the Orphans' Court and not with the register.³ But as a rule all accounts which pass through the Orphans' Court are filed with the register. The accountant being both executor and trustee should settle his account as executor first and subsequently account separately as trustee.⁴ But if he be both trustee and guardian, he must first settle his account as trustee in the Common Pleas, and then as guardian in the Orphans' Court.⁵

An account which does not state whether it is "final" or "partial" will be presumed to have been "final," after the lapse of twenty years.⁶

The manner of confirmation of accounts is regulated by rules of court. It was held in a number of cases⁷ that a brief entry by the auditing judge, of "confirmed" or "confirmed absolutely" was not a decree of confirmation, but that a proper form is as follows:

"That there are — dollars in the hands of the accountant, subject to distribution according to law."

The formal manner is for the register to present the accounts to the court for inspection, when they are ordered "confirmed *nisi*," and then lie over the number of days fixed by the rules of court, when they are marked as "confirmed absolutely," if no exceptions have been filed meantime.

[Examine your rules of court.]

It is highly objectionable to combine items of investment with an administration account;⁸ so also of distribution.⁹ The court may permit a re-statement of an erroneously blended account.¹⁰

13. Form of confirmation.

After examination of an account the same is endorsed:

And now, — day of —, 19—, examined and confirmed *nisi*.

By the Court.

After the time provided by the rule of court has passed, the account will be confirmed absolutely, if no exceptions have been filed to it. (Examine your rules of court.) In Luzerne County,

¹ Vol. 1, Johnson, p. 175.

² Mylin's Est., 7 Watts, 64.

³ Leslie's Ap., 63 Pa. 355.

⁴ Reinheimer's Est., 3 W. N. C. 244; Jacobs v. Bull, 1 Watts, 370; Brown's Ap., 12 Pa. 333.

⁵ Baskins' Ap., 34 Pa. 272.

⁶ Hubley's Ap., 19 Pa. 138.

⁷ Bowers' Ap., 2 Pa. 432; Robinett's Ap., 36 Pa. 174; Weyand's Ap., 62 Pa. 198.

⁸ Penrose, J., in Barker's Est., 159 Pa. 518-527.

⁹ Robin's Est., 180 Pa. 630.

¹⁰ Spellisy's Est., 174 Pa. 628.

"if no exceptions are filed within ten days after such confirmation *nisi* they shall come up for adjudication and final confirmation on the next day when the court shall be in session at which time the accountant shall be prepared to produce his vouchers, if required, to prove the correctness of the account."

Following is a form of confirmation absolutely:

And now, to-wit, — day of —, after due consideration, no exceptions having been filed (or exceptions dismissed and), confirmed absolutely. And it is ordered, adjudged, and decreed that there is in the hands of this accountant the sum of \$—— for distribution according to law, subject to reduction on final distribution for any sums heretofore paid to the widow and heirs (or legatees).

By the Court.

14. Exceptions.

Only such persons as are interested in the distribution may file exceptions to an account.¹ But where one executed a release and still by its terms retained an interest, exceptions may be filed by her.² Where the executor of an executor and residuary legatee filed an account creditors of the latter have no standing to except.³ But a creditor of a distributee, having attached a distributive share, has;⁴ so, also, a surety and an alienee of a distributee.⁵ A legatee whose legacy is a charge on the land, has no standing to except to an executor's account of the personalty only.⁶ A legatee's right to except is not divested by an agreement to release.⁷ The interest must be one in the estate itself and not that of outside candidates for incidental benefits;⁸ or an interest in remainder by contingency, when it is not affected.⁹ One who is indebted to the estate in a larger amount than his share, has no standing to except.¹⁰ But one although not reached by the present distribution may move for a surcharge of the fiduciary.¹¹ An administrator will not be surcharged at the instance of one who fails to make good his claim.¹² The remainderman has no standing to except on the ground of executor's failure to obtain sufficient rents.¹³ But although exceptant has no standing, if his exceptions direct the attention of the court to primary defects on the fact of the account, the court will take notice of them.¹⁴ Exceptions to an administration account must be filed within the time fixed by the rules of

¹ Tracy's Est., 15 Montg. 30; Herbein's Est., 2 Chester Co. 449; Davis' Est., 49 Pitts. L. J. 155.

² Dampf's Ap., 97 Pa. 371.

³ Law's Est., 140 Pa. 444.

⁴ Reese's Ap., 116 Pa. 272.

⁵ Moorhead's Ap., 32 Pa. 297.

⁶ Hope's Est., 34 Pitts. L. J. 251.

⁷ Bloom's Ap., 15 Pa. 403.

⁸ Roberts' Est. (Thad. Stevens' Will), 3 Lanc. L. R. 170.

⁹ Martin's Ap., 23 Pa. 433.

¹⁰ Tiernan's Est., 33 Leg. Int. 24.

¹¹ Hinkle's Est., 18 Phila. 100.

¹² Glenn's Ap., 31 Pitts. L. J. 325.

¹³ Price's Est., 12 D. R. 693.

¹⁴ Grover's Est., 12 Luz. L. R. 224.

court.¹⁵ Exceptions having been filed within the time, the auditor may consider other exceptions filed later.¹⁶ Where a supplemental account has been filed, exceptions to it must be confined to it.¹⁷ Exceptions must state definitely what is claimed so that the accountant may know what he must meet, and the auditor what he is to investigate;¹⁸ and the investigation will generally be confined to the exceptions.¹⁹ The burden of proof is upon the exceptant, and if there be no errors on the face of the account, the exceptant must prove his exceptions by competent testimony.²⁰ An agreement not to file exceptions by one of weak mind will not preclude investigation, under the circumstances.²¹ Exception withdrawn, at the suggestion of the court, may be reinstated, where the method suggested was held not to be within the jurisdiction of the court, on review.²²

15. Rules of the Orphans' Court.

A rule of the Orphans' Court is valid providing that no exception to an auditor's report shall be filed after ten days.¹ Section 21 of the act of June 16, 1836, P. L. 784, authorizes the Orphans' Court to adopt rules. The Orphans' Court in Luzerne County has power to make a rule requiring the publication of notices of filing accounts in the legal journal designated by the court.² A rule will not be waived to excuse the oversight of counsel.³ Counsel are presumed to be familiar with their own rules. The Orphans' Court is the best expounder of its rules, but this does not palliate its violation of its rules. Obeying them is different from "expounding" them from the record.⁴ A court will not be reversed herein, however, except for manifest and material error.⁵ It may even complaisantly excuse itself on the ground that its lapses are "harmless error."⁶ Section 1, of rule 2, of Philadelphia, requiring the official stenographer to attend the Register and take testimony in contests on wills and appointment of administrators was held impotent.⁷

¹⁵ Tracy's Est., 15 Montg. 30.

¹⁶ Koch's Est., 148 Pa. 159, Lebanon County, where the rule requires them to be filed "within four days after the first day of the term on which they come up from the register's office."

¹⁷ Irvine's Est., No. 2, 209 Pa. 325; Woodward's Est., 27 W. N. C. 407.

¹⁸ Stewart's Ap., 110 Pa. 410.

¹⁹ Gaston's Ap., 1 Pitts. 48.

²⁰ O'Donnell's Est., 9 Kulp, 123; Fitch's Est., 8 Lack. L. N. 150; Gilson's Est., 18 Phila. 119; Rambo's Est., 15 Montg. 25; Sheridan's Est., 10 Kulp, 157.

²¹ Hill's Est., 19 Lanc. L. R. 179.

²² Jacoby's Est., 201 Pa. 442.

¹ Mylin's Est., 7 Watts, 64; Irwin's Ap., 5 Wharton, 577.

² McGreevy v. Kulp, 126 Pa. 97.

³ Hoffman's Est., 9 D. R. 206.

⁴ Brennan's Est., 65 Pa. 16.

⁵ Kunkle's Est., 21 Supr. C. 200.

⁶ Rowe's Est., 11 Kulp, 36.

⁷ Topham's Est., 12 D. R. 4. Hanna, P. J.

(A) Confirmation.

Section 1, of rule 7, Allegheny County, provides:

"Accounts allowed by the register shall be presented on the first day of each term and confirmed *nisi*, if they appear on examination to be correct, and the register has given the required notice; which confirmation shall become absolute without further order, unless exceptions are filed within ten days."

(B) Filing, notice and confirmation by the clerk.

Section 2, of rule 7, Allegheny County, provides:

"All trust accounts not required by law to be filed in the register's office, shall be filed with the clerk (after having been examined and passed by him) who shall give notice thereof by publication, and present his said accounts for confirmation *nisi* to this court at the same time and in the same manner as the register's list of accounts of administrators, executors and guardians are now by law published and presented, and upon such confirmation the clerk shall copy said accounts into a book to be kept by him for that purpose."

(C) Confirmation of trust accounts, reports, inquests, etc.

Section 3, of rule 7, Allegheny County, provides:

"Trust accounts, reports of sale and inquests of partition, if appearing to be correct, shall on presentation to the court at the return day thereof be confirmed *nisi* and filed, which confirmation shall become absolute unless exceptions are filed within ten days, *Provided*, That when deemed necessary the court may direct special notice to be given."

(D) Exception to decree.

Section 4, of rule 7, Allegheny County, provides:

"Exceptions may be filed by leave of court to any decree within twenty days after such decree shall have been entered."

(E) Form of exceptions.

Section 5, of rule 7, Allegheny County, provides:

"All exceptions shall set forth the ground on which objections are founded; otherwise they will be dismissed, or the exceptant will be required to pay the costs of any adjournment resulting therefrom, as the court may deem just."

16. Form of exceptions.

It is impossible to give more than the general outline of exceptions, since each account may present special features and items liable to exception. Following is a suggestion from Rhone's O. C., Vol. II.

Estate of Hugh Jardyne, deceased.

Exceptions to the final account of James Bell, administrator of said estate, certified to and filed in the Orphans' Court of Luzerne County, on the — day of —, A. D. 19—.

1. Said accountant has charged himself with — inventoried at \$100, whereas he sold the same for \$150, and has failed to account for the increase of \$50.

2. Said accountant has failed to charge himself with the interest on \$500 moneys of said decedent which he has used in his business since the — day of —, A. D. 19—.

3. Said accountant wrongfully claims credit for the sum of \$76, a

debt due from one Arthur Vane, reported worthless, whereas it was lost by his neglect to collect the same.

May Eyerly, heir-at-law,
Per her attorney,
Grier B. Snyder.

[Affidavit to truth.]

Exceptions having been filed within the time provided by rule of court, the exceptant is not precluded from urging other exceptions filed later.¹¹

17. Form of notice by register.

To all legatees, creditors and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file their accounts in the office of the register for the probate of wills and granting letters of administration, in and for the county of Bucks, that said executors, administrators and guardians have settled their accounts in the office of the said register, and that the same will be presented to the Orphans' Court of the said county on Monday, —, 19—, at 10 o'clock A. M., at the court house, in Doylestown, for confirmation:

19—, June 5, Fraley, Elizabeth Fraley, Administratrix of Seth Fraley, deceased.

19—, June 5, Wynne, Jennie Wynne, Administratrix of James Wynne, deceased.

_____,
Register.

Against such notice an allegation of want of notice will not avail.¹²

18. Form of certificate of register.

Warren County, ss:

This account having been examined by me, the accountant duly sworn and legal notice having been given by weekly advertisements in the — —, and in the — —, for four successive weeks, and besides, by posting printed notices in six public places, the same is now presented to the Orphans' Court for allowance and confirmation on the — day of —, A. D. 19—.

Given under my hand and the seal of the register's office at Warren, Pa., this — day of —, 19—.

_____,
Register.

[Seal.]

19. Form of certificate of balance due from accountant.

After the filing and confirmation of the account any one interested may request a certificate to be filed in the Court of Common Pleas, which when there entered, becomes a lien as well as judgment under the act of 1909. Following is a form:

Erie County, ss.

I, Wilson King, Clerk of the Orphans' Court in and for the

¹¹ Koch's Est., 148 Pa. 159 (Lebanon County, rule).

¹² Ferguson v. Yard, 164 Pa. 586.

County of Erie, do certify, that by the final (or first or other partial) account of Carson Graham and Smith Jackson, administrators (or other accountants) of the estate of Robert McCracken, late of the city of Erie, deceased, which was finally settled and confirmed by the court aforesaid on the 11th day of August, 1881, there appears to be due from and in the hands of the said Carson Graham and Smith Jackson, administrators aforesaid, the sum of \$1458.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Erie, this 11th day of August, 1881.

Wilson King,

Clerk of the Orphans' Court.

Docket entry in above case:
The Widow, Heirs, and Estate of
Robert McCracken, deceased,

vs.

Carson Graham and Smith Jackson, Administrators of the Estate of Robert McCracken, deceased.

Certificate of balance due by administrators (defendants) to plaintiffs, as per their administration account filed and confirmed in the Orphans' Court.

Certificate from Orphans' Court filed and entered 11th August, 1881.

Debt \$1458.

Int., 11th August, 1881.

[Approved in *McCracken v. Graham*, 14 Pa. 209.]

20. Balance due from executors certified to the Common Pleas, etc.

Section 29 of the act of May 29, 1832, P. L. 190, is amended by section 1, of the act of April 27, 1909, P. L. 202, so as to read as follows:

"It shall be the duty of the prothonotary of the Courts of Common Pleas of the respective counties to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts or extracts of the amount appearing to be due from, or in the hands of, any executor, administrator, guardian or other accountant, on the settlement of their respective accounts in the Orphans' Court, which transcripts or extracts so filed shall constitute judgments against such executor, administrator, guardian, or other accountant, from the time of such entry until payment, distribution, or satisfaction; and execution and attachment execution, actions of debt or *scire facias* may be instituted thereon, by the person or persons interested, for the recovery of so much as may be due to them respectively: *Provided, however*, that the liens thereby created shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by *scire facias*, in the manner by law directed in the cases of judgments in the courts of common law: *And provided further*, That in case of an appeal from the Orphans' Court, the judgments shall be for no more than for the amount finally found due and decreed in the Supreme or Superior Court; and it shall be the duty of the prothonotary of the Common Pleas, on such decree of the Supreme or Superior Court being certified to him, to enter on his docket the amount so found due and decreed by the Supreme or Superior Court; and if such

amount be greater than that decreed by the Orphans' Court, the judgment for such excess shall take effect only from the time of entering the decree of the Supreme or Superior Court; but if the amount be reduced by the final decree of the Supreme or Superior Court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree, upon appeal being certified and filed in the said Court of Common Pleas, the said term of five years shall be counted from the time of such entry; and all executions, attachment executions and other process heretofore issued out of any of the courts of Common Pleas of this commonwealth, upon any such certified transcripts or extracts from any of the Orphans' Courts of this commonwealth, if otherwise valid, and if otherwise duly issued and served as provided by law, are hereby declared to be, and shall be deemed and held to be lawful and valid; and no defendant, garnishee or other person shall be permitted to make or take any objection, exception, plea, or defense to the same; nor shall any objection, exception, plea or defense heretofore made to the same be deemed lawful, valid, or effectual, because or on the ground that there was at the time of issuing any such process, as aforesaid, no sufficient or valid judgment upon which such process might be issued; and the provisions hereof shall be held applicable to all actions, suits and proceedings heretofore commenced or instituted, as well as to all such actions, suits or proceedings as shall be hereafter commenced or instituted: *Provided, however,* that nothing herein contained shall apply to or affect any actions, suits or proceedings, heretofore commenced or instituted and upon which final judgment or decree of the Supreme or Superior Court has been entered, or as to which any court of Common Pleas has entered its judgment or decree, and the time for an appeal therefrom has elapsed."

The amendments of the act of 1909 transformed the entry of such accounts by the prothonotary from a lien into a judgment. Prior to that it was necessary to issue a *sci. fa.* on the transcript, before execution could issue, and if the accountant had died his personal representatives must have been made parties.¹³ The account need not be a final one,¹⁴ and the transcript may be filed in every county in which the accountant has real estate.¹⁵ Such transcript may be filed after three years from the appointment of an auditor on exceptions which were treated as abandoned.¹⁶

21. Interest in accounts.

Section 17 of the act of March 29, 1832, P. L. 190, provides:

"No executor or administrator shall be liable to pay interest but for the surplusage of the estate remaining in his hands or power when his accounts are or ought to be settled and adjusted in the register's office: *Provided,* That nothing herein contained shall be construed to exempt an executor or administrator from liability

¹³ Rowland v. Harbaugh, 5 Watts, 365.

¹⁴ Royer v. Myers, 15 Pa. 87.

¹⁵ Hanson v. Bank, Etc., 7 Pa. 261.

¹⁶ Roshing v. Chandler, 3 Watts, 369; Meason's Est., 4 Watts, 343.

to pay interest, where he may have made use of the funds of the estate for his own purposes, previously to the time when his accounts are or ought to be settled, as aforesaid."

"Section 18. The amount of interest to be paid in all cases by executors, administrators and guardians shall be determined by the Orphans' Court, under all the circumstances of the case; but shall not, in any instance exceed the legal rate of interest for the time being."

The gross balance found due the estate by the auditor (or auditors) constitutes the principal on which the interest must be reckoned.¹⁷ Interest may be charged on moneys deposited in bank by the accountant.¹⁸ An administrator is chargeable with interest on moneys deposited in his own bank, at the same rate as other banks pay.¹⁹ For failure to invest he will be charged only with simple interest, the doctrine of "rests" applying only where there is malfeasance.²⁰

22. Effect of confirmation.

A decree confirming an account is definitive, from which an appeal lies;²¹ and although it be but a partial account by a trustee, it cannot be re-examined on exceptions to a subsequent account.²² This does not apply to guardians' triennial accounts, as they are only filed for information and not confirmed. After the confirmation of an account it is discretionary with the court, under the circumstances, to direct the filing of a further account.²³

If the court orders that the decree of confirmation be opened and set aside and a re-hearing is granted, an appeal does not lie from such order. The proper course is to except on the record and abide the final event.²⁴ The confirmation of an account whether partial or final has been said to be like a judgment *in rem*, and conclusive as to the matters contained in it, unless appealed from, or opened on a bill of review.²⁵ But where a grandchild was unrepresented and had no notice of the proceedings, it will not be concluded.²⁶ The confirmation has no effect upon questions arising on distribution.²⁷ It has been held that an accountant who is also a lawyer may charge the usual fees for stating the account himself.²⁸

¹⁷ Heister's Ap., 7 Pa. 455; Brinton's Est., 10 Pa. 408.

¹⁸ Biles' Ap., 24 Pa. 335; Wither's Ap., 16 Pa. 151; Beck v. Uhrich, 16 Pa. 499; Solliday v. Bissey, 12 Pa. 347; Brinton's Est., 10 Pa. 408. (See Waylan's Est., 17 W. N. C. 375.)

¹⁹ Dick's Est., 183 Pa. 647.

²⁰ Pennypacker's Ap., 41 Pa. 494; Norris' Ap., 71 Pa. 106.

²¹ Rhoads' Ap., 39 Pa. 186.

²² Moore's Ap., 10 Pa. 435.

²³ Seeger's Est., 6 W. N. C. 369; Caldwell's Est., 6 W. N. C. 370; Neill's Est., 15 W. N. C. 158; 16 Phila. 378.

²⁴ Walker's Ap., 3 Rawle, 229; McGrew's Ap., 14 S. & R. 396; Light's Ap., 22 Pa. 445; Rhoads' Ap., 39 Pa. 186; Jones' Ap., 99 Pa. 124.

²⁵ Downing's Est., 5 Watts, 90; Garber v. Comth., 7 Pa. 265; Robinett's Ap., 36 Pa. 174; Rhoads' Ap., 39 Pa. 186.

²⁶ White's Est., 163 Pa. 383.

²⁷ Foulk v. Brown, 2 Watts, 214.

²⁸ Mumma's Est., 2 D. R. 592.

23. Jurisdiction of accounts.

The Orphans' Court has exclusive jurisdiction of proceedings to determine the amount of a decedent's estate and to distribute the balances accounted for or found in the hands of his legal representatives, to creditors, legatees and next of kin.¹ An action at law, will therefore not lie in the premises,² though formerly it was somewhat different.³ Since the acts conferring this jurisdiction on the Orphans' Court, *supra*, it has been held to have jurisdiction of every question standing in the way of distribution of the balance of an account,⁴ the purpose being to distribute the whole estate in one proceeding by a single decree.⁵ The settlement in the Orphans' Court cannot be anticipated by a bill in equity, either, to enforce specific performance;⁶ or by an action in the Common Pleas,⁷ even in the form of ejectment.⁸ So the Orphans' Court has exclusive jurisdiction of the disposition of a fund directed by will to be invested for the use of the widow and a claimant on said fund cannot sue the executor in assumpsit;⁹ and a bill in equity will not lie to determine the ownership of a fund in course of settlement in the Orphans' Court.¹⁰ But a bill will lie to establish a right not interfering with the question of distribution,¹¹ and also where the grasp of the Orphans' Court has ceased by long delay and the only remedy is to apply the doctrine of equitable election to the shares in the real estate of the executors.¹² After an account is confirmed absolutely and distribution awarded, the plea of *plene administravit* by the administrator upon the *sci. fa.* on the transcript cannot be heard in the Common Pleas, it being exclusively for the Orphans' Court.¹³

The Orphans' Court has concurrent jurisdiction with the Common Pleas in the collection of legacies; but a residuary legatee must have resort to the Orphans' Court because the amount of it can only be ascertained by accounting there.¹⁴ It has jurisdiction on

¹ Linsenbigler v. Gourley, 56 Pa. 166; Weimer v. Karch, 153 Pa. 385; Hammett's Ap., 83 Pa. 392; Kittera's Est., 17 Pa. 416; P. & L. Dig., vol. 14, col. 24299; Ellwanger v. Moore, 206 Pa. 234; Brittain's Est., 28 Supr. C. 144; Peterson's Est., 29 C. C. 28.

² Black v. Black, 34 Pa. 354; Guthrie v. Kerr, 85 Pa. 303; Morgan v. Morgan, 1 Mona. 137; Piper's Est., 208 Pa. 636; Godshalk v. Seitz, 18 Montg. 125, 152; Linn v. McGrillis, 13 D. R. 440; Bickley's Est., 14 D. R. 253.

³ Purviance v. Comth., 17 S. & R. 31.

⁴ Dundas' Ap., 73 Pa. 474; Otterson v. Gallagher, 88 Pa. 355; Bayley's Est., 23 C. C. 49.

⁵ Woodward, J., in Seitzinger's Est., 2 Woodward, 348; Bicking's Ap., 2 Brewster, 202.

⁶ Lowry v. Lowry, 10 Phila. 105.

⁷ Ruth v. Katterman, 112 Pa. 251; Roberts' Est., 2 Pearson, 251; Harrisburg Natl. Bank's Ap., 84 Pa. 380.

⁸ Girard, Etc., Co. v. Wilson, 57 Pa. 182.

⁹ Dewald v. Berkheiser, 19 Supr. C. 570.

¹⁰ Tyson v. Rittenhouse, 186 Pa. 137; Tyson's Est., 191 Pa. 218.

¹¹ Fidelity, Etc., Co.'s Ap., 99 Pa. 433.

¹² Armstrong v. Walker, 150 Pa. 585.

¹³ Burd v. M'Gregor, 2 Grant, 353.

¹⁴ Dewald v. Berkheiser, 19 Supr. C. 570.

the petition of the widow to set out her exemption, to declare void an antenuptial contract set up in bar of her statutory right.¹⁵

24. Jurisdiction to ascertain the claims of creditors.

Upon distribution of the balance of an account the Orphans' Court has jurisdiction to ascertain the claims of creditors;¹ but where the Common Pleas in a lunacy proceeding has determined the amount of compensation due from the lunatic's estate, the Orphans' Court will be bound by it.² The above is the rule whether the estate be solvent or insolvent,³ when there is a fund before it, but not otherwise.⁴ When there is no fund in the Orphans' Court for distribution the right to a common law action remains.⁵ The right of action on an official bond in which decedent was surety is in the Common Pleas under the act of June 14, 1836, P. L. 637, and not in the cognizance of the Orphans' Court.⁶ A creditor who presents a claim before the auditor or auditing judge may withdraw it before the auditor has finally acted upon it, and bring suit elsewhere, but this will not delay the distribution.⁷ This right is not affected by claimant's retention of other claims before the auditor,⁸ nor by the fact that the creditor has cited the executor to account.⁹ If he submits his claim, however, and the auditor has passed upon it, he is concluded as to the choice of jurisdiction.¹⁰ The Orphans' Court may ascertain the amount of a claim for damages from a libel contained in the will of the decedent,¹¹ or the disputed claim of an attorney for services to the administrator in the settlement of the estate;¹² or unliquidated damages from a breach of covenant, although an action be pending in the Common Pleas.¹³

25. Claims against distributees.

The Orphans' Court has jurisdiction to determine the right to a legacy between the legatee and his assignee;¹⁴ or between the assignee of a legacy and an attaching creditor,¹⁵ or one claiming

¹⁵ Livengood's Est., 15 D. R. 239.

¹ Bull's Ap., 24 Pa. 286; Kittera's Est., 17 Pa. 416; Curcier's Est., 28 Pa. 261; McMurray's Est., 101 Pa. 421; Crawford v. Parker, 26 C. C. 414; Hughes' Est., 13 Supr. C. 240.

² Young's Est., 8 C. C. 4.

³ Gochenauer's Est., 23 Pa. 460; P. & L. Dig., vol. 14, col. 24315.

⁴ Frantz's Est., 6 Lanc. Bar, No. 1; Jones' Est., No. 1, 15 Phila. 533.

⁵ Swain v. Ettling, 32 Pa. 486; Sergeant v. Ewing, 30 Pa. 75; McLean v. Wade, 53 Pa. 146; Kimble v. Carothers, 81 Pa. 494; Hammett's Ap., 83 Pa. 392; Fidelity, Etc., Co.'s Ap., 99 Pa. 443.

⁶ Shipton's Est., 30 Pitts. L. J. 20.

⁷ Thomson's Est., 12 Phila. 36.

⁸ Haviland v. Fidelity, Etc., Co., 108 Pa. 236.

⁹ Sergeant v. Ewing, 30 Pa. 75.

¹⁰ Kittera's Est., 17 Pa. 416.

¹¹ Gallagher's Est., 10 D. R. 733.

¹² Wilson's Ap., 3 Walker, 216.

¹³ Guth's Ap., 5 Atl. 728.

¹⁴ Thompson's Ap., 103 Pa. 603; Rittenhouse's Est., 4 Montg. 204; Lex's Ap., 97 Pa. 289; McGettrick's Ap., 98 Pa. 9.

¹⁵ Otterson v. Gallagher, 88 Pa. 355; Hess' Est., 27 Supr. C. 498.

under the legatee's will;¹⁶ but mere claims, without assignment or attachment of distributee's share, will not be entertained.¹⁷ A judgment in the Common Pleas on an attachment execution can only affect the distributee's interest as finally ascertained by the Orphans' Court.¹⁸

An executor who pays the claim of an attaching creditor of a distributee does so at his own risk, prior to the ascertainment of the share by the Orphans' Court. He may be subrogated only to the extent of such interest.¹⁹ The Orphans' Court is bound by the record of the Common Pleas on the attachment.²⁰ The rights of the attaching creditor must be there determined,²¹ and the distribution in the Orphans' Court may be held in abeyance until so determined.²² But it has also been decided that where all the distributive shares are attached the Orphans' Court may determine the order and proportions in which such creditors are entitled to take in the distribution.²³

A suit in the Common Pleas tolls the statute of limitations²⁴ and fixes the liability of the estate to the plaintiff;²⁵ but to enforce his right as against the fund he must come into the Orphans' Court.²⁶ The same is true of a decree in Equity.²⁷ The mere pendency of a suit in the Common Pleas does not affect the right of an auditor in the Orphans' Court to pass upon the claim²⁸ and make distribution, though the latter court may in its discretion suspend proceedings until the former has passed upon the right involved.²⁹ But such suit does not strip the suitor of any right to have a citation and be heard in the Orphans' Court.³⁰ When the creditor obtains judgment after the death of the decedent he cannot by an attachment execution obtain a preference on distribution.³¹ The attaching creditor is bound to present his claim to the auditor and if he fails, the executor must pay out as awarded.³²

The auditor's jurisdiction of a claim presented cannot be ousted by the fact that it had been previously sued for.³³

The Orphans' Court has no jurisdiction, however, to enforce

¹⁶ *Bridham's Ap.*, 1 Penny. 262.

¹⁷ *Ottinger's Est.*, 4 D. R. 711; *Landis' Est.*, 2 Phila. 217; *Poorman's Est.*, 1 Pearson, 393.

¹⁸ *Maurer v. Kerper*, 102 Pa. 444.

¹⁹ *Watson's Est.*, 47 Pitts. L. J. 206.

²⁰ *Wilkinson's Est.*, 31 Pitts. L. J. 149.

²¹ *Campbell's Est.*, 9 Phila. 346.

²² See *Attachment Execution*, vol. 2. Johnson, p. 415.

²³ *Fitler's Est.*, 16 Phila. 238.

²⁴ *Hammett's Ap.*, 83 Pa. 392.

²⁵ *Middleton v. Norcross*, 11 W. N. C. 321.

²⁶ *Yocum v. Com. Natl. Bank*, 195 Pa. 411; *Phillips v. All. V. R. Co.*, 107 Pa. 465.

²⁷ *Hubert Oil Co. v. Riddle*, 6 Phila. 495; *McElhenny's Ap.*, 61 Pa. 188.

²⁸ *Schenck's Est.*, 4 W. N. C. 511.

²⁹ *Hammett's Ap.*, 83 Pa. 392.

³⁰ *Shallcross' Est.*, 13 Phila. 374; *Canam's Est.*, 6 Northam. 242.

³¹ *Strouse v. Lawrence*, 160 Pa. 421.

³² *Lex's Ap.*, 97 Pa. 289.

³³ *Benedict's Est.*, 4 Lanc. L. R. 99.

the payment of a legacy which is only a personal charge;³⁴ the remedy being by action of assumpsit in the Common Pleas;³⁵ nor can a condition personal in a will be enforced by the vendee of the land against the devisee in the Orphans' Court;³⁶ nor can it allow out of the distributive share of a son the claim of the administrator of the tenant by the curtesy for use and occupation.³⁷ It may allow counsel fees to an attorney for a legatee.³⁸ An assignee of an interest who fails to make his claim before the auditor, cannot attack the justice's jurisdiction of the attachment, by which the fund was taken, by moving to have the adjudication opened, the defendant not objecting.³⁹ The liability of a defaulting trustee under a will can only be determined by attachment proceedings.⁴⁰ The Orphans' Court has power to determine the right to a share between the original owner and one claiming it by conveyance⁴¹ or assignment.⁴² But it cannot allow a fund to a claimant on an insurance policy when such claim has been rejected in a court of competent jurisdiction chosen by the claimant himself.⁴³ The mere pendency of a suit in the Common Pleas does not, however, oust the jurisdiction of the Orphans' Court to pass upon the claim and make distribution.⁴⁴ The Orphans' Court will abide by an adjudication in partition in the Common Pleas.⁴⁵

Where the account shows no fund for present distribution, the proper practice is merely to audit and settle the account, as to its correctness.⁴⁶

³⁴ *Walter's Ap.*, 95 Pa. 305; *Ditsche's Est.*, 13 Phila. 288; *Hope's Est.*, 34 Pitts. L. J. 251; *Schmehl's Ap.*, 8 Atl. 874.

³⁵ *Hamilton v. Porter*, 63 Pa. 332.

³⁶ *South M. Twp. v. Marshall*, 138 Pa. 570.

³⁷ *Tigue's Est.*, 11 Kulp, 44.

³⁸ *Connolly's Est.*, 51 Pitts. L. J. 301; *Gross' Est.*, 14 D. R. 137.

³⁹ *Swinehart's Est.*, 21 Lanc. L. R. 258.

⁴⁰ *Wade's Est.*, 22 Lanc. L. R. 257.

⁴¹ *King's Est.*, 215 Pa. 59.

⁴² *Canavan v. Paye*, 34 Supr. C. 91.

⁴³ *Shortlidge's Est.*, 214 Pa. 620.

⁴⁴ *Craig's Est.*, 11 Kulp, 205.

⁴⁵ *Kite's Est.*, 12 D. R. 397.

⁴⁶ *Hamill's Est.*, 36 Leg. Int. 137; *Jones' Est.*, No. 1, 15 Phila. 533; *Snyder's Est.*, 3 D. R. 531.

CHAPTER XVIII

REVIEW OF ACCOUNT BY PETITION.

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| 1. Correction by petition of review. | 6. Form of answer. |
| 2. Time of petition — and character. | 7. Form of decree granting petition. |
| 3. Practice on petition. | 8. Form of decree refusing petition. |
| 4. Form of petition. | |
| 5. Form of order of court. | |

1. Correction of account by petition of review.

Section 1 of the act of October 13, 1840, (P. L. 1841, p. 1) provides:

“The judges of the Orphans’ Courts of the Commonwealth of Pennsylvania within five years after the final decree, confirming the original or supplementary account of any executor, administrator or guardian, which has [been] or may be hereafter passed as aforesaid, upon petition of review being presented by such executor, administrator, or guardian, or their legal representatives, or by any person interested therein, alleging errors in such account, which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation, said Orphans’ Court shall grant a rehearing of so much of said account, as is alleged to be error in said petition of review, and give such relief as equity and justice may require, by reference to auditors, or otherwise, with like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken under the provisions of this act within one year after the decree made on the petition of review; *Provided*, That this act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any executor, administrator or guardian.”

This act does not affect cases not within its purview.¹ It introduces equity and will be liberally used.² It will be allowed: 1, For error of law appearing in the body of the decree; 2, for new matter arising since the decree; 3, for matter which has come to light since the decree and was unknown or could not possibly have been available when the decree was made.³ But in the last case

¹ George’s Ap., 12 Pa. 260; Johnson’s Ap., 114 Pa. 132.

² Bucknor’s Est., 7 W. N. C. 470.

³ Riddle’s Est., 19 Pa. 431; Green’s Ap., 59 Pa. 235; Bishop’s Ap., 26 Pa. 470; Stevenson Ex.’s Ap., 32 Pa. 318; Russell’s Ap., 34 Pa. 258; Priestley’s Ap., 24 W. N. C. 305; Milligan’s Ap., 82 Pa. 389.

it will be allowed only as a matter of grace and not of right.⁴ The purpose is to afford equitable relief where strict law and technical rules would produce injustice.⁵

2. Petition of review, time of and character.

A petition for review of an account, under the act of 1840, *supra*, is only of right, when the errors complained of are apparent on the face of the record.⁶ If the party has had his day in court and been heard upon the matter fully, his petition is without merit and will not be granted *ex gratia*.⁷ If the petition be based upon allegations of fraud in the procuring of the decree complained of, it must be sustained by clear and satisfactory evidence of the facts averred as constituting the alleged fraud.⁸ The statutory time of five years is not inflexible, under proper circumstances where great injustice would result, if not allowed. But where one sleeps upon his rights for eight years after the decree is entered, and waits until both parties have been translated, he cannot ask for a review on after discovered evidence.⁹

Where an accountant has neglected to charge the estate with debts owing him by the same, he has his remedy by petition of review.¹ Even a decree discharging a guardian after settlement, payment of balance to his successor and release by him is not a bar to this petition.² Where the administrator has charged himself with rents and profits and proceeds of realty in his account, his sureties have a standing to petition for review.³ It may be invoked more than three years after decree in partition for a clear mistake of fact, purchasers not having become interested. To bar the remedy the party must have been guilty of supine negligence. While a bill would not lie in Chancery, yet the Orphans' Court as a court of equitable procedure is not bound by the rigid rules of practice nor is it subject to the nice distinctions "which time and a somewhat subtle temper of a bygone age contributed to impress upon the older tribunal."⁴ Said Bell, J., in *George's Ap.* just quoted:

"The Orphans' Court has from the beginning exercised the power of reviewing and modifying its proceedings and decrees, as an authority necessarily inherent and essential to the right discharge of its duties. On this point, no statutory direction was given until the act of October, 1840, which, however, is confined to reviews of alleged errors in the settled accounts of executors, admin-

⁴ *Hartman's Ap.*, 36 Pa. 70; *Scott's Ap.*, 112 Pa. 427.

⁵ *Stevenson's Ex.'s Ap.*, 32 Pa. 318; *Yeager's Ap.*, 34 Pa. 173; *Whelan's Ap.*, 70 Pa. 410.

⁶ *Dox's Est.*, 227 Pa. 606.

⁷ *Milliken's Est.*, 227 Pa. 502.

⁸ *Minor v. Minor*, 204 Pa. 199.

⁹ *Buck v. Buck*, 195 Pa. 373.

¹ *Clauser's Est.*, 1 W. & S. 215.

² *Neisly's Ap.*, 8 Pa. 457.

³ *Bishop's Est.*, 10 Pa. 469.

⁴ *Bell, J.*, in *George's Ap.*, 12 Pa. 260, citing *Comth. v. Judges*, 4 Pa. 301; *Brinker v. Brinker*, 7 Pa. 53; *Shaffer's Ap.*, 8 Pa. 43; *Jenkins v. Jenkins*, 8 Pa. 246; *Johnson's Ap.*, 9 Pa. 416.

istrators and guardians. This limits the period within which a review may be had in such cases to five years, but it leaves untouched the pre-existing practice in all other instances. Being thus unrestrained by the written law I see no objection to the liberal exercise of the right to rehear and redress for the correction of manifest mistake involving injury, tempered, however, by the application of a sound discretion, seeking to protect the rights of third persons, and which, in most cases, would dictate a refusal to interfere when the relative position of the original parties was materially changed, or the interests of third persons might be put to hazard. In estimating such a contingency, the time which had elapsed since the decree complained of, would of course enter largely into the consideration of the court; and, where this was much extended, might of itself afford a sufficient objection to bar the prayer for relief. It is said that in England, in the time of Lord Guilford, there was no limitation for a bill of review: *Fetton v. Macclesfield*, 1 Vern. 287; though in *Goddard v. Goddard*, Ch. Rep. 139, it was not permitted sixteen years after a decree, and it now seems to be the rule not to reverse on review after twenty years, except for very apparent error. But a review will be allowed even after twenty years, in favor of persons under the disabilities specified in the statute of limitations: *Smith v. Clay*, 3 Bro. ch. ca. 639, S. C. Amb. 645; *Lytton v. Lytton*, 4 Bro. ch. ca. 458. As a bill of review is in the nature of a writ of error,⁵ it is probable this period of twenty years was adopted by analogy from stat. 10 and 11, Wm. III, c. 14, limiting writs of error in certain cases; and should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our acts of 1791 prohibiting writs of error after seven years, or, it may be, to the act of 1840, just mentioned."

A bill of review will be refused after sixteen years, on the ground of the trustees' laches.⁶ Review will not be granted for trivialities;⁷ nor where a trustee was allowed 5 per cent. commission, after his accounts were examined and approved by the *cestui que trust*.⁸

A bill of review may be allowed for an error in law appearing in the body of the decree; or for new matter which has arisen after the decree. It may also be obtained by special leave for new proof which has come to light after the decree, which could not possibly be used at the time when the decree was made. It should not be granted upon the same questions of fact which had been before fully heard and decided.⁹ But it will not be granted as a matter of right four years after confirmation, nor on the ground of after-discovered evidence which could have been produced at the audit, with due diligence.^{9a}

⁵ *Dennison v. Goehring*, 6 Pa. 403.

⁶ *Adams' Est.*, 183 Pa. 134.

⁷ *Radigan's Est.*, 13 Supr. C. 131.

⁸ *Vastine's Est.*, 190 Pa. 443.

⁹ *Riddle's Est.*, 19 Pa. 431. Lewis, J., quoting Lord Chancellor Bacon and Story's Eq. Pl., section 404. *Whiting v. Bank of U. S.*, 13 Peters, 13; *Bailey's Est.*, 208 Pa. 594.

^{9a} *Barr's Est.*, 43 Supr. C. 540.

3. Practice on bill of review.

A bill or petition of review is in the nature of a new suit, founded on substantial error of law, appearing on the record of a former case, or on newly discovered evidence; and it is never allowed to stand on strict law and against equity.¹⁰ The petition must specifically set forth all the errors complained of. If the settlement or decree have been obtained by fraud and review is allowed on that ground the whole account may be opened, on due proof.¹¹ The allowance of a review for new proof discovered since the decree, is a matter of grace and not of right.¹²

The act of 1840 *supra* allows a petition in the case of an administrator's partial as well as final account. Final decree applies equally to the confirmation of either.¹³

The bar of a petition after five years from the confirmation of the account cannot be removed by an act of the legislature, which thereby assumes arbitrary power over the functions of the judiciary, and is prohibited by the constitution.¹⁴

The limitation of the above act cannot be evaded by a citation to the executor to file a supplemental account.¹⁵

But the Orphans' Court may entertain a bill of review notwithstanding affirmance by the Supreme Court, and after the term has gone by;¹⁶ also after the limitation, where a guardian has not accounted for moneys of his ward; the payment of the balance in the account does not preclude examination as to that which he has not accounted for.¹⁷

The act does not apply where the distribution and payment were voluntary and made before the account was filed.¹⁸

Where an administrator, in pursuance of a decree of the court has paid over money to a distributee, without notice of a bill of review, he will be protected against loss should the court subsequently open and change the decree.¹⁹

In case a guardian has committed a fraud the old rule of law, established from time immemorial, was that the statute begins to run from the time when it was discovered and not the confirmation of the account.²⁰

Quoting Judge Bell, *supra*, George's Ap., the court held²¹ that it would be well for courts of equity to follow the analogy of the law with reference to appeals and insist upon the statutory time. A bill

¹⁰ Lowrie, Ch. J., in Yeager's Ap. 173, citing Riddle's Est., 19 Pa. 431; Bishop's Ap., 26 Pa. 470; Stevenson's Ex.'s Ap., 32 Pa. 318; Hartman's Ap., 36 Pa. 70; Cramp's Ap., 81 Pa. 90.

¹¹ Yeager's Ap., *supra*.

¹² Hartman's Ap., 36 Pa. 70; Green's Ap., 59 Pa. 235.

¹³ Rhoads' Ap., 39 Pa. 186.

¹⁴ Bagg's Ap., 43 Pa. 512.

¹⁵ Eby's Est., 45 Pa. 379.

¹⁶ Parker's Ap., 61 Pa. 478; Young's Ap., 99 Pa. 74.

¹⁷ Kinter's Ap., 62 Pa. 318.

¹⁸ Nevin's Est., 70 Pa. 410.

¹⁹ Stewart's Ap., 86 Pa. 149; Charlton's Ap., 88 Pa. 476.

²⁰ Kuhn's Ap., 87 Pa. 100. (But see Smith v. Blachley, 198 Pa. 173, for the overturning of the same case, 188 Pa. 550.)

²¹ Littleton's Ap., 93 Pa. 177.

of review will not be granted where the amount found due has been paid and discharged.²²

An order of the Orphans' Court that a decree confirming an account shall be opened and set aside and a rehearing had, is not a final decree from which an appeal lies.²³

Where a proper case is set forth on the face of the petition and the facts therein stated are verified by affidavit, it is the duty of the Orphans' Court to grant a review, unless the case falls within the proviso appended to said act.²⁴

The application of a bill of review as to other proceedings than accounts, in the Orphans' Court is discussed in Johnson's Ap., though somewhat loosely, by Paxson, J.²⁵ The doctrine so carefully laid down and explained by Bell, J., in George's Ap.²⁶ is expanded until the Orphans' Court instead of being a court of equitable jurisdiction becomes not only a court of Equity distinctively but a court of High Chancery, with the puisne judge sitting as a High Lord Chancellor, in the opinion of the justice. The bill in this case prayed that the decree confirming the sale of land by the guardian at Orphans' Court sale be opened, that the sale be set aside and the purchase money refunded and the deed cancelled, because there was a mistake in the quantity of the land sold by the guardian. The purchaser complied with every condition to bring himself within the rule laid down in George's Ap. and the later case of Milne's Ap.,²⁷ but it was in no sense necessary to make the Orphans' Court either a court of Equity or of Chancery to do it. If the petitioner refused to appear at the audit and instructed counsel to ignore the orderly settlement of the estate, she will not, after distribution, have any equitable claim that will appeal to the judge of the Orphans' Court to re-open the account.²⁸

The confirmation of an executor's account is only conclusive as to such matters as are properly embraced in it.²⁹

A bill of review of an account after 17 years must show very strong evidence of fraud to appeal for review. Mere inferences or presumptions cannot move the conscience of the court to equitable relief. Where the bill is demurred to as well as answered, and by leave of court the answer was withdrawn, except so far as it demurred the rule that an answer overrules the demurrer is of no avail.³⁰ The errors complained of must be clearly set forth in the petition and such items in the account as are not objected to will not be disturbed.³¹ But for an error of law on the face of the record, the

²² Lehr's Ap., 98 Pa. 25. (But see when the guardian has not accounted; Kinter's Ap., 62 Pa. 318.)

²³ Loufse Jones' Aps., 99 Pa. 124.

²⁴ Meckel's Ap., 112 Pa. 554.

²⁵ Johnson's Ap., 114 Pa. 132.

²⁶ George's Ap., 12 Pa. 260.

²⁷ Milne's Ap., 99 Pa. 483.

²⁸ Fletcher's Ap., 125 Pa. 352.

²⁹ Robin's Est., 180 Pa. 630.

³⁰ Finley's Est., 196 Pa. 140; McNeel's Est., 68 Pa. 412, distinguished.

³¹ Snyder's Est., 18 Supr. C. 462.

court has inherent power, aside from the act of 1840, which is construed as an act of limitation, to rectify the wrong.³²

4. Form of petition for review of guardian's account.

Following is a form of petition for review of an account, as given in Rhone's O. C., Vol. II:

To the Hon'ble — —, Judge of the Orphans' Court of the County of — —.

The petition of Lavinia Kuhns, a daughter of Isaac R. Kuhns, late of the County of Lancaster, deceased, respectfully represents:

1. That Isaac R. Kuhns died intestate on the — day of —, 19—, seized and possessed of considerable real and personal estate, and that by order of court the real estate was sold, and the administrators having filed their accounts on the — day of —, A. D. 19—, it appeared thereby that there remained in their hands the sum of — dollars, whereof the share of your petitioner was — dollars.

2. That John B. Stehman was on the — day of —, A. D. 19—, duly appointed guardian of the person and estate of your petitioner and on distribution of the estate of her said father the sum of — dollars was paid over to said guardian, as her share therein.

3. That during the minority of petitioner said guardian never filed any inventory, statement or account of said estate.

4. That your petitioner came of age on the — day of —, A. D. 19—, and said guardian on the — day of —, A. D. 19—, filed an account of his said trust in which he charged himself with only \$4,722.99, whereas in truth and in fact he had received the sum of \$5,813.45, as distributed by the court, making a difference of \$1,090.46, for which he has at no time accounted. Said account was confirmed *nisi* on the — day of —, A. D. 19—, and no exceptions were filed thereto.

5. That during the minority of petitioner, viz.: on or about the — day of —, A. D. 19—, she removed from Lancaster, Pa., to Urbana, O., where she has ever since resided, which removal and residence were well known to said guardian; that she was ignorant of the amount of her father's estate and the full value of her interest therein; that she received no notice and had no knowledge of the filing of said account by her guardian or of its confirmation, until after the same had become absolute and she was then assured by her guardian that the sum with which he had then charged himself was all that he had received for her from said estate, and relying upon said assurance and his integrity, she was persuaded not to investigate the truth thereof then; that she had no reason to suspect that said statements were untrue until quite recently, when she discovered the facts as herein above set forth. She therefore prays your honorable court to issue a citation to the said John B. Stehman, guardian aforesaid, commanding him to appear and show cause why said decree of confirmation should not be opened, reviewed and set aside and the account corrected by charging the accountant with the additional

³² Ehrhart's Est., 31 Supr. C. 120; Gillen's Ap., 8 W. N. C. 499; Whelan's Ap., 70 Pa. 410.

amount not included in his said account, and she will even pray, etc.
Lavinia Kuhns.

[Affidavit to truth.]

5. Form of order of court.

Now, — day of —, 19—, citation awarded as prayed for.
Returnable the — day of —, 19—, at 10 o'clock A. M.

By the Court.

6. Form of answer by guardian.

To the Honorable, etc.

The answer of John B. Stehman, to petition of Lavinia Kuhns, respectfully sheweth:

That he objects to and protests against the whole proceeding, as not sustainable, either in law or equity, and denies the power of the court to grant the prayer of the petitioner for the following reasons, viz.:

1. That respondent did file a guardianship account of the estate of said Lavinia Kuhns, on — —, —, showing a balance in her favor of \$4871.08, which was duly confirmed by said court at June Term, —.

2. That in said account he charged himself with all the money he received for said Lavinia Kuhns, and she having attained her lawful age early in October previous, a full settlement was made with her on said — —, at Lancaster, Pa., in the presence of counsel for the administrators of her father's estate, and who prepared the guardianship account, release, and note then taken.

3. That at her request \$4700 of said balance was left standing, the respondent giving her his note therefor, payable in one year, with five and a half per cent. interest, and the residue of said balance paid her in cash. That said note, according to her wishes, remained unpaid until the spring of —, the interest in the meantime being paid; and at the time last mentioned, she was in Lancaster County for some five or six weeks, and several days at the residence of your respondent.

4. That said Lavinia Kuhns had every opportunity to examine the account, and the settlement made, and never raised any objection, to the knowledge of your respondent, until the presentation of the petition, and by numerous letters to him, all showing the confidence in, and entire satisfaction with, what your respondent had done in her estate.

5. That a release given by her to respondent as her guardian, dated — —, —, was recorded in the recorder's office at Lancaster, and the following is an extract therefrom: "I have this day had and received from John B. Stehman, my guardian, the sum of four thousand eight hundred and seventy-one dollars and eight cents (\$4871.08), in full satisfaction and payment of the full balance of the account filed by him as aforesaid, and all moneys received by him for my use during said guardianship, from any and all sources whatever, and all interest accrued thereon after deducting the payments by him made and credited in his said account."

6. That all the allegations contained in said petition, which in any

way impute or insinuate that the respondent has neglected to account for the moneys due the petitioner are untrue.

Your respondent therefore prays that the petition aforesaid may be dismissed at the costs of the petitioner.

John B. Stehman.

[Affidavit to truth.]

7. Form of decree granting petition.

Now, — day of —, 19—, after due consideration by the court, aided by the report of an auditor, the court being of the opinion that the said guardian has, with a fraudulent intent, concealed from his late ward the truth in relation to his said account, whereby he has not accounted or paid over to his ward all that she has been and now is entitled to; therefore it is ordered, adjudged, and decreed that the account be opened, notwithstanding more than five years have elapsed since its final confirmation, and that the matter be referred back to the auditor, who has heretofore reported on the same, with authority to take further evidence, investigate the facts as to the amount actually due from the said guardian to his said ward, and to make report thereon.

By the Court.

By consent the whole testimony may be submitted to the court with the first report of the auditor, and in that case a final decree may be made at once. Proceedings for a review in any other matter are substantially the same as the foregoing. (Rhone's O. C., Vol. II.)

8. Form of decree refusing petition.

Estate of Isaac R. Kuhns, } In the Orphans' Court of Lancaster
Deceased. } County.

In re proceedings for review of guardian's account, etc.

Now, — day of —, 19—, this case having been set down for hearing on petition and answer, and as the answer discloses the fact that no injustice has been done the petitioner in the account as stated, it must stand; and the petition for review is, therefore, dismissed at the costs of the petitioner.

By the Court.

When the court grants a petition, the decree is rescinded and the account opened as to the matters embraced in the petition and may be heard by the court, or an examiner or auditor appointed, as seems best.

CHAPTER XIX.

FAMILY AGREEMENTS.

- | | |
|---|--|
| 1. Family settlements favored by the law. | 4. Form of release of widow and heirs. |
| 2. Form of power of attorney. | 5. Form of agreement to refund. |
| 3. Form of bond of attorney. | 6. Agreement where there is a will. |

1. Family settlements.

Family agreements concerning the settlement of estates are favored by the law, and are sustained in all cases where there has been neither fraud nor overreaching, because they are in themselves mutually beneficial and conducive to peace and harmony.¹ They are usually compromises, in which some yield their supposed or even real rights in furtherance of the common purpose to adjust the estate amicably, and will not be disturbed.² They will not be enforced, in equity, however, unless complete in themselves and made in all fairness, without looking to some future act.³ There being no debts of the decedent and all the heirs *sui juris*, i. e., of age and free from legal disability, they may by agreement among themselves do what they like with their patrimony and without raising administration or proving a will, if there be one.⁴ They may agree about a construction of the will;⁵ or they may agree to set it aside altogether and distribute the estate as they deem agreeable to them. They may terminate a trust before its completion and request the Orphans' Court to distribute the fund, and may agree to give all the proceeds of the real estate to the widow.⁶ They may settle a dispute concerning partition by an agreement to arbitrate.⁷ The statute of limitations runs against an action on such agreements.⁸ A release by a ward to his guardian, after he comes of age, is not considered a family settlement.⁹ Where an estate has been fairly settled, all the parties being represented and they themselves construing the will, courts will not interfere,¹⁰ although they erred in their

¹ Shartel's Ap., 64 Pa. 25; Wilen's Ap., 105 Pa. 121; Burkholder's Ap., 105 Pa. 31.

² Bierer's Ap., 92 Pa. 265.

³ Wistar's Ap., 80 Pa. 484. Sharswood, J.

⁴ Walworth v. Abel, 52 Pa. 370; Ebbs v. Comth., 11 Pa. 374.

⁵ Follmer's Ap., 37 Pa. 121; Hume v. Hume, 3 Pa. 144; Cowan's Ap., 74 Pa. 329; Lies v. Stub, 6 Watts, 48; Delamater's Est., 1 Wharton, 362; Freeman's Est., 16 D. R. 873.

⁶ Culbertson's Ap., 76 Pa. 145.

⁷ Johnston v. Furnier, 69 Pa. 449.

⁸ Steele v. Steele, 25 Pa. 154.

⁹ Eberts v. Eberts, 55 Pa. 110.

¹⁰ Morris' Est., 16 Phila. 343.

interpretation;¹¹ and especially, after a long time.¹² If, however, there is a doubt whether all parties were fully and fairly represented, the court may go into the question.¹³ But in the absence of mistake or fraud, parties consenting to such settlement will be held to it.¹⁴ But a parol agreement, without any apparent consideration, will not be held binding.¹⁵ A fair and equitable family agreement whereby the distribution is equalized, supersedes the will, and if letters have been issued, they may agree to a revocation, the one named as executor, having no interest in the estate except the commissions he might receive, has no standing to object to such revocation.¹⁶ A family settlement has been sustained even where the widow and a grandson had not joined in it, where a question arose after the death of both;¹⁷ also where the parties agreed to a distribution under the intestate laws.¹⁸ But such an agreement cannot affect one who was not a party to it, and claims his rights under a codicil, discovered after such agreement.¹⁹ However, where an unexecuted codicil was by agreement adopted by all the parties, they cannot afterwards be heard to object to it.²⁰ Parties to such family agreement are estopped from claiming distributive shares against a devisee.²¹ Where there are remaindermen affected by such agreement, their interests will be equitably protected.²² The heirs may enter into an arrangement with the widow to hold the estate, on its terms, although one of the legatees becomes indebted subsequently, and the widow will be protected.²³ The courts will in all cases protect the interests of the widow.²⁴ It is obvious that the policy of the law is to encourage amicable settlement of estates, when fairly done by those fully competent, and hence a contest upon a will may be compromised and it will be sustained;²⁵ but it must be an executed agreement, otherwise it cannot be offered on the trial of an issue.²⁶ Parties not consenting are not bound.²⁷ No contestant in a will proceeding can compromise more than his own interest in it.²⁸ In a compromise of a will contest, a part of the estate may be distributed as realty, *ex parte paterna*, according to the terms of the agreement.²⁹

¹¹ Follmer's Ap., 37 Pa. 121.

¹² McDonald v. Dunbar, 2 Mona. 483; Stetson v. Rosenberger, 196 Pa. 534; Pearson's Est., 10 D. R. 189.

¹³ Manning's Est., 23 Lanc. L. R. 409.

¹⁴ Santee v. Santee, 64 Pa. 473; Hoff's Est., 7 D. R. 93; Goodbread's Est., 9 D. R. 710; Reynold's Est., 13 D. R. 604; Brenneman's Est., 17 Supr. C. 75; Johnson's Est., 8 C. C. 1.

¹⁵ Patterson's Ap., 116 Pa. 8.

¹⁶ Lloyd's Est., 10 D. R. 207; Heckman v. Kipp, 228 Pa. 436.

¹⁷ Ralston's Est., 172 Pa. 104.

¹⁸ Alburger's Est., 3 D. R. 114.

¹⁹ Bracken's Est., 138 Pa. 104.

²⁰ Hart's Est., No. 3, 203 Pa. 492.

²¹ Patterson's Ap., 116 Pa. 8.

²² Batione's Est., 136 Pa. 307.

²³ Hess' Est., 27 Supr. C. 498.

²⁴ Sturgeon v. Ely, 6 Pa. 406; Cooper's Est., 147 Pa. 322.

²⁵ Gould's Est., 11 Kulp, 45.

²⁶ Spence v. Spence, 4 Watts, 165.

²⁷ Whitaker's Will, 13 Phila. 22.

²⁸ Seip's Est., 163 Pa. 423.

²⁹ Pepper's Compromise Fund, 4 D. R. 101.

2. Form of power of attorney of widow and heirs to one, to sell real estate and distribute, under family agreement.

Following is a form empowering one of a number of heirs to sell the real estate discharged from the widow's dower and all charges, liens and debts of decedent which remain a lien for two years after the death:

"KNOW all men by these presents that we, — —, widow of — —, and — — [here naming all the heirs, their wives or husbands if any, and residence of same], have made, constituted and appointed, and by these presents do make, constitute and appoint — — of — —, our true and lawful attorney, for us and in our names, place and stead, to enter into and take possession of all such messuages, lands, tenements, hereditaments and real estate whatsoever, in all the following tracts or pieces of land, respectively bounded and described as follows:

[Here give description of each by metes and bounds]
to or in which we are or may be in any way entitled or interested; and to grant, bargain and sell the same, or any part or parcel thereof, at public or private sale, for such sum or sums, or price or prices, and on such terms as to him shall seem meet; and for us and in our names to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same, either with or without covenants and warranty; and until the sale or sales thereof, to let and demise the said real estate for the best rent that can be procured for the same; and to ask, demand, recover and receive all sums of money which shall become due and owing to us by means of such bargain, sale or sales, or lease or leases, and to take all lawful ways and means for the recovery thereof; to compound and agree for the same, and to execute and deliver sufficient discharges and acquittances therefor; with power to substitute one or more attorney or attorneys, under him, in or concerning the premises or any part thereof, and the same at his pleasure to revoke: Giving and granting unto our said attorney, or his substitute or substitutes, full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as we might or could do, if personally present; hereby ratifying and confirming all that our said attorney or his substitute or substitutes, shall lawfully do, or cause to be done by virtue hereof.

In witness whereof we have hereunto set our hands and seals this — day of —, A. D. 19—.

— —, [Seal.]
— —, [Seal.]
— —, [Seal.]
Etc., etc..

Signed and delivered in the presence of

— —,
— —.

J. H. Musser,
Attorney for Widow and Heirs.
Harrisburg, Pa.
[Acknowledgment in due form.]

3. Form of bond by attorney for faithful performance of duties.

"KNOW all men by these presents, that I, — —, of the City of Harrisburg, County of Dauphin, and State of Pennsylvania, am held and firmly bound to the Commonwealth Trust Company of Harrisburg, Pa., Trustee for [name the *cestuis que trustent*], in the sum of — dollars, lawful money of the United States, to be paid to the said Commonwealth Trust Company, trustee as aforesaid, to which payment, well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents: Sealed with my seal and dated the 28th day of January, A. D. 1910.

Whereas, by letter of attorney bearing date the — day of —, 1910, the said [naming them as above], have duly authorized and empowered the above bound — — to sell and lease their respective interests in four certain lots or tracts of land situate in [give location] as by the said letter of attorney more fully and at large appears:

Now, the condition of this obligation is such that if and when the above bounden — — shall exhibit to the Commonwealth Trust Company, a release, executed by the said [naming them as above] their heirs, executors, administrators or assigns, to him, for the proceeds of the sale of the property herein before mentioned (the reasonable commissions, attorneys' fees and expenses of the said — — for selling and renting the said property being first deducted therefrom), such release having been duly recorded in the office for the recording of deeds in and for said county of [where estate lies] then this obligation to be void, otherwise to be and remain in full force and virtue.

— —. [Seal.]

Signed, sealed and delivered in presence of,

— —,
— —.

4. Form of release of widow and heirs.

Whereas, by a letter of attorney bearing date — —, —, and recorded in New Bloomfield in the office for recording of deeds, etc., in and for the County of Perry in the State of Pennsylvania, in Deed Book 78, page 645, in which [names of parties], duly authorized and empowered — — (the only son and other heir of — —), to sell and lease their respective interests in certain lots or tracts of land situate in —, which are fully described in said letter of attorney;

And whereas, the said — —, on the — day of —, A. D. 1910, sold said lots or tracts to the following named persons [names and amounts received respectively], making a total of — dollars; and after deducting — dollars for commissions and attorney's fees, and expenses, there is left the sum of — dollars for distribution;

And whereas, it has been agreed by the said [name parties to family agreement], that the said — —, attorney as aforesaid, shall pay the said — —, widow as aforesaid, the sum of — dollars for her sole use, and that the remaining sum of — dollars be equally divided between the said children of the said — —, deceased, giving each of them the sum of — dollars:

Therefore, know all men by these presents that I, — —, widow of — —, do hereby acknowledge that I have had and received of and from said — —, my attorney in fact, the sum of — dollars due me, arising from the sale of the real estate of my deceased husband and in full satisfaction and payment of all such sum or sums of money, share or shares, purparts and dividends which were due, owing, payable and belonging to me, by any means whatsoever, for or on account of my full share, part or dividend of the real estate of my said husband, deceased, as agreed upon; and that we [naming the heirs], do hereby acknowledge that we each have had and received of and from — —, our attorney in fact, the sum of — dollars, the amounts due us, arising from the sale of the real estate of our deceased father, and in full satisfaction and payment of all such sum or sums of money, share or shares, purparts and dividends which were due, owing, payable and belonging to us, by any means whatsoever, for or on account of our full shares, parts or dividends of the real estate of our said father, deceased.

And therefore we [names of heirs] do by these presents remise, release, quit claim and forever discharge the said — —, attorney as aforesaid, his heirs, executors and administrators of and from the said shares, or dividends of the real estate aforesaid, and of and from all actions, suits, payments, accounts, reckonings, claims and demands whatsoever, for or by reason of the sale thereof.

In witness whereof we have hereunto set our hands and seals, this — day of —, 1910.

— — [Seal.]
— — [Seal.]

Signed, sealed and delivered in presence of,

— —,
— —.

[Acknowledged in due form.]
[Certificate of record by Recorder of Deeds, etc.]

5. Form of agreement of heirs to refund pro rata if any debts appear within two years.

Know all men by these presents, that it is understood and agreed by the undersigned widow and heirs of — —, deceased, late of — —, that they and each of them will pay an equal *pro rata* share of any just unliened claim or claims that may be discovered against the estate of — —, which may be presented within two years from the date of the death of said decedent. Said share or shares shall be payable to the Commonwealth Trust Company of Harrisburg, Pa., in trust for such creditors if any.

In witness whereof, etc.

— — [Seal.]
— — [Seal.]

Signed, sealed and delivered in presence of,

J. H. Musser,

— —.

6. Agreement under a will.

Notwithstanding there is a will, the heirs being *sui juris*, may enter into an agreement and appoint an attorney or trustee to manage

the estate for them, and if, in the meantime letters testamentary are issued to the executor named, may proceed before the register for their revocation.³⁰ Or, recognizing the executorship, may take the land by agreement free from any questions as to conversion,³¹ or otherwise; or as to separation of estates into surface and subjacent minerals, with incidental questions of easements.³²

A widow to whom a fee simple is given in one will of her husband is not deprived of it, by an agreement with her husband's heirs setting aside a later will and stating that the heirs should have what remains at her death. Alienation is not restrained thereby.³³

³⁰ Lloyd's Est., 10 D. R. 207. (See *supra*.)

³¹ Adams' Est., 44 Pitts. L. J. 331.

³² Jones v. Wagner, 66 Pa. 429; Republic Iron Works v. Burgwin, 139 Pa. 439.

³³ Heckman v. Kipp, 228 Pa. 436.

CHAPTER XX.

DISTRIBUTION OF BALANCE DUE BY ADMINISTRATOR, ETC.

- | | |
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| 1. Time of making distribution. | 6. Interest of fiduciaries in distribution. |
| 2. Stay or suspension. | 7. Difference between settlement and distribution. |
| 3. Manner of distribution. | 8. Payment into court — rules. |
| 4. Distribution when balance is not cash. | 9. Distribution to minors. |
| 5. Distribution in particular cases. | |

1. Time of making distribution.

Section 38 of the act of February 24, 1834, P. L. 70, provides: "No administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate."

The distribution of a decedent's estate need not await the final settlement and a decree of distribution is not necessarily predicated upon an account, it may be upon a statement. Twenty years will raise a presumption that a distributive share has been paid, and the time may be computed from the time when the money is demandable. It is a mischievous practice to blend distribution in an administration account, but when the accountant does so and states that he has paid the distributees and holds their receipts, such statement is in the nature of a *protestando* in pleading and must be taken in connection with the account, after nearly twenty years have elapsed since the filing.¹ When an administrator so blends distribution with administration he will not be protected unless he takes refunding bonds;² and one who distributes within a year is similarly situated; he pays out at his own risk.³

The Orphans' Court will not distribute to a single legatee or creditor, before an account is filed,⁴ nor can an administrator or executor be compelled to pay out before his account is audited.⁵ And the court will not order payments by way of anticipation, even for monuments or tomb-stones.⁶ Where the executor is also trustee and guardian and dies, his accounts in all these capacities must be settled before distribution can be made of his estate.⁷

¹ Comth. v. Snyder, 62 Pa. 153.

² Louise Jones' Aps., 99 Pa. 124.

³ Alex. Simpson, Jr.'s, Ap., 109 Pa. 383; Rastaetter's Est., 15 Supr. C. 549.

⁴ Seitzinger's Est., 2 Woodward, 348.

⁵ Gaul's Est., 11 Phila. 18; Mazurie's Est., 11 Phila. 143; Hanbest's Est., 12 Phila. 31; Reinheimer's Est., 11 Phila. 160; De Haven's Est., 13 W. N. C. 179; Lafferty's Est., 4 D. R. 133; Glanding's Est., 15 D. R. 985.

⁶ Benner's Est., 3 Brewster, 398; Hirst's Est., 15 Phila. 587.

⁷ Riddle's Est., 17 Phila. 520.

The time fixed by the testator in his will for distribution must be observed, although an unanticipated event occurs which the will did not provide for.⁸ A mere precatory expression in the will, however, will be disregarded.⁹ Where distribution is to be made after the youngest child attains the age of twenty-one, it must be made appear on the record that the event has transpired.¹⁰ The rule also applies to a trust created by will.¹¹ The will is the law of the case. Questions of advancements should be settled, at the first account, although it be only of the income and not the principal sum.¹² The distribution of the income is properly determined although the incidental effect will be to bind the future distribution of the principal.¹³ Where land is sold on order of the Orphans' Court for the payment of debts, distribution may be compelled immediately and the shares are then demandable and the presumption of payment begins to run from that date and not from the date of filing the last account. The subsequent filing of an account does not overcome the presumption.¹⁴

2. Stay or suspension of distribution.

The Orphans' Court may, in its discretion, direct a portion of the fund to be held to meet a claim pending in a suit, or one whereon suit is to be brought in a law court or in Equity.¹⁵ But it will not order suspension of distribution indefinitely;¹⁶ nor where the party seeking it has been guilty of laches;¹⁷ nor where the equitable proceeding might result in indefinite delay and irretrievable loss.¹⁸

The attachment of a legacy will not of itself be sufficient to hold up the audit.¹⁹ The proper practice is to distribute the share and direct the accountant to hold the attached interest until the attachment is concluded.²⁰ Where a part of an estate remains unadministered, accountant having died, distribution may be suspended until after the filing and adjudication of an account by the administrator *d. b. n. c. t. a.*²¹ For other illustrations of the suspensory power of the Orphans' Court, see Vol. XIV, P. L. Dig., col. 24383.

3. Manner of distribution.

Section 39 of the act of February 24, 1834, P. L. 70, provides:

"Whenever distribution as aforesaid shall be required by any per-

⁸ Aubert's Ap., 119 Pa. 48.

⁹ Warner's Est., 130 Pa. 359.

¹⁰ Bonaffon's Est., 16 Phila. 345; McWilliam's Est., 18 Phila. 62; Mar-sailles' Est., 4 C. C. 661.

¹¹ Thouron's Ap., 18 W. N. C. 56; Frymeyer's Est., 17 Lanc. L. R. 401.

¹² Patterson's Ap., 128 Pa. 269.

¹³ Penrose, J., in Potter's Est., 4 D. R. 329.

¹⁴ Comth. v. Snyder, 62 Pa. 153.

¹⁵ Lindsay's Est., 184 Pa. 262; Fulton's Est., 200 Pa. 545; P. & L. Dig., vol. 14, cols. 24378-9; Bennett's Est., 132 Pa. 201; McGeary's Ap., 6 Atl. 763; Kern's Est., 5 D. R. 117; Helb's Est., 16 D. R. 986; Pickering's Est., 4 D. R. 263.

¹⁶ Hammett's Ap., 83 Pa. 392.

¹⁷ Gallagher's Est., 5 C. C. 214; Craig's Est., 11 Kulp, 205.

¹⁸ Rorke's Est., 10 D. R. 754; Alexander's Est., 13 D. R. 459.

¹⁹ Lex's Ap., 97 Pa. 289.

²⁰ Douglass' Est., 10 D. R. 479.

²¹ Berry's Est., 8 D. R. 50.

DISTRIBUTION OF STOCKS, ETC., IN KIND.

The Act of June 10, 1911, provides

"Section 1. Be it enacted, &c., That whenever it shall appear at the audit and distribution of an estate in the orphans' court, that the balance, after payment of debts, includes stocks, bonds, or other securities, which, for reasons satisfactory to said court, had not been converted by the accountants, it shall be lawful for said orphans' court having jurisdiction thereof to direct distribution of such assets in kind to and among those lawfully entitled thereto.

"Section 2. Where stocks, bonds, or other securities have been distributed in kind, as provided in section one of this act, to any guardian, trustee, or other fiduciary, it shall be the duty of such guardian, trustee, or other fiduciary to use reasonable diligence in converting such securities as shall not be investments now or hereafter authorized by law; and if the guardian, trustee, or other fiduciary is doubtful as to the propriety of making sale of the securities, such guardian, trustees, or other fiduciary may apply to the orphans' court having jurisdiction of his accounts, by petition, for authority and direction to sell the same; whereupon, after due notice to all parties interested, said court shall make such order in the premises as to it may appear proper.

"Section 3. In all cases where distribution in kind of stocks, bonds, or other securities has heretofore been made by any orphans' court of this Commonwealth, having jurisdiction thereof, upon audit of any estate by said court, the same is hereby validated: Provided, however, That this act shall not apply in any case where suit or other action is now pending for the purpose of determining the validity of such distribution."

INSERT P. 415, VOL. 3, JOHNSON.

son interested, the administrator shall present to the Orphans' Court having jurisdiction of his accounts, a statement of all demands against the estate which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue, under the direction of the Orphans' Court aforesaid."

The Orphans' Court has exclusive jurisdiction to make and enforce distribution of the estates of intestates.²² A decree of distribution after the year in which creditors may present their claims, protects the administrator who pays out the fund so distributed.²³ But if he does so before the year from the grant of letters, he will only be protected by taking refunding bonds.²⁴

It is the duty of all claimants to appear and present their claims in this forum, although they have suits pending elsewhere, or they will be barred from the distribution.²⁵ Wherefore, after such distribution of a balance determined by a confirmation absolute undisturbed by appeal, the refunding bonds take the place of the fund distributed, and to these bonds, or to a residue of the estate unaccounted for, creditors must resort for payment.²⁶ This must be understood as to an account settled after one year from the granting of letters.²⁷ Where there is a suit pending in the Common Pleas against the estate the Orphans' Court may direct a sum to be withheld to await the determination of that action.²⁸ Where one year has expired from the granting of letters, before the account is filed, distribution cannot be delayed and an auditor will be appointed to make it.²⁹

4. Distribution where the balance is not cash.

A balance stated by executors in their account is not necessarily cash. It may consist of securities or other property. A distribution therefore may be in kind and if the distributees insist on having cash, when the securities are unconverted, a bill of review will be granted.³⁰ If the account shows the securities, the distribution is necessarily also of securities.³¹ The accountant will not be compelled to pay out cash before he has realized on the securities.³² The court may permit the legatees to take securities in kind;³³ and if they are willing to do so the executor cannot delay filing an account

²² Ashford v. Ewing, 25 Pa. 213.

²³ Koch's Est., 4 Rawle, 268; Stewart's Ap., 86 Pa. 149.

²⁴ Rastaetter's Est., 15 Supr. C. 549.

²⁵ Hammett's Ap., 83 Pa. 392.

²⁶ Schaeffer's Ap., 119 Pa. 640.

²⁷ Rastaetter's Est., *supra*.

²⁸ Bennett's Est., 132 Pa. 201, affirming Penrose, J. Orphans' Court of Phila.

²⁹ Haggerty's Est., 13 D. R. 663.

³⁰ Page's Est., 3 D. R. 212.

³¹ Lehigh's Est., 11 D. R. 176.

³² Harvey's Est., 26 C. C. 500.

³³ Brown's Ap., 14 Atl. 130; Hart's Est., 10 D. R. 421.

because they are unconverted into cash.³⁴ The executors who hold unconverted assets of an estate which goes in trust to residuary legatees may be required to turn it over to the trustees for the purposes of the trust.³⁵ But if the executor has included the stock in his account as unsold and no distribution has been made, it will not be turned over on a petition only.³⁶

5. Distribution in particular cases.

When one dies pending distribution, his share, as a rule, goes to the personal representative;¹ but the Orphans' Court will not authorize a trustee to pay over without filing his account, when upon confirmation and audit the amount which was due the *cestui que trust* may be paid to his legal representative.² A share awarded to one who being absent seven years, as to whom the presumption of death has arisen, should be paid to the administrator duly appointed.³ But in cases where the husband and wife, whose estates are commingled, have been so long dead that there can be no claims of creditors, the court will, without administration, distribute and decree the estate directly to the heirs entitled,⁴ upon petition accompanied with the proper certificates from the record and proofs of the right to participate.⁵ But the Common Pleas cannot distribute a fund in the hands of a trustee to the next of kin of a deceased *cestui que trust*. It must be paid to his administrator.⁶

If the beneficiaries under a will, being *sui juris*, all agree to a distribution different from the will, it is not error for the auditor to follow it, and this does not let in others excluded by the will.⁷ The court will not disturb a settlement made by the parties in interest, upon their own construction of a will when they have acquiesced in it for several years;⁸ although the course of descent is thereby altered.⁹ After the widow agrees to a distribution made by the executors in good faith, she cannot contest it,¹⁰ and her acknowledgment of the correctness of an account is binding on her minor son who is interested in the remainder.¹¹

Where parties have acted under a will in their supposed rights and according to it, they will not as a rule be disturbed. Where the estate of a deceased distributee has been fully settled and his ex-

³⁴ Reed's Est., 82 Pa. 428; McDowell's Est., 17 Montg. Co. 43.

³⁵ Pepper's Est., 2 D. R. 533; Foster's Est., 55 Pitts. L. J. 65.

³⁶ Vernon's Est., 10 Del. Co. 356.

¹ Montier's Est., 7 Phila. 491.

² Dubree's Est., 4 W. N. C. 128.

³ Levy's Est., 6 Phila. 122; Wisler's Est., 6 Montg. 159.

⁴ Ogden's Est., 9 Kulp, 412; Hodgdon's Est., 17 Phila. 461; Phillips' Est., 47 Pitts. L. J. 77.

⁵ Rittenhouse's Est., 8 D. R. 700.

⁶ Johnson's Est., 2 Wharton, 120. (For other cases similar, see P. & L. Dig., vol. 14, cols. 24390-1.)

⁷ Bartholomew's Est., 155 Pa. 283; Palethorp's Est., 3 D. R. 760.

⁸ Morris' Est., 16 Phila. 343; English's Est., 17 Phila. 501.

⁹ Patterson's Ap., 116 Pa. 8; Irwin's Est., 12 Lanc. L. R. 129.

¹⁰ Risher's Est., 40 Pitts. L. J. 131; Webb's Est., 14 D. R. 768.

¹¹ Barber's Est., 142 Pa. 476.

ecutor discharged, his share may be awarded directly to the persons entitled to it.¹²

6. Interest of executor, etc., in distribution.

As a rule the executor or administrator is not interested in the distribution, as such, and therefore cannot appeal.¹³ If he is interested as an heir or legatee, he can appeal in such character. If he is an active trustee under a will the executor may appeal from the decree;¹⁴ or where considered as representative of the claimants.¹⁵ But if an attempt is made to charge an accountant with more than he is legally liable for, he is aggrieved and may appeal.¹⁶ Executors have been held to have the right to contest a note presented to the auditor on the ground of actual fraud, doing so for the legatees.¹⁷

7. Difference between settlement and distribution.

An auditor appointed to settle an account is confined to that duty and cannot make distribution. If he is appointed to settle and distribute he must exercise the distinct duties separately and make separate reports, one of settlement and one of distribution.¹⁸ Payments by way of distribution have no place in an administrator's account.¹⁹ If a creditor tenders proof of a claim and the auditor passes upon it, although irregular, and the report of the auditor is confirmed, he has no standing to complain of the rejection of his claim.²⁰

The facts regularly ascertained by an auditor, although his distribution may be set aside because irregular, may be used by the court in decreeing distribution.²¹

8. Payment into court.

When the names and number of distributees are unknown the fund may be ordered paid into court to await further order and decree.²² If the court is in doubt as to whom to award the fund, it may be impounded.²³ Where a legacy is paid into court and the executor discharged, the court may allow the legatee to take it out of court.²⁴ See Partition for rule of court in Philadelphia.

¹² Hershey's Est., 23 Lanc. L. R. 37; Irwin's Est., 22 Lanc. L. R. 393; Foltz's Est., 19 Lanc. L. R. 133. (As pertinent to this subject, see also Union Trust Co.'s Ap., 19 Lanc. L. R. 361; Witmer's Est., 19 Lanc. L. R. 324; Bergdoll's Est., No. 2, 11 D. R. 701. See Williams' Est., 8 D. R. 125.

¹³ Stineman's Ap., 34 Pa. 394; Gallagher's Ap., 89 Pa. 29; Mays' Est., 25 Supr. C. 267; Fuhrman's Est., 21 Supr. C. 27; Sharp's Ap., 3 Grant, 260; Chew's Ap., 3 Grant, 308; Transue's Est., 2 Northam. 393.

¹⁴ Frymeyer's Est., 17 Lanc. L. R. 401.

¹⁵ Koch's Estate, 4 Rawle, 268. A unique case. Mellon's Ap., 32 Pa. 121.

¹⁶ Godwin's Est., 22 Supr. C. 469; 7 Lack. L. N. 321.

¹⁷ Snyder's Est., 29 C. C. 10.

¹⁸ Yundt's Est., 6 Pa. 35; Robins' Est., 180 Pa. 630.

¹⁹ Rittenhouse v. Levering, 6 W. & S. 190.

²⁰ Bloom's Ap., 106 Pa. 498.

²¹ Drysdale's Ap., 14 Pa. 531.

²² Gable's Ap., 40 Pa. 231.

²³ Breeswine's Est., 11 York, 141.

²⁴ Lupher's Est., 26 C. C. 172.

Section 1 of rule 13, Allegheny County, provides:

"On the payment of money into court to abide the order of the court, the same shall be deposited in such incorporated bank as the court may designate, to the credit of the court in the particular cause, and shall be drawn out only upon the order of the court, attested by the clerk. A copy of this section shall be inserted in the bankbook in which the deposits are entered."

Section 2. "The Bank of Pittsburgh, National Association, is designated as depository."

9. Distribution to minors.

The Orphans' Court has no authority to order money belonging to a minor, to be paid to any one but his legal guardian;²⁵ nor will it authorize guardians or trustees to pay money to minors and take their receipts therefor.²⁶

²⁵ Megee's Est., 5 C. C. 58.

²⁶ Mellinger's Est., 5 Lanc. L. R. 294.

CHAPTER XXI.

DISTRIBUTION OF AN ESTATE — APPOINTMENT OF AUDITORS — AUDITING JUDGES, PRACTICE BEFORE.

1. Auditors to settle and adjust assets to creditors.
2. Appointment of auditors — rules.
3. Notice by auditors, Philadelphia.
4. Notice to persons beyond the jurisdiction.
5. Duties, fees and expenses in Allegheny.
6. Scope of duties, generally.
7. Presentation of claims.
8. Action at law by creditor.
9. Objections to claims of other creditors.
10. Proof of claims.
11. Sufficiency of proof.
12. Incompetent testimony.
13. Compelling attendance of witnesses.
14. Procedure before the auditor.
15. Claims insufficiently proved.
16. The two years' limitation.
17. Effect of will as to debts.
18. Bequest subject to payment of debts.
19. Administration expenses and surcharge.
20. Claims before the auditor.
21. Claims of nonresidents.
22. Claims of legal representatives.
23. Annuities or charges.
24. Set-off of debts due decedent against distributees.
25. Marshaling assets — contribution and subrogation.
26. Distribution under a will.
27. Equalization of partial distributions.
28. Distribution of further assets.
29. Distribution at fiduciary's risk.
30. Application of funds to payment of debts.
31. Auditor's reports.
32. Form of reports in Allegheny County.
33. Exceptions to reports in Allegheny County.
34. Confirmation, etc.
35. Exceptions, in Philadelphia.
36. Filing and confirmation, Philadelphia.
37. Taxation of compensation, Philadelphia.
38. Costs of audit and security, Philadelphia.
39. Re-opening of audit.
40. Adjudication before an auditing judge.
41. Rules as to depositions, etc., Philadelphia.
42. Attendance by parties, Allegheny.
43. Receipts to be recorded, Allegheny.
44. Time of payment over, Allegheny.
45. Form of petition for adjudication — testate estate.
46. Form of petition for adjudication — intestate estate.
47. Procedure on petition.
48. Rules in Philadelphia.
49. Administration must be separated from distribution.
50. Time of audit, Philadelphia.
51. Division of audit lists, Philadelphia.
52. Advertisement of lists, Philadelphia.
53. Petition for adjudication, etc., Philadelphia.
54. Examiner of continuing trusts, etc., Philadelphia.
55. Copy of inventory, Philadelphia.
56. Notice to ward, Philadelphia.
57. Exceptions to adjudication, Philadelphia.
58. Affidavit by accountant, Philadelphia.

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| 59. Partial suspension, by exceptions, Philadelphia. | 69. Distributee to give refunding bond. |
| 60. Agreements for confirmation, Philadelphia. | 70. Refunding bonds from heirs. |
| 61. Re-commitment of adjudication. | 71. Reciprocal bonds to refund. |
| 62. Liability of accountant for costs. | 72. Married ward's refunding bond. |
| 63. Liability of the loser for costs. | 73. Suit on refunding bond. |
| 64. Apportionment of costs. | 74. Restitution. |
| 65. Fixing amount of costs. | 75. Effect of distribution. |
| 66. Attachment and execution for costs. | 76. Accounts and auditors' reports to be recorded. |
| 67. Security for costs. | 77. Acknowledgment of satisfaction. |
| 68. Administrator, etc., when not liable to creditor. | 78. Form of petition to compel distribution in kind. |
| | 79. Form of refunding bond. |

1. Auditors to settle and adjust assets to creditors.

Section 19 of the act of March 29, 1832, P. L. 190, provides:

"Whenever there shall not be sufficient assets to pay all the debts of a decedent, it shall be the duty of the Orphans' Court having jurisdiction, upon the application of the executor or administrator, to appoint auditors to settle and adjust the rates and proportions of the assets to and among the respective creditors, according to the order established by law: *Provided, nevertheless*, That no creditor who shall neglect or refuse to exhibit his account to the executor or administrator, within twelve months after public notice given in one or more of the newspapers published in the county in which letters testamentary or of administration may have been granted, or if there be none in such county, then in one or more newspapers published in an adjoining, and continued in such newspaper for four consecutive weeks, shall be entitled to receive any dividend of such remaining assets."

Under this act the commonwealth has been held to be a "creditor."¹ One who has failed to appear before the auditor, has no standing to except to his report.² If the auditor's report is erroneous, it must be sent back to him for correction; the court cannot reform it.³ A re-hearing will only be granted, when applied for during the term, and at the cost of the petitioner, unless great injury would manifestly ensue.⁴

Section 1 of the act of April 13, 1840, P. L. 319, authorizes the court "at their option" to appoint "one or more auditors to make distribution."

2. Appointment of auditors — Rules of court.

The appointment of auditors to make distribution is regulated by the act of April 1, 1909, P. L. 95, as well as the acts cited, *supra*. In separate Orphans' Courts, where the auditing judge audits the accounts, under the act of 1874, unless all the parties in interest agree, the courts have adopted rules, the following of which illustrate the practice:

¹ Mitchell's Est., 2 Watts, 87; Stoevers' Ap., 3 W. & S. 154.

² Carey's Est., 1 Kulp, 331. (See note 1, also.)

³ Boyer's Est., 5 Watts, 50.

⁴ Phillips' Est., 1 Kulp, 333.

(A) *Auditor — Appointment, Philadelphia.*

Section 1 of rule 5, Philadelphia, provides:

"Parties in interest desiring the appointment of an auditor must all unite in a written request to the court, signed by themselves or their attorneys. The application must be accompanied by sufficient affidavits that the applicants are all the parties in interest, and that the signatures appended are genuine."

"Section 2. Auditors shall be members of the bar who have been admitted to practice in this court at least two years."

Section 11 requires the clerk to notify auditors, etc., forthwith of their appointment.

(B) *Appointment, Allegheny County.*

Section 1 of rule 5, Allegheny County, provides:

"Where it appears by writing filed, duly signed and verified by affidavit, that all persons interested are desirous of having an account referred to an auditor named therein, such reference may be made accordingly."

"Section 2. In all other cases where it appears necessary, the court, on application of any party interested, will appoint an auditor."

(C) *Vacating appointment.*

Section 3 of rule 5, Allegheny County, provides:

"If no satisfactory cause for the delay is shown, the court will vacate the appointment of any auditor whose report is not filed within sixty days after his appointment, on motion for that purpose being made by any party in interest."

3. *Notice by auditors, Philadelphia.*

Section 3 of rule 5 provides:

"Public notice shall be given by auditors of their appointment by advertisement, made twice successively in the *Legal Intelligencer*, and also every other day, five times, in one daily paper in this city. They shall state in such notice that their appointment was made by the court at the request of all parties interested in the estate."

Section 5 of rule 5, Allegheny County, provides:

"Ten days' notice of the time and place of hearing shall be given personally to all lien creditors and others appearing to be interested, or their attorneys, if residing in the county; all others shall be notified by advertisement published once a week for three consecutive weeks in some newspaper of the City of Pittsburgh, the last of which advertisements shall be published at least ten days before the day of hearing."

4. *Notice to persons beyond the jurisdiction.*

Section 20 of the act of March 29, 1832, P. L. 190, provides:

"When any of the heirs, legatees, distributees or creditors of a decedent reside out of this state, or out of the United States, or from other circumstances, it may be expedient that additional or further notice should be given of the settlement of the account of an executor, administrator, guardian or trustee, or of the distribution of the assets or surplusage of the estate, it shall be in the discretion of the Orphans' Court to require such further or additional notice to be given by such accountant, as they may think proper, to appear

in court, or before the auditors by them appointed, as the case may be, at such times as shall be fixed for the examination of such account, or for the distribution of the assets or the surplusage of the estate."

Section 6 of rule 15, Allegheny County, provides:

"All cases in which costs shall remain unpaid for more than twenty days after decree thereon, and no exceptions thereto shall be pending, the clerk may, as of course, issue a rule to show cause why attachment for contempt should not issue for nonpayment."

5. Duties, fees and expenses.

Section 4 of rule 5, Allegheny County, provides:

"When an auditor is appointed, he shall assign a time and place for hearing, and proceed without delay, except for sufficient cause; he shall keep and return regular minutes of his proceedings, showing his different sessions and their extent, and the cause of delay, if any, so that the court may adjust the amount to be allowed for fees and expenses, and direct how and by whom the same shall be paid."

6. Scope of duties.

Where the facts arising are such that the court can conveniently pass upon them it will not appoint an auditor.¹ But where the assets are insufficient to pay decedent's debts it must appoint an auditor, as required by section 19 of the act of March 29, 1832, P. L. 190, and if he makes an erroneous report, it must send it back to him to be reformed by him.² Of course, this does not apply in counties having a separate Orphans' Court, where the judge is also the auditor of accounts.³

In order to raise an issue before an auditor exceptions must be filed to the account. He cannot consider any matters contrary to the account which are not raised by the exceptions;⁴ nor will he inquire into the solvency of the administrator, or the liability of his sureties;⁵ or rights concerning property not brought into the account, or unconverted lands or their proceeds;⁶ or the value of real estate not embraced in the account.⁷ A continuance of the hearing may be allowed by the auditor or auditing judge in his discretion.⁸ But where by unavoidable accident exceptants and counsel are delayed and the parties are peremptorily deprived of a thorough investigation, by refusing to continue the audit, the decree will be reversed.⁹ The absence of creditors in the army was held a good cause for continuance, though not for reversal of the decree.¹¹ While the account is before an auditor on exceptions by some heirs, the

¹ Maxwell v. McClintock, 10 Pa. 237.

² Boyer's Est., 5 Watts, 50.

³ Section 6, May 19, 1874; P. L. 206.

⁴ Gaston's Ap., 1 Pitts. 48.

⁵ Wetherill's Ap., 3 Walker, 261.

⁶ McClelland's Est., 3 D. R. 759.

⁷ Potter's Est., 4 D. R. 329.

⁸ Becker's Est., 3 D. R. 513.

⁹ Lloyd's Est., 82 Pa. 143. Woodward, J.

¹¹ Hahnlin's Ap., 45 Pa. 343.

court may order payment of a distributive share of one, as to whom there is no dispute.¹² The court may allow a partial distribution, where in its opinion enough of the estate remains to satisfy the claims in dispute if eventually allowed.¹³

But it will not be permitted where a verdict for the will has been set aside in the Common Pleas, in an issue *devisavit vel non*.¹⁴ In order that distribution may be made, there must be an ascertainment of the persons entitled at the death of the decedent and proof of all the facts necessary to show the devolution of the rights of the persons so entitled.¹⁵ Where the executors have included in their account money received from the sale of land in partition, the regularity of the partition cannot be considered at the audit.¹⁶ Where none of the parties in interest except to a charge for counsel fees, it is error for the court to appoint an attorney to file and argue exceptions as *amicus curiæ*.¹⁷ An auditor appointed to ascertain a claim by an acting administrator for payments to his co-administrator on alleged indebtedness of the estate to him cannot go beyond that and ascertain the claims of other creditors. He can only find the balance in the hands of the administrator.¹⁸

The fact that the judge of the Orphans' Court had previously acted as auditor in an estate, it seems, does not disqualify him from passing upon exceptions to his report as auditor.¹⁹

7. Presentation of claims against an estate, before the auditor.

The distribution of a decedent's estate to those entitled belongs exclusively to the Orphans' Court,¹ and although a claimant recovers judgment in a common law court, he must bring the evidence of it before the Orphans' Court or its auditor.² A lien creditor, however, is not excluded from sharing in a fund, if he applies to court before final decree.³ One who was ill and could not appear before the auditor, was let in after the adjudication and before final decree.⁴ The remedy of a belated creditor is not to except to the auditor's report, but to petition for a re-hearing.⁵ The creditor will

¹² Flintham v. Forsythe, 9 S. & R. 133.

¹³ Gable's Ap., 40 Pa. 231.

¹⁴ Neal's Est., 16 Phila. 330, 359.

¹⁵ Clement's Est., 2 D. R. 341. In this case "next of kin" was held to mean those living when the act of Congress passed. Clement's Est., 160 Pa. 391.

¹⁶ Samson's Est., 22 Supr. C. 93.

¹⁷ Stitzel's Est., 221 Pa. 227.

¹⁸ Speise's Est., 21 Lanc. L. R. 185.

¹⁹ Rufe's Est., 29 C. C. 617. Is not this almost equivalent to a judge judging his own cause, and contrary to the long and venerable rule of courts *in banc*, where the judge who decided the cause at *nisi prius* declined to sit *in banc*, upon the cause reviewed for his alleged error?

¹ Bull's Ap., 24 Pa. 286; Kittera's Est., 17 Pa. 416; Whiteside v. Whiteside, 20 Pa. 473; McMurray's Ap., 101 Pa. 421.

² Hammett's Ap., 83 Pa. 392; Strouse v. Lawrence, 160 Pa. 421.

³ Ross' Est., 9 Pa. 17.

⁴ Callahan's Est., 9 W. N. C. 253.

⁵ Carey's Est., 1 Kulp, 33. Rhone, J.

be too late after the confirmation of the administrator's account and the distribution of the fund in accordance with the auditor's report.⁶

8. Action at law by the creditor.

It was held that the Common Pleas has concurrent jurisdiction with the Orphans' Court in ascertaining the claim of a creditor against an estate⁷ and the judgment therein is conclusive.⁸ But having been so ascertained the duty is upon the creditor to bring the evidence of his judgment before the Orphans' Court if he wishes to share in the fund.⁹

Having appeared before the auditor, he may withdraw and bring suit, there being no adjudication made,¹⁰ but without evidence of such withdrawal he will be nonsuited.¹¹ An executor who has not been active may sue his co-executor to establish his claim against the estate.¹² An action will lie against an administrator for the value of goods alleged to have been tortiously taken by the decedent.¹³ A judgment may be entered on an agreement after the death of a party to it, but no execution can issue upon it without a *sci. fa.*¹⁴ The pendency of an action is not in itself sufficient to hold distribution in abeyance,¹⁵ but the Orphans' Court may make such order as it deems proper in regard to withholding part of the fund.¹⁶ If the judgment in the Common Pleas is against the validity of his claim, he has nothing to present to the Orphans' Court.¹⁷

9. Objections to claims of other creditors.

When the fund is insufficient to pay all the creditors, each has a standing to contest the claims of the others.¹⁸ One who holds a judgment against the administrator of an estate is entitled to participate, in the absence of any evidence of fraud or collusion.¹⁹ Other creditors, however, may not intervene in the suit brought by a creditor against the personal representative.²⁰ All the creditors are entitled to share in a surcharge of the administrator, secured by the

⁶ Cramp's Ap., 81 Pa. 90.

⁷ Sergeant v. Ewing, 30 Pa. 75; 36 Pa. 156.

⁸ Schmidt's Est., 36 W. N. C. 152.

⁹ Phillips v. Allegheny V. R. Co., 107 Pa. 465, citing and reviewing the cases, among them Dundas' Ap., 73 Pa. 474; Shollenberger's Ap., 21 Pa. 337.

¹⁰ Swain v. Ettling, 32 Pa. 486; Haviland v. Fidelity, Etc., Co., 108 Pa. 236.

¹¹ Kreckel v. McCullagh, 12 Lanc. L. R. 179.

¹² Pringle v. Pringle, 130 Pa. 565.

¹³ Kimble v. Carothers, 81 Pa. 494.

¹⁴ Webb v. Wiltbank, 1 Clark, 284.

¹⁵ Hammett's Ap., 83 Pa. 392; Guth's Ap., 5 Atl. 728; P. & L. Dig., vol. 4, col. 6251.

¹⁶ Grigg's Est., 2 Foster, 273; Bennett's Est., 132 Pa. 201; Kern's Est., 4 D. R. 73; Gallagher's Est., 19 Phila. 45.

¹⁷ Dyer's Ap., 3 Grant, 326.

¹⁸ Hahnlin's Ap., 45 Pa. 343; Felton's Est., 7 D. R. 262; McCaull's Est., 12 D. R. 769.

¹⁹ McPherran's Est., No. 2, 212 Pa. 432.

²⁰ Hassinger v. Hassinger, 20 C. C. 485.

action of one.²¹ The personal representative is not bound to plead the statute of limitations against a claim²² and if he does not, other creditors may.²³ The time to make objection is at the audit.²⁴

10. Proof of claims.

When a claim is presented and disputed the burden of proof rests upon the claimant.¹ But where a judgment, upon a sealed instrument, from father to son, was presented and there was no charge of undue influence, the burden was upon the contestants.²

The auditor's finding of fact upon a claim is like a verdict of a jury.³

Exceptions must be taken before the auditor. If made afterwards they will be too late.⁴

11. Sufficiency of proof.

The uncontradicted testimony of a single disinterested witness, whose credibility is unimpeached, will be sufficient to sustain a claim against the estate.⁵ The testimony of a physician has been held sufficient to support his claim.⁶ Claimant's book of original entries, with one witness, was held sufficient;⁷ so of memoranda, etc., in the hand writing of decedent.⁸ But oral testimony as to declarations by the decedent should be scrutinized;⁹ but if they are supported by the circumstances and the whole seems credible they will suffice.¹⁰ A power of attorney supplemented with book entries by decedent will piece out a good claim;¹¹ so of declarations of indebtedness patched up with a paper among decedent's effects to the same purport;¹² so, also of book entries by decedent in his employers' books.¹³ Where experts testify in their omniscient introspection that a note is a forgery, but credible witnesses to the fact support its genuineness, the claim must be allowed.¹⁴ But where the inventory shows collateral, the executor cannot be heard to dispute it on his solitary claim against it.¹⁵ Mere unsupported

²¹ *Fechter's Est.*, 51 Pitts. L. J. 323.

²² *Smith's Est.*, 1 Ashmead, 352.

²³ *Kittera's Est.*, 17 Pa. 416; *Curcier's Est.*, 28 Pa. 261; *Claghorn's Est.*, 181 Pa. 600.

²⁴ *Young's Est.*, 7 C. C. 287.

¹ *Heffner's Est.*, 134 Pa. 436; *Fiddler's Est.*, 14 D. R. 359; *Anderson's Est.*, 50 Pitts. L. J. 199.

² *Hoffman's Est.*, 32 Supr. C. 646.

³ *Breneman's Est.*, 1 Lanc. Bar, No. 28; *Gilliland's Est.*, 6 D. R. 138; *Hasson's Est.*, 19 Phila. 24.

⁴ *Nathan's Est.*, 36 W. N. C. 184.

⁵ *Banes' Est.*, 19 Phila. 6.

⁶ *Quickel's Est.*, 5 York, 71.

⁷ *Barry's Est.*, 18 Phila. 31.

⁸ *Haas' Est.*, 3 C. C. 345; *Arnold's Est.*, 5 Phila. 215.

⁹ *M'Cann's Ap.*, 9 Atl. 48.

¹⁰ *Shirk's Est.*, 14 Atl. 413.

¹¹ *Burton's Est.*, 15 C. C. 367.

¹² *Toner v. Taggart*, 5 Binney, 490.

¹³ *Roberts' Ap.*, 126 Pa. 102.

¹⁴ *Fox's Ap.*, 11 Atl. 228.

¹⁵ *Souder's Est.*, 169 Pa. 239.

claims cannot be allowed.¹⁶ But a judgment obtained against a decedent in his lifetime, although unrevived, is sufficient evidence of a valid claim.¹⁷ A note "for value received" from an old man to a young woman, need not be too closely scrutinized as to the consideration, especially when the conversation proved supports it as a *bona fide* affair.¹⁸ A note of decedent though undelivered, accompanied by other proof of the debt was held sufficient.¹⁹ So also a due bill.²⁰

When it is shown that decedent received money as a loan, or for investment, from the claimant, it places the burden on the estate to show repayment or an accounting;²¹ a note under seal which imports a consideration is sufficient evidence;²² so where a widow holds her husband's check.²³

12. Incompetent testimony.

The admission of incompetent testimony by agreement of those present at the audit binds not those who are absent.²⁴ But if the auditing judge hears testimony to the competency of which no objection is made until it has been heard, the objection may be disregarded.²⁵ Objections not taken at the hearing will not be considered after the auditor's report is made.²⁶

13. Compelling attendance of witnesses.

Section 2 of rule 8, Philadelphia, provides:

"Subpœnas for witnesses residing in the city of Philadelphia shall be taken at least five days before the day assigned for the audit of any account in which their attendance shall be required. But this rule shall not dispense with the obligation to take the deposition of any such witness, where the parties requiring his attendance know previously to that period that such witness intends to be absent from the jurisdiction at the time of the audit."

14. Procedure before the auditor.

Exceptions to the account should be disposed of before the appointment of an auditor to distribute.²⁷ A duplication in the account, on exception, may be corrected by reference to the books of the accountant in possession of the auditor.²⁸

For various extraordinary slips and corrections in audits see P. & L. Dig., Vol. XIV, cols. 24,356-7.

¹⁶ Fox's Ap., 11 Atl. 228.

¹⁷ Esterly's Ap., 109 Pa. 222.

¹⁸ Royer's Est., 217 Pa. 626.

¹⁹ Miller's Est., 53 Pitts. L. J. 321; 34 Supr. C. 385.

²⁰ Schaefer's Est., 16 D. R. 537.

²¹ Brown's Est., No. 2, 210 Pa. 499; also No. 1, 210 Pa. 493; McGlinchy's Est., 11 D. R. 257.

²² Hess' Est., 9 D. R. 19; Groff v. Groff, 209 Pa. 603.

²³ Wilkinson's Est., 192 Pa. 117.

²⁴ Sweeten's Est., 3 Del. Co. 127.

²⁵ Gerker's Est., 8 C. C. 583.

²⁶ Huber's Est., 9 Lanc. L. R. 337; Christman's Est., 11 D. R. 363.

²⁷ Harding's Est., 24 Pa. 189.

²⁸ Bowker's Est., 12 Phila. 88.

15. Claims insufficiently proved and not allowable.

In order that a claim may be allowed in the Orphans' Court it must be proved as satisfactorily and with the same kind and degree of evidence as if an action at law had been brought for it.¹ A mere *ex parte* affidavit filed with the auditor is not enough.² If the evidence is vague and the circumstances are suspicious a claim will be rejected.³ A claim of a physician for services rendered long before the death of decedent and based upon book entries alone which are not original will be disallowed.⁴

Where claimants' book shows a settlement, but is indefinite, whilst checks of decedent show payments to a greater amount, the claim will be rejected.⁵ Where the decedent was in the habit of keeping very correct accounts, his books will be accepted as the best evidence of his dealings with claimant.⁶ Mere statements made to others, not in the presence of the party interested are insufficient to prove a claim.⁷ A claim for money lent to decedent may be rebutted by evidence of inability and dependence of claimant upon the decedent for support, etc.⁸ Where a claim is made in behalf of one estate against another for services rendered after the demise of the first it cannot be overthrown by evidence of gratuity, unless it be shown too that the contract was continuing after his death.⁹ Where the evidence shows that a claimant had in his possession the means of payment it will support a finding that he was paid,¹⁰ all the circumstances tending to that conclusion. A claim for repairs by a tenant must be made to the heirs and devisees, in the absence of a contract with the decedent.¹¹ A mortgage for money claimed to have been advanced was disallowed where the ground was shifted and the claim made that it was for the support of decedent's parents.¹² A lessor's claim for minimum royalties in a coal lease, no coal having been mined, will be confined to those accruing to the date of lessee's death.¹³ Where the parties themselves have mixed up their financial transactions so that they are dubious, it requires more than declarations to sustain a valid claim.¹⁴ If no question is raised as to the competency of the claimant as a witness his evidence alone uncontradicted and unimpeached will substantiate his claim.¹⁵ But where the transaction is in itself doubtful; it requires more evidence to support the claim.¹⁶ An agreement

¹ Keith's Est., 19 Phila. 73; Thompson's Ap., 13 Atl. 952.

² Bortz's Est., 2 Northam. 81.

³ McMahon's Est., 132 Pa. 175; Heffner's Est., 134 Pa. 436.

⁴ Butterweck's Est., 4 D. R. 563.

⁵ Arthur's Est., 1 Del. Co. 159.

⁶ Ziegler's Aps., 4 Atl. 837.

⁷ Mueller's Est., 159 Pa. 590.

⁸ Glessner v. Patterson, 164 Pa. 224.

⁹ Lewis' Est., 20 W. N. C. 88.

¹⁰ McMichan's Est., 220 Pa. 187.

¹¹ Robinson's Est., 15 D. R. 92.

¹² Harrison's Est., 31 Supr. C. 485.

¹³ Davis, Est., 17 D. R. 570.

¹⁴ Farver's Est., 11 Dauphin, 283.

¹⁵ Haas' Est., 16 D. R. 251.

¹⁶ Powell's Est., 16 D. R. 544.

between brother and sister as to the management of the estate by her as executrix, in the possession of the attorney for both, is admissible.¹⁷

A signed judgment note found among the effects of the deceased, with only remote declarations to show that it represented a real debt is insufficient evidence of a claim.¹⁸ The age of the claim is not a circumstance in favor of it, but against it, nor is the widow exempt from this rule, it seems, for money she alleges to have advanced to her husband, which seems a harsh and ungallant position, considering the relation and the common law rule which then obtained.¹⁹ As to her claim, the statute of limitations did not begin to run until the death of her husband;²⁰ and the statute is invocable in the Orphans' Court as well as in the Common Pleas.²¹ Not only that, but since York's Ap. legislated upon the subject and as Ch. J. Paxson himself said, "We applied the knife," a demand upon the executor or administrator is not sufficient to toll the running of the statute. There must be an action at law instituted.²² Not even the probate of the claim before a prior auditor, who was not called upon to adjudicate, is sufficient to relieve the claimant from his action at law, even though she be the widow.²³ Claims which have lost their lien and against which the statute has run are barred.²⁴ Where a claim might have been made in the lifetime of the decedent it will be scrutinized severely.²⁵ The admission of a decedent that he owes a party which does not fix the amount or how he became indebted is not of itself sufficient to fix the liability of the estate.²⁶ But where such declarations are made in the presence of members of his own family they are admissible and entitled to weight with other evidence as to the existence of a claim.²⁷ But this does

¹⁷ White's Est., 26 Lanc. L. R. 13.

¹⁸ McKown's Est. (No. 2), 198 Pa. 102.

¹⁹ Irwin's Est., 133 Pa. 1. Paxson, C. J.

²⁰ Towers v. Hagner, 3 Wharton, 48; Kutz's Ap., 40 Pa. 94.

²¹ York's Ap., 110 Pa. 69, overruling McClintock's Ap., 29 Pa. 360, Black, J., which was hornbook law and ruled that a debt owing by a decedent less than six years at the time of the debtor's death was not barred because the six years were completed before settlement and distribution. This was sound law then and is sound sense to-day, except for its misconception and misinterpretation by Paxson, J., in York's Ap., which also overruled McCandless' Est., 61 Pa. 9, where McClintock's Ap. was applied to a case in which letters testamentary were not taken out until seven years after the death of the testator and five years after the debt was barred. This was an extreme case, because the debtor might have moved for administration on his debt before the six years expired. Agnew, J., in dissenting from a misapplication of McClintock's appeal, concurred in the judgment on the ground that the statute was suspended by the want of letters testamentary, which, however, seems no reason, and was not implied in McClintock's Ap.

²² Keyser's Ap., 124 Pa. 80. Paxson, C. J., affirming Paxson, J., in York's Ap., 110 Pa. 69.

²³ Irwin's Est., 133 Pa. 1.

²⁴ Monroe's Est., 9 Kulp, 334; Clarke's Est., 1 Phila. 356.

²⁵ Miller's Est., 188 Pa. 214; Funk's Est., 21 Lanc. L. R. 149.

²⁶ Horner's Est., 10 D. R. 729.

²⁷ Rhoades' Est., 13 D. R. 287.

not extend to the admissions of his wife.²⁸ A check drawn to the order of decedent is not evidence of an unpaid debt.²⁹ Where lawyers are not partners they may prove each other's claims.³⁰

16. The two years' limitation.

Section 1 of the act of June 8, 1893, P. L. 392, which has been variously amended, was held not to apply to judgments, but only to debts not of record.¹ Under it, as amended June 14, 1901, P. L. 562, a debt due the commonwealth loses its lien upon the decedent's real estate both generally and against heirs and devisees, unless the commonwealth institutes proper proceedings, as required by the statute, within two years after the death of the decedent, to continue the lien.²

The issuing of a citation in the Orphans' Court within two years is a proceeding to collect which will preserve the right of the claimant.³ The filing of a bond is good as against the surety in it, to preserve the lien after his decease.⁴ Prior to the act of 1909, the expenses of administration were not included as debts which lost their lien, but said act includes them. A bond accompanying a mortgage loses its lien as to other land than that covered by the mortgage, after two years.⁵ Funeral expenses are also cut out.⁶

The fact that the testator directed his just debts and funeral expenses to be fully paid and satisfied does not countervail the statute — and an executor cannot sell or mortgage real estate to reimburse himself for debts paid by him after their lien was lost.⁷ Judgment bonds not entered or notes not filed are within the effect of the statutory bar.⁸

17. Effect of a will as to debts.

A provision in a will that all just debts shall be paid does not create any new debt nor will a statement dehors the will that testator owed a judgment validify a void judgment.⁹ A voluntary promise

²⁸ Liggett's Est., 12 D. R. 324.

²⁹ Lamb's Est., 11 D. R. 243.

³⁰ Dean's Est., 11 D. R. 84.

¹ Biesecker v. Cobb, 13 Supr. C. 56.

² Koering's Est., 34 Supr. C. 425, affirming Hawkins, J., who cited Mitchell's Est., 2 Watts, 87, for the proposition that the commonwealth "is as much bound by the rules prescribed for the administration of justice as any citizen."

³ Bartley's Est., 19 C. C. 599; 20 C. C. 451; Stevenson v. Long, 23 C. C. 391.

⁴ Turner's Est., 27 C. C. 372; Oberley's Est., 10 Northam. 391; Reynold's Est., 195 Pa. 225.

⁵ McKibben's Est., 7 D. R. 511.

⁶ McNutt's Est., 15 D. R. 429. Penrose, J. (But see Galboesch's Est., 16 D. R. 259, where Sando holds they are not, citing Elbert's Est., 3 C. C. 611.)

⁷ Kurtz' Est., 16 Lanc. L. R. 205.

⁸ Engle's Est., 22 Lanc. L. R. 261; Cooper's Est., 206 Pa. 628; Cake's Est., 157 Pa. 457.

⁹ Smith's Ap., 1 Penny. 48.

in a will to pay a person a certain sum cannot affect the rights of *bona fide* creditors.¹⁰ Where the testator had failed and compromised with his creditors the court will so marshal the fund as not to do injustice to old or new creditors.¹¹ A clause in a will directing that the funeral expenses of testator's widow should be paid out of the estate, does not carry anything more.¹²

18. Bequest subject to payment of debts.

If one accepts a bequest subject to the payment of a debt or incumbrance there is an assumption of the debt for which assumpsit will lie.¹³ A bequest of half of an estate to a child, without mentioning debts, will be construed liberally in favor of such child, as regards the debts.¹⁴ A devise subject to payment of debts, when accepted prefers all other debts to those due the devisee from the testator.¹⁵ It does not matter that debts and legacies are charged on different parcels of real estate.¹⁶ The manner of distribution fixed by the will cannot be altered by the legatees, without the consent of the creditors.¹⁷ But if the will is silent, the distribution will be according to law.¹

A decree of distribution before the end of the year does not conclude a creditor who had no notice,² nor one who brings suit within the year.³ A creditor may by his laches lose his claim.⁴

19. Administration expenses, and surcharge.

On distribution, where the administrator's expenses were omitted in his account, the auditor allowed them, and though irregular practice, it was permitted to stand.⁵ It is irregular to surcharge an administrator or executor on distribution. It must be done when his account is audited.⁶ A proceeding to surcharge an executor with property may be suspended until the question of title can be determined in an action at law.⁷ A surcharge must be established by the exceptant's own witnesses and not by cross-examination of accountant's witness whose testimony in chief is only as to the payment of certain debts of the decedent.⁸ An accountant who has advanced moneys to claimants, before the audit, will be charged

¹⁰ Klein's Est., 6 D. R. 370.

¹¹ Sinclair's Ap., 116 Pa. 316.

¹² Koehler's Est., 10 Lanc. L. R. 171.

¹³ Dreer v. Penna., Etc., 108 Pa. 226.

¹⁴ Shaw v. M'Cameron, 11 S. & R. 252.

¹⁵ Thompson's Ap., 11 Atl. 455.

¹⁶ Blake's Est., 134 Pa. 240.

¹⁷ Morrow's Est., 22 Pitts. L. J. 137.

¹ Maury's Est., 4 D. R. 752; McCartney's Est., 2 C. C. 202; Penna. Co. v. Claghorn, 7 D. R. 213.

² Gallen's Est., 20 Phila. 13.

³ Rastaetter's Est., 15 Supr. C. 549; Robin's Est., 180 Pa. 630.

⁴ Stroud's Est., 15 Phila. 591.

⁵ Wilson's Est., 2 Pa. 325.

⁶ Heyer's Ap., 34 Pa. 183; McCormick's Ap., 104 Pa. 146; Withers Ap., 16 Pa. 151; McFarland's Est., 1 Phila. 378.

⁷ Shaw's Est., 15 Phila. 602.

⁸ Dougherty's Est., 14 Phila. 288; Burdick's Est., 6 Lack. Jur. 361. Sando, J.

with them and subsequently be allowed credit for them.⁹ An auditor appointed to distribute a fund and pass upon exceptions to the account cannot over-reach the present account and surcharge the accountant with alleged balances due distributees on former accounts.¹⁰ A distribution will be suspended where a question must be decided antecedently in the same court,¹¹ or in some other forum or proceeding¹² but not where the claimant was derelict and failed to present his claim.¹³

20. Claims before the auditor.

Where a legatee opposes an act of the executor, he is not in a position to claim any of the profits which flow from it.¹⁴ When a claim is duly presented before an auditor the claimant is not obliged to offer it as a set off in a suit by the legal representative against him before a magistrate.¹⁵ If the Orphans' Court awards a claim to one and it is not actually paid, there is nothing to prevent his coming in on a second or later fund of the same estate.¹⁶ A claim for use and occupation will be allowed regardless of the form of it.¹⁷ But in order to be allowed a claim must be made on the fund through the decedent as part of his estate and either by or through one who is a creditor, legatee or next of kin;¹⁸ for if his claim is adverse to the title of the decedent he cannot participate as a distributee.¹⁹ So a husband cannot claim money in the account of his wife's executor, as tenant by the curtesy.²⁰ The Orphans' Court assumes that the property accounted for belonged to the estate and will not entertain questions of ownership adverse to the estate;²¹ This rule, however, does not apply where the fund also includes money or property received by accountant as trustee,²² and although the property stands in the name of one person but really belongs to another, the real owner may follow it into the court making distribution.²³ When once distributed the money cannot be returned, but proceedings may be had against the executors to the extent that there has been no appropriation legally; further than that they are relieved from personal

⁹ Tasker's Est., No. 3, 15 D. R. 174.

¹⁰ Ashman's Est., No. 1, 218 Pa. 509.

¹¹ Price's Est., 12 D. R. 694.

¹² Black's Est., 12 D. R. 720.

¹³ Thompson's Ap., 13 Atl. 952.

¹⁴ Moulson's Est., 1 Brewster, 296.

¹⁵ Axtell's Ap., 6 Atl. 560.

¹⁶ Pomeroy's Ap., 127 Pa. 492.

¹⁷ Stockton's Ap., 64 Pa. 58.

¹⁸ McBride's Ap., 72 Pa. 480; Robinson's Est., 12 Phila. 170; Braman's Ap., 89 Pa. 78; Winton's Ap., 111 Pa. 387; High's Est., 136 Pa. 222; Fry's Est., 10 D. R. 493; Law's Est., 140 Pa. 444.

¹⁹ Gravenstine's Ap., 2 Penny. 61; Hamor's Est., 1 Chester Co. 319; Corson's Est., 137 Pa. 160; Hirsh's Est., 15 D. R. 431.

²⁰ McBride's Ap., 72 Pa. 480.

²¹ Bentley's Est., 16 Phila. 263.

²² Geisinger's Est., 1 D. R. 338.

²³ Martin's Est., 1 D. R. 167; Marshall v. Hoff, 1 Watts, 440; Robb's Ap., 41 Pa. 45; Rupp's Ap., 100 Pa. 531; High's Est., 136 Pa. 222. (For a discussion of the rule and exceptions, see P. & L. Dig., vol. 14, col. 24365.)

liability.²⁴ The burden of proving a trust is upon him who alleges it and the evidence must be of such a character as to move a chancellor to decree a trust²⁵

Where one claims a gift in the lifetime of decedent it is an adverse claim and precluded by the rule.¹ A claim for damages against the executors of decedent has no place in the Orphans' Court.² But where a mistake is made in paying a fund to the administrator, when it should have been paid to another, the auditor will correct it.³

The rights of an heir who has been absent and unheard of for nearly thirty years cannot be disregarded and the payment of his share to the administrator raised under the act of June 24, 1885, P. L. 155, will be sustained as against the claims of the other distributees for it.⁴

Distribution should not be made to them in any event without taking proper refunding bonds.⁵ A claim based on malfeasance of the president of a trust company is not to be settled in the Orphans' Court, in the first instance,⁶ unless the proceeds can be traced to his own account.⁷ The Orphans' Court has no jurisdiction of a claim which is not owing by the decedent but is a transaction purely between the accountant and the claimant.⁸ But it may correct an error when the account includes something which belongs to another.⁹ And it may ascertain and enforce a parol trust.¹⁰ But a trust alleged to exist by an agreement before the death of the trustee, which is a continuing trust, the amount of which is unascertained, must be established in the Common Pleas.¹¹ To the rule above stated that no one can claim at the distribution adversely to the estate there is an exception made to avoid circuitry of action, as where it is shown that funds have been wrongly included in the account as trust funds.¹²

Such a case is this where the husband includes in his account as administrator of his wife's estate a deposit in his wife's name and after his death his executor claims it as part of his estate.¹³

But a claim of adverse ownership under title derived from the decedent in his lifetime must be determined in the Common Pleas.¹⁴ If there is no question of title involved the Orphans' Court will take jurisdiction.¹⁵

²⁴ Morgan's Est., 2 D. R. 816.

²⁵ Fague's Est., 19 Supr. C. 638.

¹ Gravenstine's Ap., 2 Penny. 61.

² Braman's Ap., 89 Pa. 78; Winton's Ap., 111 Pa. 387.

³ Fisher's Est., 7 Lanc. L. R. 333.

⁴ Sherwood's Est., 206 Pa. 465.

⁵ Glentworth's Est., 17 D. R. 292, 221 Pa. 329; Jennings' Est., 16 D. R. 252.

⁶ Locher's Est., No. 1, 219 Pa. 42.

⁷ Locher's Est., No. 2, 24 Lanc. L. R. 17.

⁸ Bracken's Est., 15 D. R. 71.

⁹ Justice's Est., No. 1, 15 D. R. 342.

¹⁰ Washington's Est., 16 D. R. 561; 220 Pa. 504.

¹¹ Jones' Est., 15 D. R. 30.

¹² Moore's Est., No. 1, 211 Pa. 338.

¹³ Crosetti's Est., 211 Pa. 490.

¹⁴ McGrann's Est., 12 D. R. 219; 14 D. R. 261; Fisher's Est., 7 D. R. 116.

¹⁵ Herstine's Est., 29 C. C. 481.

21. Claims of nonresidents.

A nonresident has the same right as a resident to present his claim in this jurisdiction.¹⁷ But if he presents a claim he must also reciprocally submit himself to the jurisdiction for a debt he owes the decedent and agree to pay it.¹⁸

22. Claims of legal representative.

An executor has no claims as such against the balance. He must make all his claims in the account. But if an attempt is made to surcharge him for bonds which he claims were delivered to him in the lifetime of the testator for his sole use, he may except and have an issue. He may be enjoined from disposing of such bonds.¹⁹ The same is true where he fails to charge himself with his own notes to the testator which were delivered to him long prior to the death of the testator and which he claims were paid. He may show payment before the auditor.²⁰

If the administrator is surcharged on his account those who do not as well as those who do except are equal beneficiaries;²¹ and when an audit is re-opened to let in other creditors they are entitled to share *pro rata* in the entire fund.²²

23. Annuities or charges.

Where an annuity of \$6,000 is to be paid, the capital withdrawn to meet it is not too large at \$120,000.²³ Although the sum is larger than required, some of the securities being of fluctuating and uncertain value the court will not set apart a portion and distribute the remainder.²⁴ Where the testator intended to give a fixed sum annually and not the income of a fixed sum, the court will determine the amount to be set aside to meet it.²⁵

24. Set-off of debts due decedent against distributive shares.

The Orphans' Court is the exclusive forum in which to ascertain the amount and validity of a debt due the estate from a distributee, as a set-off against such share.¹ It has also power to ascertain how much a legatee owes the estate and to deduct the sum from his legacy.² So of advancements from the estate by the administrator;³ also where a creditor purchases the real estate, the purchase money may be set off against the claim;⁴ also on a sale in partition, the debt of an heir

¹⁷ Bewley's Est., 12 Phila. 56; Newton's Est., 11 Phila. 100.

¹⁸ Gallagher's Est., 10 D. R. 733.

¹⁹ Osterhout's Est., 8 Lanc. L. R. 18.

²⁰ Bierly's Est., 81 * 419.

²¹ Charlton's Ap., 34 Pa. 473; McPherran's Est., No. 1, 212 Pa. 425.

²² Bardsley's Est., 3 W. N. C. 548.

²³ Grigg's Est., 11 Phila. 23.

²⁴ Christian's Est., 2 D. R. 489; Lathrop's Est., 3 D. R. 100.

²⁵ Gallet's Est., 19 Phila. 15.

¹ Bucknor's Est., 9 W. N. C. 511. (See Milne's Ap., 99 Pa. 483.)

² Shallcross' Est., 13 Phila. 374; Springer's Ap., 29 Pa. 208; Manifold's Est., 5 W. & S. 340; Alexander's Est., 214 Pa. 369.

³ Conner's Est., 16 Phila. 239.

⁴ Grier's Ap., 25 Pa. 352.

to the estate will be equalized and deducted from his share;⁵ or on a sale under the act of June 12, 1893, P. L. 461.⁶ It was said that the proper practice where a distributee is indebted to the estate in a sum larger than his share, is to award the whole balance shown by the account to the other distributees.⁷ The debt of a married daughter, evidenced by her note was charged against her share before the act of June 4, 1893.⁸ So, the amount of a note to decedent, the principal to be lifted only by him, is deductible from the maker's share in his estate, the right to lift passing to the administrator.⁹ When the decedent and claimant had intricate unsettled accounts concerning real estate as well as personal property, the auditor cannot untangle the personalty from the whole and set off the amount against the claim.¹⁰ The court is limited to the amount of the share in its ascertainment of the debt.¹¹

Where there have been advancements not taken off in the first account the court may do so in a subsequent account.¹² The accountant should present the claim of advancement or set-off against the distributee at the audit.¹³ A legatee cannot be charged with any more than the amount actually remaining for her use and benefit where she expended it under instructions from the donor.¹⁴ A sum claimed to be due on a void contract cannot be set off against a distributive share.¹⁵ Indemnity of decedent is a proper subject of set-off.¹⁶ Where the advancements to distributees were greater than their shares, they were omitted entirely.¹⁷

25. Marshaling assets — Contribution and subrogation.

The Orphans' Court has exclusive jurisdiction of the application of the proceeds of real estate to pay legacies and annuities under the will when the personal estate is insufficient.¹ It may marshal the assets between legatees and devisees, although the law speaks only of apportionment among the creditors of an insolvent estate;² and having jurisdiction may require contribution between residuary devisees,³ and may likewise equitably subrogate a creditor of the administrator to the latter's rights.⁴ It may marshal the real estate for the benefit

⁵ Dickinson's Est., 148 Pa. 142.

⁶ Hartman's Est., 12 Supr. C. 69.

⁷ Hostetter's Est., 8 York, 127.

⁸ Bucknor's Est., 136 Pa. 23; Willock's Est., 165 Pa. 522.

⁹ Findley's Est., 3 Lanc. L. R. 190.

¹⁰ Fulton's Est., 178 Pa. 78.

¹¹ Springer's Ap., 29 Pa. 208.

¹² Stelwagon's Est., 17 D. R. 609; Stahl's Est., 26 Lanc. L. R. 61.

¹³ Sweeney's Est., 15 D. R. 191.

¹⁴ Gibbon's Est., 15 D. R. 447.

¹⁵ Spayd's Est., 15 D. R. 592.

¹⁶ McCaul's Est., 12 D. R. 769.

¹⁷ Hunsicker's Est., 15 Montg. 199; Fulton's Est., 178 Pa. 78; Miller v. Fulton, 206 Pa. 595.

¹ Norris v. Farrell, 11 Phila. 271; Kunkle's Est., 21 Supr. C. 200; Hartz' Est., 20 Lanc. L. R. 25.

² Barklay's Est., 10 Pa. 387. Gibson, C. J.

³ Hays' Est., 33 Pitts. L. J. 414; Mitchell's Est., 17 D. R. 566.

⁴ Williamson's Ap., 94 Pa. 231.

of the annuitant, where the widow elects to take against the will.⁵ Where an administrator and heir takes the land at the valuation and his account shows a balance in his favor on the personalty, he is entitled to a set-off against his debt for such balance, if the petition shows that the land is bound for such balance.⁶ This power to compel contribution ceases when distribution has been made unless it be a matter that can be reviewed.⁷ In a proceeding in equity to compel an election under a will the decree of the Common Pleas is conclusive;⁸ and a wrongful election by devisees may be adjudicated in an action of ejectment.⁹ But the Orphans' Court has exclusive jurisdiction to subrogate an administrator to the rights of the mortgagees of his decedents' real estate, when he has paid their mortgages out of the proceeds of other lands, on the ground that the funds so used should have been applied to the payment of the unsecured debts whose lien has expired.¹⁰ It may require contribution from joint devisees who allotted lands by amicable partition, where one's allotment was afterwards sold for the payment of decedent's debts.¹¹

The general creditors are entitled to subrogation to the rights of a mortgagee where a portion of the fund to which they were entitled was appropriated to the payment of the mortgage.¹²

26. Distribution under a will.

The Orphans' Court cannot distribute an estate before the time set by the testator in his will;¹³ nor has it any control over articles which were by the will itself withdrawn from the control of the executor.¹⁴ The court will not decide any questions upon the first and partial account of an executor, such as void bequests to charity, within one month of his death;¹⁵ nor by way of anticipation merely to facilitate settlement.¹⁶

27. Equalization of partial distributions.

If upon a partial distribution some distributees fail to appear and are left out, on a subsequent distribution their shares may be equalized, though it takes the entire fund.¹⁷ If some have received more than their shares the excess may be taken from their shares in the next distribution.¹⁸ The same rule applies to an overpaid creditor.¹⁹

⁵ Bigham's Ap., 6 Cent. R. 118.

⁶ Dreisbach's Ap., 17 Pa. 120.

⁷ Hand's Est., 11 D. R. 148.

⁸ Van Dyke's Ap., 60 Pa. 481.

⁹ Lewis v. Lewis, 13 Pa. 79; Armstrong v. Walker, 150 Pa. 535.

¹⁰ Miskimins' Ap., 114 Pa. 530.

¹¹ Rhoads' Est., 3 Rawle, 420; act April 1, 1811; 5 Sm. L. 257.

¹² Taylor's Est., 7 D. R. 305.

¹³ Gould's Est., 6 C. C. 639.

¹⁴ Wood's Est., 7 D. R. 484.

¹⁵ Moore's Est., 8 D. R. 399.

¹⁶ Hano's Est., 8 D. R. 353.

¹⁷ Grim's Ap., 109 Pa. 391; Grim's Est., 147 Pa. 190; Yetter's Est., 160 Pa. 506; Cairn's Est., 18 Phila. 350; Calhoun's Est., 16 Phila. 268; Wittman's Est., 9 D. R. 47; Kline's Ap., 86 Pa. 363; Landmesser's Est., 13 Supr. C. 467.

¹⁸ Vanderford's Ap., 12 Atl. 491; Sampson's Est., 18 Phila. 61, 63; Richardson's Est., 12 Phila. 32.

¹⁹ Gerhard's Est., 4 Leg. Gaz. 74.

Where a gift to a charitable institution was at first rejected, upon a later distribution it was let in, the institution having had its charter amended so as to comply with the terms of the will.²⁰ A decree on the first distribution does not determine that subsequent distributions shall be made on the same theory.²¹ An erroneous application of funds on the first distribution may be remedied in the subsequent one.²² The findings of fact by an auditing judge, approved *in banc* will not be reversed unless palpably erroneous.²³

28. Distribution of further assets.

Section 40 of the act of 1834, *supra*, provides:

"After six months elapsed from a distribution made as aforesaid, the like proceedings, in all respects, may be had for the distribution of further assets, if any shall then remain, after deducting as aforesaid for other demands, which may have been made known to the administrator, and so, from time to time, until the whole estate shall be settled and distributed."

29. Distribution at fiduciary's risk.

Section 58 of the act of 1834, *supra*, provides:

"Executors and administrators may make distribution and pay or deliver legacies, without application as aforesaid to the Orphans' Court, upon such security as may be satisfactory to them, nevertheless at their own risk."

Where such distribution is made within a year from the grant of the letters of administration.²⁴

30. Application of funds to payment of debts.

Section 52 of the act of July 16, 1842, P. L. 374, provides:

"In cases of intestacy, where the real estate of the decedent shall be sold under an order of the Orphans' Court, for distribution, before the expiration of five [now two] years from the death of the intestate, the administrators are authorized to apply the proceeds of such sale, whilst in their hands, to the payment of debts and claims owing by the decedent, for which there may not be other assets in hand, and in all such cases that may have heretofore occurred, and such sale shall have been made within five years from the death of the decedent, the payment of such debts or claims that have been so made out of the proceeds, shall be allowed as credits on the accounts of said administrators, subject to the usual examination by the Orphans' Court, notwithstanding such payment hath been made after the expiration of said time: *Provided*, That, if, before any such payment is made, the distributees of the proceeds of such real estate, their guardians or agents, shall have given, or in future cases may give, written notice to such administrators objecting to such payment, then, and in such case, this section shall not justify the same unless such

²⁰ Jacoby's Est., 54 Pitts. L. J. 237; 34 Supr. C. 355.

²¹ Stahl's Est., 25 Supr. C. 402.

²² Githen's Est., 10 D. R. 375; Vankirk's Est., 49 Pitts. L. J. 146.

²³ Barr's Est., 43 Supr. C. 540. What the effect is when there is but one judge and he approves himself is left to inference.

²⁴ Gallen's Est., 20 Phila. 13. (See Bierly on Executors, p. 111.)

real estate were or may be otherwise legally liable to such payment."

31. Auditors' reports.

The rules of court in each jurisdiction regulate the time and manner of auditors making their reports, and the proceedings thereon. These will be illustrated by citing the rules in Allegheny and Philadelphia. Lawyers will consult their own rules of court, in these matters.

32. Form of auditor's report in Allegheny.

Section 6, of rule 5, Allegheny County, provides:

"Where facts are controverted, the auditor shall report his findings thereon in concise form, after the manner of a special verdict, and shall also state concisely the points of law raised before him, with his opinion and reasons therefor; and where an account and schedule of distribution is necessary, it shall not be blended with other parts of the report, but stated separately in a form convenient to be recorded. The testimony, documentary or otherwise, shall be returned separately, and filed with the report."

Section 10 of the same rule provides:

"The reports of auditors shall be arranged so that they may be recorded according to the act of Assembly."

33. Exceptions to reports.

Section 7, of rule 5, Allegheny County, provides:

"After the report is made out, the auditor shall give the parties ten days' notice of the day designated for filing the same, and in the meantime they shall be allowed access thereto; and no exceptions to such report shall be received unless filed with the auditor before the day so designated; and if exceptions are so filed, the auditor shall re-examine the subject and amend his report, if, in his opinion, the exceptions are, in whole or in part, well founded."

34. Confirmation, etc.

Section 8, rule 5, Allegheny County, provides:

"The report on being filed in the office, shall be marked confirmed *nisi*, by the clerk, which confirmation shall become absolute without further order, if no objection thereto is made, and noted on the record within ten days; and if objection is so made, it shall be treated as a renewal of the exceptions filed by the party with the auditor, and the clerk shall immediately enter the case on the argument list, and, on the hearing, the party will be confined to these exceptions, reserving to the court, however, the power of recommitting the report, should justice require it."

35. Exceptions to report of auditor and master in Philadelphia.

Section 8, of rule 5, Philadelphia, provides:

"No exception to the report of an auditor or master will be received unless the party excepting has filed the same with the auditor or master by whom the report had been made, whose duty it shall be, on

such exceptions being filed, to re-examine the subject and amend his report, if in his opinion, such exceptions are in whole or part well founded. And in order to give all parties in interest an opportunity of entering such exceptions, no auditor or master shall file his report until ten days after he has notified the parties of his intention so to do on a day designated, and giving them an opportunity of having access to such report. And it is further ordered that on the hearing of the question of confirming or setting aside any auditor's or master's report, the party excepting thereto shall be confined to the exceptions made by him before the auditor or master according to the previous requisition of this rule; reserving to the court, however, the power of committing the report again should justice require it."

36. Filing and confirmation, Philadelphia.

Section 9, of rule 5, Philadelphia, provides:

"All reports of auditors shall be filed on Saturday and every such report, unless in case of exceptions filed as provided by the foregoing rule, shall be confirmed absolutely on the second Saturday succeeding that on which the said report shall have been filed."

Section 4, of rule 5, Philadelphia, provides:

"Every auditor shall make his report within sixty days after his appointment, unless, upon application made, the court has enlarged, the time; and in default thereof, his appointment may be vacated, and nothing allowed him for expense or trouble in relation to the same."

Section 5, of rule 5, provides:

"Auditors, or examiners or masters shall not retain their reports as security for their compensation, but when the compensation is allowed by the court, they shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof, he does not pay within the time prescribed by the court."

Masters are abolished by the new Equity rules of the Supreme Court.

37. Taxation of compensation, Philadelphia.

Section 6, of rule 5, Philadelphia, provides:

"Any party dissatisfied with the compensation claimed by any auditor, examiner or master, shall have the right to require such auditor, examiner or master to file his report before payment of such compensation, in order that the same may be taxed by the court."

Section 7 is concerned with the adjustment of compensation with counsel and exceptions.

38. Costs of audit and security, Philadelphia.

Section 10, of rule 5, Philadelphia, provides:

"Auditors, masters and examiners, appointed by this court, may at any time, with the leave of the court, require security for the payment of their and the clerk's costs, and may decline to proceed further until such security be entered. No report of an auditor, or master and examiner, shall be confirmed absolutely until all the costs of the reference, including the costs of the auditor, or master and examiner, be paid."

39. Reopening of audit.

The auditor may in his discretion refuse to re-open the audit to enable a party to offer testimony which was withdrawn on objection,²⁵ or other reasons that seem insufficient.²⁶

[The subject of auditor's reports, filing, exceptions and confirmation is also considered in Vol. II, under title "Distribution."]

40. Adjudication before an auditing judge.

The practice of auditing accounts before an auditing judge, is somewhat different from that before an auditor, in its technique, so to speak. The rules of court in each separate jurisdiction must be consulted.

The practice in Philadelphia and Lancaster County, where the rules are similar, is to present a petition for adjudication, to which are appended schedules as will appear by the forms following:

Section 1, of rule 8, Allegheny County, provides:

"The clerk shall append to each advertisement of the register's list of accounts, notice to parties interested: (a) That an audit list will be made up of all accounts (except guardians') which shall show balances for distribution, and all accounts to which exceptions shall be filed; and (b) that such audit list will be taken up on the third Monday of the succeeding month and continue thereafter each day (Saturday and Sunday excepted) until the whole list shall be disposed of."

41. Rules as to depositions, etc., in Philadelphia.

Section 1, of rule 8, Philadelphia, provides:

"The rules of the courts of Common Pleas of the County of Philadelphia, with regard to the depositions of witnesses and commissions for taking testimony, are adopted by this court, so far as concerns the taking of depositions to be used before an auditing judge."

42. Attendance of audit by parties.

Section 2, of rule 8, Allegheny County, provides:

"Accountants, creditors and other persons interested, will be expected to attend at the time fixed for audit and furnish such information, and produce such evidence, as may be necessary to make a proper disposition of exceptions and of funds for distribution. In cases where the proceeds of sales of real estate are to be distributed, accountants will be required to furnish lists of liens, properly certified, the cost whereof will be paid out of the fund for distribution."

43. Receipts on distribution to be recorded.

Section 1, of rule 10, Allegheny County, provides:

"It shall be the duty of the officer, or party distributing or paying out money in any manner connected with the proceedings in court in all cases to have a receipt for each item paid out, entered on the appearance docket in the clerk's office, or on the face of the proper record of the lien or claim in whatever office it exists."

²⁵ Myer's Est., 13 Supr. C. 476.

²⁶ Funk's Est., 21 Lanc. L. R. 149; Hurley's Est., 5 C. C. 84.

44. Time of payment over.

Section 2, of rule 10, Allegheny County, provides:

"If no exceptions be filed to the confirmation of a report or entry of a decree distributing money within twenty days after the entry thereof, the money shall be paid over according to the report or decree without further delay. And if exceptions be filed and no appeal be taken from the decree disposing of the same within twenty days after the entry thereof, the money shall be paid over according to the decree without further order."²⁷

45. Form of petition for adjudication in a testate estate.

To the Orphans' Court of Lancaster County, State of Pennsylvania.

No. ——. — Term, 19—.

Estate of Peter J. McCullagh, late of the city of Lancaster, said County of Lancaster, deceased.

The petition of John McCullagh *respectfully represents*:

That the said Peter J. McCullagh died on the first day of March, A. D. 1910, testate, unmarried, and leaving to survive him one brother, John McCullagh, and two sisters, Mary McGarvey and Annie Boyle.

That an account has been filed by his executor.

That, under the provisions of the last will and testament of said deceased, the only person entitled to the estate embraced in the said account, or any part thereof (other than as creditors), are as follows: their relationship, proportion of interest, and name of guardian of such as are minors, being stated in schedule "A"; that a list of advancements made to distributees, and of debts due to the decedent by distributees, appears in schedules "B" and "C," respectively, hereto annexed, and that a copy of the inventory and last will and testament of said deceased are hereto attached.

Your petitioner, therefore, prays that distribution may be made to the parties in said schedule "A," according to their respective interests. And he will ever pray, etc.

John McCullagh.

Philadelphia County, ss.

John McCullagh, being duly affirmed, says: That the statements made in the foregoing petition and in the schedules hereto attached are true to the best of his knowledge and belief. Affirmed and subscribed before me, at, etc.

— Clerk Orphans' Court.

Richard P. Powell,
N. P.

[NOTE.—If there be no surviving widow or husband strike out words in eleventh line as circumstances necessitate.]

SCHEDULE "A."

A full and true statement of all the parties in interest, of their relationship, proportion of interest, and name of guardian of such as are minors:

NAMES.	Relationship.	Interest.	Of Age or Not.	Name of Guardian.
Etc., etc.				

²⁷ Patterson's Ap., 104 Pa. 369.

SCHEDULE "B."

A true and perfect statement of advancements made to distributees:

NAMES.	Relationship.	Amount.
Etc., etc.		

SCHEDULE "C."

A true statement of debts due by distributees to the decedent:

NAMES.	Relationship.	Amount.
Etc., etc.		

46. Form of petition for adjudication for intestate's estate.
To the Orphans' Court of Lancaster County, State of Pennsylvania.
No. ——. Term, 19—.

Estate of ———, late of the — of —, said County of Lancaster, deceased.

The petition of ——— *respectfully represents*

That the said ——— died on the — day of —, A. D. 19—, intestate, —married, and leaving to survive h—, [names of survivors].

That an account has been filed by h— —.

That, under the provisions of the intestate laws of this Commonwealth, the only person entitled to the estate embraced in the said account, or any part thereof (other than as creditors), are as follows: their relationship, proportion of interest, and name of guardian of such as are minors, being stated in schedule "A"; that a list of advancements made to distributees, and of debts due to the decedent by distributees, appears in schedules "B" and "C," respectively, hereto annexed, and that a copy of the inventory is hereto attached.

Your petitioner, therefore, prays that distribution may be made to the parties in said schedule "A," according to their respective interests. And he will ever pray, etc.

Lancaster County, ss.

———, being duly —, say: That the statements made in the foregoing petition and in the schedules hereto attached are true to the best of h— knowledge and belief.

C. G. Strickler,

2nd Asst. Clerk Orphans' Court.

[The schedules attached are in the same form as in the one *supra*.]

47. Procedure on petition.

Where no petition is presented as required by the rule of court, an order for distribution will be rescinded, with leave to apply in appropriate form.¹ There should be appended to the account filed or presented to the auditing judge, where distribution has been made in whole or in part, a distribution account which can be regularly vouched.² In case of delay in preparing a schedule, because of an unsold ground rent, the actual cash balance may be distributed and the distribution of the remainder suspended until further order of the

¹ McClelland's Est., 3 D. R. 759. Penrose, J.

² Fleming's Est., 10 D. R. 259. Penrose, J.

court.³ An adjudication may be corrected by the auditing judge, when it was made contrary to the provisions in a will, to which his attention was not drawn before the adjudication.⁴

The question of a void bequest to charity in a will not properly attested by two subscribing witnesses, may be raised by petition at the adjudication; and such bequest will fall into intestacy. Distribution made within one year from the granting of letters, will be suspended until the year has expired.⁵ If there is no petition for adjudication, the auditing judge confirms the account and rests.⁶

Where the auditing judge overlooks an agreement of counsel that certain items shall be reserved for another account, he will allow an exception and sustain it *pro forma*.⁷ On the audit of an account of proceeds of a sale of land for the payment of debts the auditing judge should not decree contribution from the devisee whose land was sold. It must come up on petition and answer.⁸ Petitions for distribution must not consist of scattered pieces of paper. The sheets must be fastened together in order and the petition be sworn to.⁹ It must be a clear statement of the matter sought to be adjudicated.¹⁰

48. Rules in Philadelphia.

Form of Account.

Rule 1 of the Orphans' Court rules of Phila. provides regulations of accounts and adjudications on "audits." Section 1. For convenience in filing, accounts shall be stated with debits preceding credits, upon paper of the ordinary legal cap size, with the sheets fastened at and folding over from the top of the page.

49. Administration not to be blended with distribution.

Section 2. The dates of all receipts and disbursements must be accurately stated: Administration must not be blended with distribution, nor principal with income, but a separate account must be given of each. Accounts of the proceeds of sale of real estate must also be separate from the administration account.

50. Time of audit, Philadelphia.

Section 3. During two weeks of each month, except August and September, beginning on the first Monday of each month, accounts filed in the register's office and in the Orphans' Court (other than triennial accounts of guardians) will be audited, settled and adjusted in the several courts Nos. 1, 2, 3 and 4 [5 now] and distribution decreed of the balances ascertained to be in the hands of the accountants.

51. Division of audit lists, Philadelphia.

Section 4. Upon the presentation to the court for confirmation of the accounts advertised by the register of wills, and of those filed in

³ Harvey's Est., 11 D. R. 83. Penrose, J.

⁴ Trickett's Est., 8 D. R. 398.

⁵ McCullagh's Est., Lancaster L. R. (1911).

⁶ Rowland's Est., 15 Phila. 525; Hart's Est., 10 D. R. 421.

⁷ Harrison's Est., 15 D. R. 117.

⁸ Mitchell's Est., 16 D. R. 376.

⁹ Barton's Est., 25 Lanc. L. R. 390. Smith, J.

¹⁰ Eshelman's Est., 25 Lanc. L. R. 311. Smith, J.

this court, the clerk shall divide the same into four lists [five now] as nearly equal as may be, numbered 1, 2, 3 and 4 [five] and shall post duplicates of said lists in the court rooms and in his office, together with a notice that said lists will be called in the courts correspondingly numbered upon the first Monday of the next month, except in the months of August and September, and that said accounts will be called in the order in which they come on the lists, on such days as are indicated in the "Arrangement of Business"; but the court may adjourn or postpone an audit when, in the opinion of the auditing judge, it is necessary.

52. Advertisement of lists, Philadelphia.

Section 4 continued. It shall be the duty of the clerk to give notice of the hearing of the audit lists, provided by this rule, by advertisement, once in the *Legal Intelligencer*, and twice in three or more daily papers, if the costs allowed be sufficient, and for such advertisements he shall be allowed the sum of three dollars and fifty cents on each account.

53. Petition for adjudication and schedules, Philadelphia.

Section 5. When an account is called for audit, there shall be handed to the auditing judge, to be annexed to the adjudication, a statement or petition, verified by affidavit, setting forth the date of decedent's death, the names and relationship of the persons who claim a share in the distribution, and the manner in which their interest arises. Where such claimants are minors, such statement shall contain the names of their guardians and by whom appointed. Such statement or petition shall also set forth in all cases in which there is a will, that the decedent did not marry after the date of the will, and that there were or were not children born after that period. The names of all legatees mentioned in the will and codicils (except where legacies have been revoked), with the amount of the legacy to each must be set forth; if any legatee or distributee has died, the fact must be stated, with date of death. In guardian's accounts the statement shall set forth when the ward became of age, and that he or she has received notice of the time appointed for the audit of the account.

54. Examiner of continuing trusts, etc., Philadelphia.

Section 6, amendment: There shall be appointed a permanent officer of the court, who shall, under the order and direction of the auditing judges, in all cases where accounts are filed of continuing trusts, or where securities are to be retained by the executors, administrators or trustees, examine the securities of the estate and report to the auditing judge the fact, if he so finds it, that the said fiduciary has possession of the securities, etc., supposed to be in his possession, and that they are properly registered or otherwise earmarked as the property of the estate to which they belong, and also where and how the cash is kept and deposited. For the performance of this duty the examiner shall be allowed, for estates under \$50,000, a fee of \$5; for estates between \$50,000 and \$250,000 a fee of \$10; for estates between \$250,000 and \$1,000,000 a fee of \$15, and for estates over a million dollars a fee of \$20. These fees to be paid out of the estates, the securities of which are so examined.

55. Copy of inventory, Philadelphia.

Section 7. In all cases where accountants shall be charged in the accounts filed with the amount of inventory and appraisement, a copy of such inventory as filed shall be exhibited and produced to the auditing judge at the audit of the account.

Collateral Tax, Philadelphia.

Section 8. Credits claimed for payment of collateral inheritance tax must be vouched by the receipt of the register of wills, countersigned by the auditor-general.

56. Notice to ward, of guardian's account, Philadelphia.

Section 9. No account of any guardian will be audited or confirmed unless it shall appear to the satisfaction of the court, that the ward, if of full age, or some disinterested friend, if in his or her minority, has had notice that such account will be called for audit on the day fixed by the court.

57. Exceptions to adjudication, Philadelphia.

Section 10. After a judge of the court shall have filed in the office of the clerk his adjudication, showing the adjustment and settlement of an account and a decree of distribution when necessary, any parties excepting to the same must file their exceptions with the clerk, and furnish a copy of the same to the judge who audited the account, at any time on or before the third Saturday following. The argument upon such exceptions will be heard by the court when sitting to hear cases on the argument list. If the exceptions are not filed within the time limited the adjudication will become absolute.

58. Affidavit by accountant, Philadelphia.

Section 11. Where an accountant is the exceptant, and in such other cases as the court may direct, the exceptions must be accompanied by an affidavit that they are not intended for delay.

59. Partial suspension of distribution, by exceptions, Philadelphia.

Section 12. Where the matters which are the subject of an adjudication or of an auditor's report are so separate and distinct that an exception to any of them, whether sustained or dismissed, cannot affect the others, and the accountant cannot be prejudiced by complying with the decree relating to the latter, the confirmation of such adjudication or auditor's report shall not be suspended, except to the extent that it may be excepted to, and distribution shall proceed as to all other matters, and the usual process to enforce it may issue.

60. Agreements for confirmation of account, Philadelphia.

Section 13. In all agreements filed for the purpose of obtaining the confirmation by the court of an account of an executor or administrator, it must be shown by sufficient affidavits:

I. That the debts of the decedent have been fully paid.

II. That the parties to the agreement are all the parties interested in the estate, and are of full age and under no legal disability.

III. In what manner the parties to the agreement have derived their interest in the estate.

In case of an administrator's account, his securities must, in writing, assent to the confirmation.

61. Recommitment of adjudication.

A petition to re-commit an adjudication to the auditing judge will not be allowed on slight reasons.¹¹ Where the auditing judge allowed accountant's claims, which the judges *in banc* consider founded on slight evidence, the adjudication will be re-committed for further proofs;¹² and also, if a claim appears to be well founded but not supported by competent evidence.¹³ Upon such re-submission new matter should not be introduced.¹⁴

A recent unique illustration of practice in the distribution of an estate, where the auditing judge was finally sustained, after he was reversed in the Superior Court, which was perfunctorily affirmed by the Supreme Court, is furnished by *De Havens' Est.*¹⁵ The auditing judge dismissed exceptions to his adjudication and upon appeal to the Superior Court, and on the re-argument of the case, counsel for exceptant invoked the act of limitation of April 27, 1855, P. L. 368, it was said for the first time, the cause having been considered upon the question of the sufficiency of the evidence to overcome the presumption of payment. The Superior Court reversed on this plea and held that its benefits might be had in the appellate court.¹⁶ This judgment was affirmed by the Supreme Court, on appeal.¹⁷ Judge Smith in the *Orphans' Court of Lancaster County* then filed an interlocutory opinion suspending distribution, until application could be made by the doubly defeated party, to the Supreme Court, to modify its decree. This was done by petition, quoting Judge Smith's opinion, and upon the modified decree of the Supreme Court the audit was opened to take testimony upon the question of payment of the charge on land and the acknowledgment of its existence to rebut the presumption of payment.¹⁸ It was maintained that a debt barred by the statute is still a debt, the remedy only being barred, and a promise to pay is binding without any new consideration.¹⁹ In his interlocutory opinion, Smith, J., said:

"If it is proper to introduce a statute of limitation in the appellate court as a defense, how may the opposing side answer? If such is the law, parties with abundant evidence to defeat the operation of the statute will be helpless if its introduction is withheld until the case is in that court."

Upon the re-hearing of the case, evidence was conflicting and the auditing judge decided it upon what he considered the preponderance

¹¹ *Douglass' Est.*, 10 D. R. 478.

¹² *Naylor's Est.*, 11 D. R. 414.

¹³ *Haas' Est.*, 3 C. C. 345.

¹⁴ *Lafferty's Est.*, 5 D. R. 347.

¹⁵ 24 *Lanc. L. R.* 97.

¹⁶ *De Haven's Est.*, 25 *Supr. C.* 507, following *Wingett's Ap.*, 122 *Pa.* 486.

¹⁷ 215 *Pa.* 549.

¹⁸ *Evans' Est.*, 23 *Lanc. L. R.* 52.

¹⁹ *Woods v. Irwin*, 141 *Pa.* 278.

of proof, in favor of the valid subsistence of the claim. From this an appeal was taken to the Superior Court and the lower court's adjudication sustained.²⁰ The distinction between a statute of limitations and the presumption of payment was pointed out.²¹ The appellate court is loth to permit a shifting of ground in a cause on after-discovered law.²²

The amount awarded will be paid to counsel appearing and not direct to the client.²³ In making distribution, where any specific portion passes collaterally provision should be made for the tax that may be payable to the state.²⁴

62. Liability of accountant for costs.

There is no fixed rule in regard to placing the costs of an audit upon the accountant.¹ The lower court will not be reversed where it refuses to place the costs upon the accountant and it does not appear that they were incurred solely by his dereliction.² Where a fiduciary is guilty of fraud, misappropriation or mismanagement, the court will be justified in putting either a part or the whole of the costs upon him.³ This rule is especially rigorous as regards a guardian who has misappropriated the funds of his ward.⁴ Accountant has been charged with costs where he has used the money in his own business;⁵ and he has been charged with interest, in lieu of costs.⁶ Where he has wrongfully appropriated a part of the estate to his claim against the decedent the costs have been placed upon him.⁷ The costs may be divided in the decree of the appellate court, where accountant was not deemed wholly blamable.⁸ If his failure to advise the distributees has caused the audit he may be charged with the costs of the audit occasioned.⁹ The fees of the Orphans' Court are not chargeable to an insolvent trust company which has acted as trustee.¹⁰ Where the administrator commingles the personalty with business affairs of the heirs, under advice of counsel, and the audit could have been avoided by citing the administrator to file a proper account, he will not be charged with the costs.¹¹ The bad faith of the accountant and his efforts to hinder, delay or defraud the parties out of their rights are

²⁰ De Haven's Est., 41 Supr. C. 382.

²¹ Biddle v. Hoover, 120 Pa. 221.

²² Levanite v. City of Lancaster, 215 Pa. 576.

²³ Whiteside's Est., 8 D. R. 274.

²⁴ McDowell's Est., 17 Montg. Co. 43.

¹ Fieser's Est., 15 Supr. C. 447.

² Shadle's Est., No. 2, 30 Supr. C. 160; Brooke's Est., No. 2, 36 Supr. C. 332.

³ Clauser's Est., 84 Pa. 51; Harlan's Accounts, 1 Clark, 451; Dolan's Est., 15 Supr. C. 20; Emanuel's Est., 13 Supr. C. 43; P. & L. Dig., vol. 14, col. 24751; Lau's Est., 8 York, 173; Moss' Est., 4 Kulp, 235.

⁴ Mulholland's Est., 154 Pa. 491.

⁵ Parker's Est., 64 Pa. 307; Small's Est., 24 W. N. C. 92.

⁶ Hensler's Est., No. 2, 18 Lanc. L. R. 317.

⁷ Fisher's Est., 46 Pitts. L. J. 168.

⁸ Whiteside v. Whiteside, 35 Supr. C. 481.

⁹ King's Est., 10 Dauphin Co. 214.

¹⁰ Mylin's Est., 32 Supr. C. 504.

¹¹ Young's Est., 204 Pa. 32.

good causes to mulct him with the costs.¹² But where the auditor does not find reasons to charge him with the costs, the court will not,¹³ except in extreme cases.

The costs may be put upon an accountant who unreasonably delays filing his account; or upon his estate, if he be dead.¹⁴ An executor who long postpones filing of an inventory may have the costs to pay;¹⁵ or where he puts off filing a supplemental account.¹⁶ An accountant who unnecessarily multiplies accounts to get commissions, etc., may be charged with the costs.¹⁷ So an accountant has been charged with the costs when his account was improperly stated and occasioned a protracted controversy to straighten it out;¹⁸ also where his conduct was covinous in his accounting and efforts to deceive and thwart a fair settlement;¹⁹ and where he makes an unfounded claim upon the fund and delays the settlement by this means.²⁰

63. Liability of the loser for costs.

The court will use sound discretion in ordering the losing party to pay the costs, having regard to whether his claim was founded in good faith or reasonable cause, and whether honestly mistaken in his rights. An audit is generally a useful and necessary arm of the court to gather in the facts as the basis of doing substantial justice. Before the costs are imposed upon a losing litigant there must be an element of willfulness and an effort wantonly to make the costs which he ought, in conscience to pay.²¹ Such instances of wantonness are these: filing exceptions and then abandoning them;²² or as to matters frivolous which the court strikes out,²³ or that have been adjudicated.²⁴ In such and other cases, if the attorney is responsible, his client might have recourse to him, unless indeed he be justly mulcted for employ-

¹² Lachenour's Est., 6 Northam. 165; Speise's Est., 21 Lanc. L. R. 185; Hoffman's Est., 15 York, 114; Givler's Est., 6 Dauphin Co. 18; Rufe's Est., 29 C. C. 617; Ehrhart's Est., No. 2, 18 York, 134; 31 Supr. C. 120.

¹³ Rambo's Est., 15 Montg. 25.

¹⁴ Warner's Est., 130 Pa. 359; Simon's Ap., 19 W. N. C. 94; Stewart's Est., 12 Phila. 150.

¹⁵ Gorgas' Est., 4 Lanc. Bar, No. 27.

¹⁶ Witman's Ap., 28 Pa. 376.

¹⁷ Roberts' Ap., Brightly's N. P. 479; Schiel's Est., 46 Pitts. L. J. 38; Spangler's Est., 21 Pa. 335.

¹⁸ Pyle's Est., 2 Chester Co. 569; McClintock's Ap., 71 Pa. 365; Nagle's Est., 12 Phila. 25; Wirt's Est., 11 York, 145; Brenneman's Est., 14 York, 14; Brinton's Est., 10 Pa. 408.

¹⁹ Smith's Est., 4 Phila. 377; Smith's Est., 16 Phila. 308; Reeser's Est., 4 C. C. 417.

²⁰ Gable's Ap., 36 Pa. 395; Price's Est., 81 Pa. 263; P. & L. Dig., vol. 14, col. 24757.

²¹ Patterson's Ap., 1 Pitts. 135; Roth's Est., 150 Pa. 261; La Bar's Est., 181 Pa. 1; Stokely's Est., 19 Pa. 476; Scott's Est., 14 York, 77. The rule of the civil law: "*victus victori in expensis condemnatus est*," applies in Common Law and Equity courts (John's Est., 1 Lanc. L. R. 291); but it does not bind the Orphans' Court (Stokely's Est., *supra*. Black, Ch. J.)

²² Funk's Est., 1 C. C. 430.

²³ John's Est., 1 Lanc. L. R. 291.

²⁴ Maurer's Est., 1 Northumb. Co. 197; Mintzer's Est., 163 Pa. 484.

ing an attorney who would lead him into a pit-fall.²⁵ It is aptly said by Smith, J.,²⁶ that in many cases it is impracticable to impose costs upon the unsuccessful claimant, as the auditor is appointed to make distribution and the expenses must be borne by the estate. The rejection of a claim does not therefore necessarily carry costs and the best practice is to make application for the imposition of costs to the auditor and his failure to impose costs on the unsuccessful party will not be reversed except for clear abuse of discretion. If charges of fraud and malpractice are made in a petition and are not sustained the costs will be placed on the petitioner.²⁷ A passive agent of an executor will not be held for costs but the executor will, for badgering the life-tenant and holding her out of her rights.²⁸ If the guardian of minors acts in good faith in refusing a compromise, though the estate be thereby diminished, he will not be chargeable with the costs.²⁹ The unsuccessful contestant for a legacy under a will must pay the costs;³⁰ and so of one who attacks a settlement by bill of review and fails to sustain his charge.³¹

64. Apportionment of costs.

The court will betimes exercise a measure of distributive justice and apportion the costs as it may deem just and equitable,³² and instead of placing them upon the estate as a whole, put them upon the shares which occasioned the litigation.³³ Where the parties settle and fail to provide for the costs, each will pay his own costs.³⁴ The court may divide the costs equitably between several funds.³⁵

65. Fixing amount of costs.

The disposition of an appeal by the appellate court "at the cost" of a party fixes his liability only for the costs of the appeal, and not in the lower court.³⁶ If the liability in the Orphans' Court has been fixed by the appellate court, the only question will be whether all the items in the bill are proper.³⁷

Where an auditor to pass upon exceptions and make distribution charges all the costs to the estate and the court confirms his report — the appellate court has no means of making distribution of the costs.³⁸ The court, where it believed that costs were illegally charged, on its

²⁵ See Reed's Est., 4 Montg. 173; Wertz' Est., 18 Phila. 204; Young's Est., 204 Pa. 32, as illustrations.

²⁶ Union Trust Co.'s Ap., 19 Lanc. L. R. 361; 203 Pa. 293.

²⁷ Hock's Est., 12 Luz. L. R. 350.

²⁸ Boyle's Est., 10 D. R. 206.

²⁹ Shadle's Est., No. 2, 30 Supr. C. 160.

³⁰ Heller's Est., 16 D. R. 306.

³¹ Stetler's Est., 17 D. R. 593.

³² Shirk's Est., 8 Leg. Gaz. 11; Old's Est., 150 Pa. 529; Toomey's Est., 150 Pa. 535; Galloway's Est., 5 Supr. C. 272; P. & L. Digest of Dec., vol. 14, col. 24766.

³³ Evans' Est., 155 Pa. 646.

³⁴ Schlaefel's Est., 13 Phila. 348.

³⁵ Burgard's Est., 26 C. C. 127.

³⁶ Lightner's Est., 16 Lanc. L. R. 244.

³⁷ Hines' Est., 9 D. R. 753.

³⁸ Garman's Est., 32 Supr. C. 494.

own motion, appointed a committee of the bar, as *amici curiæ*, to file exceptions,³⁹ and adjusted the fees.⁴⁰ The costs may be taxed after the appellate court has passed on the question of liability, for taxation is the means of ascertaining what the legal costs are.⁴¹ The bills for witness fees should be regularly made out, sworn to and filed; but where they are not, the auditing judge may order the accountant to pay them out of the fund.⁴² The question of taxing costs on an attachment cannot be brought in on a rule to compel the accountant to pay a distributive share.⁴³ A decree which makes no mention of costs may be amended subsequently so as to fix the liability for them,⁴⁴ so also upon a re-adjudication by a judge as auditor.⁴⁵ In a suit upon a trustees' bond, where no adjudication was asked for costs in the Orphans' Court, the claim for costs will be held to have been waived.⁴⁶ Where a wife was held not liable for costs, because of nonjoinder of her husband, after decree, it is too late to amend so that a party may be brought on the record, for liability for costs.⁴⁷

66. Attachment and execution for costs.

An attachment for costs is in the nature of a criminal proceeding as for contempt and before it may issue there must be an order or decree for costs against the defendant; service thereof upon him and failure to pay. The better practice is to obtain an admonitory rule to show cause why he should not pay the costs or be attached, returnable at a time fixed by the court, and served by the sheriff. Upon proof of service of the rule and respondent not appearing on the day fixed for him to show cause, the rule will be made absolute and an attachment be ordered to issue forthwith.¹ It has been mooted whether an attachment will lie, where there is no element of fraud, or breach of trust.² It may issue only at the instance of one who has paid, or is liable for, or entitled to receive the costs.³ When the costs are due and payable under the order, an attachment may issue notwithstanding an appeal.⁴ As against an execution for costs the exemption may be claimed⁵ unless the party has absconded from the jurisdiction after appropriating trust funds.⁶

67. Security for costs.

A nonresident claimant may be required to give security for costs, under rules of court,⁷ but not otherwise.

³⁹ 10 Lanc. L. R. 139.

⁴⁰ Mumma's Est., 10 Lanc. L. R. 193. (See Franklin's Ap., 163 Pa. 1.)

⁴¹ Barber's Est., 1 D. R. 138.

⁴² Rankin's Est., 5 C. C. 603.

⁴³ Moss' Est., 4 Kulp, 236.

⁴⁴ Simpson's Ap., 1 Mona. 202.

⁴⁵ Lafferty's Est., 5 D. R. 347.

⁴⁶ Comth. v. McDonald, 170 Pa. 221.

⁴⁷ Tarr's Est., 4 C. C. 182. This was before the act of 1893.

¹ Hoffman's Est., 10 Supr. C. 113; Patton's Est., 19 Supr. C. 545.

² Tarr's Est., 4 C. C. 182.

³ Patton's Est., *supra*.

⁴ Lundy's Est., 3 C. P. R. 139.

⁵ Taylor's Est., 9 C. C. 293.

⁶ Woods' Est., 7 W. N. C. 84.

68. Administrator, etc., when not liable to creditors.

Section 57 of the act of 1834, *supra*, provides:

"Executors or administrators making distribution, or paying or delivering any legacies as aforesaid, shall not be liable for the assets so paid or distributed, in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken, as is hereinbefore provided."

The administrator may refuse to pay until a refunding bond is given.⁸ If he takes such bond, creditors must have recourse to it.⁹

69. Distributee to give refunding bond.

Section 41 of the act of 1834, *supra*, provides:

"Before any person shall be entitled to receive any share in the distribution as aforesaid, he shall give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction as aforesaid, in such sum and form as the said court shall direct, with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand, and of the costs and charges attending the recovery of the same; but if the person or persons entitled to receive the same, is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans' Court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the Orphans' Court, on application, shall order it to be paid to the person or persons entitled to it."

If the legal representative fails to take a refunding bond, the obligation to refund rests only upon an assumption¹⁰ and is liable to be met with a plea of the statute of limitations.

70. Refunding bonds by distributees as heirs.

Section 45 of the act of 1834, *supra*, provides:

"Before any distribution of the proceeds of such real estate shall be made among the kindred of the decedent, the persons entitled to receive the same shall respectively give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, with condition that if any debt or demand shall be afterwards recovered against the estate of the decedent, or otherwise be duly made to appear, they will respectively refund the ratable part of such demand, and the costs and charges attending the recovery of the same, so far as such real estate would have been liable to such demand, if it had remained unsold; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest as directed by the 41st section of this act."

⁷ Lehman's Est., 1 T. & H. Pr., section 930; Buckwalter's Est., 6 C. C. 20; McCullough's Est., 5 C. C. 87.

⁸ Bahnert's Est., 4 W. N. C. 360.

⁹ Schaeffer's Ap., 119 Pa. 640.

¹⁰ Robin's Est., 180 Pa. 630; Rastaetter's Est., 15 Supr. C. 549.

71. Reciprocal bonds to refund.

Section 1 of the act of April 13, 1859, P. L. 604, provides:

"Where any executor, administrator or guardian has been required, or hereafter shall be required, upon the receipt of money, to give a refunding bond as required by law, it shall be lawful for such executor, administrator or guardian, upon paying over such money to creditors, heirs, legatees or ward, to require, under the direction of the Orphans' Court, a bond, refunding receipt, or other obligation from the person or persons receiving the money, to indemnify such executor, administrator or guardian to the amount each one may receive."

72. Married ward's refunding bond to guardian.

Section 1 of the act of June 10, 1881, P. L. 106, provides:

"Whenever such ward has reached lawful age and is a married woman, it shall be competent for her, either in person or by attorney, to sign, seal and deliver her own refunding bond to such guardian or his legal representative, with the same effect as if she were unmarried, and were receiving said money directly from the executor or administrator."

73. Suit on refunding bond.

Section 1 of the act of June 30, 1885, P. L. 203, provides:

"In all cases where refunding bonds shall be given upon the distribution or partition of the estate of any decedent, no action or suit thereon shall be brought after the expiration of five years from the date of such bond: *Provided*, That where the creditor shall be within the age of twenty-one years, *non compos mentis*, imprisoned, or from or without the United States of America, or where a creditor, whose debt shall not mature within such period shall file within said period, in the office of the clerk of said court, a copy or particular statement of any bond, covenant, debt, or demand upon which his claim arises, then and in any such cases, an action may be brought by the creditor at any time not exceeding two years from the coming of age, or removal of such disability of the creditor, or the maturing of the debt or demand aforesaid."

74. Restitution.

The Orphans' Court has power to order restitution of an amount erroneously awarded to a distributee;¹¹ and in favor of a creditor whose claim has been overlooked or disregarded.¹² But where the executor voluntarily pays out and takes no refunding bonds a different rule obtains.¹³ Where there has been fraud and concealment practiced the court may order restitution even after more than twenty years have elapsed.¹⁴

Where settlement and distribution were made within a year, the adjudication will be opened and restitution ordered *pro tanto*, to take care of a claim presented within the year.¹⁵ A distributee in a volun-

¹¹ Sutter's Est., 5 C. C. 591; Elliott's Est., 5 D. R. 455.

¹² Clinton's Est., 9 D. R. 455; Lynch's Est., 17 D. R. 374.

¹³ Robin's Est., 180 Pa. 630; Miller v. Hulme, 126 Pa. 277.

¹⁴ White's Est., 1 D. R. 508.

¹⁵ Gallen's Est., 8 C. C. 37. Penrose, J.

tary settlement cannot graft a complaint and ask for restitution upon settlement of the executor's account.¹⁶ But distributees who have been paid pending an appeal upon a claim which was not a super-sedeas, can be called upon to make restitution *pro rata* when the claim is sustained.¹⁷

(For forms of petition, writ, etc, see Vol. II.)

Where the holder of a bond secured by mortgage neglected to appear before the auditor, he cannot ask for restitution of the deficiency at the sale under the mortgage;¹⁸ nor where distribution was made under erroneous advice of counsel for a series of years.¹⁹

75. Effect of distribution by auditor.

An award by the auditor on distribution is not payment; so that if the legal representative becomes insolvent and does not pay, the distributee may come in on a second fund.¹ But the sale of real estate for the payment of debts operates as payment to the extent realized, so that other real estate cannot be sold for the payment of such amount;² although the trustee spent the fund wrongfully.³ Where the widow without taking out letters receives money due the decedent and applies it to the funeral expenses, the debtor is entitled to a credit for the amount so applied.⁴ In no case should a creditor be allowed more than his claim.⁵ But where suit is brought the claim is not limited by the amount of the bill presented to the executor.⁶ In case the bar of the statute of limitations has not been raised against a claim the claimant may apply what is awarded to him on a partial distribution to that part of his claim which is barred.⁷

One who has been paid by the widow cannot afterwards come in on the estate.⁸ But, having once established his claim, miscellaneous checks the relation of which is not established, will not reduce it.⁹ A son who from filial love, delayed presenting his claim until final settlement was not permitted to be prejudiced thereby in an Orphans' Court where humanity is administered as part of the law.¹⁰ Section 19 of the act of April 8, 1833, P. L. 315, was held to operate on heirs and not on creditors.¹¹ It is as follows:

"All of the intestate's relations and persons concerned, who shall not lay claim to their respective shares, within seven years after the decease of the intestate shall be debarred from the same forever:

¹⁶ Clinton's Est., 9 D. R. 455.

¹⁷ Stough's Est., 10 D. R. 547.

¹⁸ Piper's Est., 208 Pa. 636.

¹⁹ Vogdes' Est., 16 D. R. 377.

¹ Pomeroy's Ap., 127 Pa. 492.

² Benner v. Phillips, 9 W. & S. 13.

³ Briggs' Est., 32 Pitts. L. J. 447.

⁴ Cooper v. Eyrich, 6 Supr. C. 200.

⁵ Yearsley's Ap., 48 Pa. 531; Meyer's Est., 10 D. R. 445.

⁶ Russell v. Pratt, 7 C. C. 662.

⁷ Michael's Est., 5 C. C. 321.

⁸ Barton's Est., 25 Lanc. L. R. 390.

⁹ Hughes' Est., 24 Lanc. L. R. 40.

¹⁰ Andress' Est., 14 Phila. 240. Hanna, P. J.

¹¹ Burd v. McGregor, 2 Grant, 353.

Provided, That, if any such relation or person, shall at the time of the decease of the intestate, be within the age of twenty-one years, or a married woman, he or she shall be entitled to receive and recover the same, if he or she shall lay legal claim thereto, within seven years after coming to full age or discoveriture."¹² This section has reference to the claim for distribution.¹³ The administrator is a trustee for the next of kin, and while a trust subsists, the statute does not continue to run,¹⁴ and he will be held accountable in the case of a mispayment, for the principal in question and interest from one year after the date of the adjudication and decree of distribution. The act of 1833, *supra*, does not apply to such a case.¹⁵ This act was held not to apply to real estate,¹⁶ and can only be pleaded where there has been a *bona fide* distribution, without notice of any claim by the heir or next of kin.¹⁷ When the balance due by an executor or administrator, who died without administering the estate, is ascertained, it must be awarded to the administrator *d. b. n.* of the original decedent for final distribution.¹⁸

Payment will not be awarded until final distribution.¹⁹ The whole account, no matter how involved and mixed up with different transactions of the decedent, must be settled at one time and it is error to put over some items for a future account.²⁰

76. Accounts and auditors' reports to be recorded.

Section 18 of the act of April 25, 1850, P. L. 569, provides:

"The several clerks of the Orphans' Courts of the counties of this commonwealth, are hereby authorized and required to place upon record, in a fair and legible hand, in a book or books to be provided for that purpose, all accounts of executors, administrators and guardians, as well as all reports of auditors appointed by the Orphans' Courts of the several counties of this commonwealth, omitting the testimony and documents accompanying the same; the fees for this service to be one-half of the amount now allowed by law for the recording of deeds."

But see later fee bill.

77. Acknowledgment of satisfaction.

Section 30 of the act of 1832, P. L. 190, is amended by the act of April 27, 1909, P. L. 202, so as to read as follows:

"When the executor, administrator, guardian, or other accountant shall have fully paid and discharged the amount of such judgment, the parties who have received payment shall acknowledge satisfaction thereof, to the extent of what they have received, on the record of the

¹² *Quære*. What effect had "the knife" of Yorks' Ap., 110 Pa. 69, on this law?

¹³ Bagg's Ap., 43 Pa. 512.

¹⁴ Logan v. Richardson, 1 Pa. 372.

¹⁵ Bear's Est., 9 Supr. C. 492; Walthour v. Walthour, 2 Grant, 102, on the time from which interest is chargeable. Withers' Ap., 16 Pa. 151.

¹⁶ Blackmore v. Gregg, 2 W. & S. 182.

¹⁷ Glasz's Est., 17 W. N. C. 349.

¹⁸ Comth. v. Strohecker, 9 Watts, 479; Montgomery's Est., 7 Phila. 504; Carter v. Truman, 7 Pa. 315.

¹⁹ De Haven's Est., 13 W. N. C. 179.

²⁰ Fulton's Est., 178 Pa. 78.

Court of Common Pleas; and in case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all cost, such party shall forfeit, and pay to the party aggrieved, the sum of fifty dollars, absolutely, and any further sum, not exceeding the amount by such person received, as shall be assessed by a jury on a trial at law; or the Orphans' Court, on due proof to them made that the entire amount due from such executor, administrator, guardian, or other accountant, according to the final settlement of the said account has been fully paid and discharged, may make an order for their relief from such recorded judgment, which order, being certified to the Court of Common Pleas, shall be entered on their records and shall enure and be received as a full satisfaction and discharge of such judgment."

78. Form of petition by heirs or legatee to compel an administrator or executor to distribute the estate in kind without conversion.

To the Honorable, etc.

The petition of Mary Meyer, widow, and John Meyer, by his guardian, James Wood, respectfully represents:

I. That they are the only heirs of William Meyer, late of said county, deceased.

II. That Henry Ullman was appointed administrator of said estate more than one year ago, to-wit, on the — day of —, 19—.

III. That said administrator has paid all the debts of the estate, as your petitioners are informed and believe, and has on hand the following notes and bonds, property of the estate, to-wit: One promissory note dated 1st June, 19 —, for three hundred dollars, payable five years after date, with interest, and one U. S. four per cent. bond of the par value of six hundred dollars, and other assets in cash sufficient to pay all the expenses of the administration of the estate.

IV. That your petitioners believe that the said investments are safe and desirable, have often requested the said administrator to turn over the said securities to them in kind, but he hath as often refused to do so, claiming that it is his duty to convert the same into cash.

Your petitioners, therefore, pray the court to authorize and direct the said administrator to deliver the said note to said Mary Meyer, widow, and the said bond to said guardian as part of their distributive shares of said estate. And the said guardian further prays the court to authorize him to hold the said bond as an investment of the estate of his said ward.

And they will ever pray, etc.

Mary Meyer, widow,
John Meyer, by
James Wood, Guardian.

(Affidavit of truth.)

Order for Citation.

Now, — day of —, 19 —, citation awarded to Henry Ullman, administrator, commanding him to appear and show cause why the prayer of the petitioners shall not be granted. Returnable — day of —, 19 —.

By the Court.

(For further forms, see *infra*, Executor, *et seq.*)

79. Form of refunding bond given by an heir to an administrator.

Know all men by these presents, that we, James Burns, of ——— Township, in the County of ———, and State of Pennsylvania, one of the heirs and distributees of John Burns, late of said township, deceased, and Edward Morse and George Brown, his sureties, all of said county and state, are held and firmly bound unto Paul Lee, administrator of the estate of said decedent, in the sum of ——— dollars, lawful money of the United States, to be paid to the said Paul Lee, administrator, as aforesaid, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents; sealed with our seals, dated the ——— day of ———, A. D. one thousand nine hundred and ———.

Whereas, the said James Burns has this day had and received from Paul Lee, administrator of John Burns, late of ——— Township ——— County, Pennsylvania, deceased, the sum of ——— dollars, supposed and reckoned to be his share of the estate of the said deceased, after the payment of all the debts of said decedent, as appears by a distribution account filed in the Orphans' Court of said county, and the decree of the court thereon (or as appears by a reckoning heretofore made by us).

Now, the condition of this obligation is such, that if any debt or demand shall hereafter be recovered against the estate of the said John Burns, deceased, or otherwise be duly made to appear that the share of the said James Burns is not so much as has been supposed, reckoned and paid to him as aforesaid, and which the said administrator shall not have other assets to pay, then the said James Burns shall refund a ratable part of such debt or demand, and of the costs and charges attending the recovery of the same; whereupon this obligation shall be void, or else be and remain in full force and virtue.

James Burns,
[Seal.]
George Brown,
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Edward Morse,
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Signed, sealed and delivered in presence of

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CHAPTER XXII.

THE LAW OF INHERITANCE.

1. Origin of Pennsylvania laws of inheritance.
2. Inheritance and guardianship by the twelve tables.
3. Intestate defined.
4. Time when heir's dominion begins.
5. At what time there is a proper heir.
6. Intestacy — law of descent.
7. Restriction on wife's power to will — husband's election.
8. Married woman's separate personal estate.
9. Lineal descent of realty — distribution of personalty.
10. Heir at common law not to take to exclusion of others in the same degree.
11. Inheritance by next of kin.
12. Distribution to those in the same class.
13. Inheritance *per capita* and *per stirpes*.
14. Inheritance of females *per stirpes*.
15. Distribution *per capita* and *per stirpes*.
16. Next of kin defined.
17. Real estate to vest in the blood of the ancestor from whom derived.
18. "The blood of the ancestor."
19. Rule as to blood of the first purchaser.
20. Purchaser defined.
21. Husband or wife as heir.
22. How husband may lose his right.
23. Proceedings by husband or wife to obtain the inheritance.
24. Who are proper and necessary heirs.
25. Adoption of children as heirs.
26. Inheritance under adoption.
27. Adoption of adult as heir.
28. How illegitimates may inherit.
29. Capacity to inherit.
30. Half-blood relation defined.
31. Intent of act, as to illegitimates.
32. The status of spurious children.
33. Posthumous children to inherit, equally.
34. Posthumous child as proper heir.
35. Inheritance by father or mother.
36. Degrees of cognation at the civil law.
37. The mother's right to inherit.
38. Inheritance of *agnates* — collaterals.
39. *Agnation* by adoption.
40. Females as *agnates*.
41. Inheritance by collateral heirs.
42. Father and mother to take real estate in fee.
43. Descent of realty to collaterals of the half-blood.
44. Representation of deceased grandparents.
45. Restriction to blood of the ancestor.
46. Right of accretion — lapsed inheritance.
47. Murderer not disinherited by his act.
48. Rights of heirs fixed at death of decedent.
49. Distribution of proceeds of real estate.
50. Seven years' limitation on claimants.
51. Proof of inheritance for record purposes.
52. Advancements.
53. Escheat of estate.
54. Ante-nuptial contracts.

1. Origin of Pennsylvania laws.

It was said by Chief Justice McKean¹ that William Penn, by

¹ Johnson v. Haines, 4 Dallas, 64.

virtue of section 6 of his charter introduced the English laws "for regulating and governing of property, as well for the descent and enjoyment of lands, as for the enjoyment of goods and chattels." This established also the common law rule as to the descent of estates tail general and special to the eldest son as heir in tail.² This rule was held to be in force even after the act of April 8, 1833, P. L. 315, as to estates tail, and that the rule in Shelley's case did not apply;³ and the same position was taken as to the legal title of a trustee who died with a lessee in possession;⁴ though an equitable estate, as for instance, a separate use trust, descends in the same manner as a legal estate.⁵

Under section 1 of the act of April 27, 1855, P. L. 368, estates tail become a fee. It provides:

"That whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable."

Our system of inheritance more nearly resembles and follows the civil law adopted for Rome by Justinian.⁶

2. Inheritance and guardianship by the twelve tables.

It was declared in Table V of the Twelve Tables of the Emperor of Rome:

"I. Law. After the death of a father of a family let the disposition he made of his estate and his appointment concerning the guardianship of his children be observed."

"II. Law. If he dies intestate, and has no children to succeed him, let his nearest relation be his heir; if he has no near relation, let a man of his own name be his heir."

"IV. Law. After the death of a debtor, his debts shall be paid by his heirs, in proportion to the share they have in his inheritance. After this they may divide the rest of his effects, if they please, and the prætor shall appoint three arbitrators to make the division."

"V. Law. If a father of a family dies intestate and leaves an heir under age, let the child's nearest relation be his guardian."

"VI. Law. If anyone becomes mad, or prodigal, and has nobody to take care of him, let a relation, or if he has none, a man of his own name have the care of his person and estate."

² Goodright v. Morningstar, 1 Yeates, 313; Lyle v. Richards, 9 S. & R. 322; Hileman v. Bauslaugh, 13 Pa. 344.

³ Guthrie's Ap., 37 Pa. 9, criticizing Price v. Taylor, 28 Pa. 89; Reinhart v. Lantz, 37 Pa. 488.

⁴ Jenks v. Backhouse, 1 Binney, 91; Carlisle's Ap., 9 Watts, 331; Baird's Ap., 3 W. & S. 459.

⁵ Dubs v. Dubs, 31 Pa. 149; Shalters v. Ladd, 141 Pa. 349.

⁶ The codification of the Roman laws, which we are told had approached nearly 2,000 volumes, was a work undertaken and done by the Emperor Justinian in the year 528 after Christ, and his fifty books called digests or pandects superseded and consolidated all to that date. The use of all other law books was forbidden by him, though he subsequently added to them *novels* or codes. His work was begun "*in Nomine Domini Nostri Jesu Christu*"—and bears all through it the highest seal of right and justice.

3. Intestate defined.

"A man dies intestate, who hath either not made a testament; or not made one in due form of law; or if his testament, though rightly made, be cancelled or broken; or if no one will become heir under it."⁷

4. Time when heir's dominion begins.

"The dominion of an inheritance is continued in the heir from the instant of the death of his ancestor; nor is the authority of a tutor necessary, because inheritances may be acquired by proper heirs, without their knowledge; neither does a disordered person inherit by assent of his curator, but by operation of law [*sed ipso jure*]."⁸

5. At what time there is a proper heir.

"When it is asked is such a man a proper heir, we must inquire at what time it was certain that the deceased died without a testament; which happens if his testament be relinquished. Thus, if a son be disinherited and a stranger instituted heir, and, after the death of the son, it becomes certain, that the instituted heir was not in fact the heir, either because he was unwilling, or unable to accept the inheritance, in this case, the grandson of the deceased becomes the proper heir of his grandfather; for, at the time when it was certain that the deceased died intestate, there was no other heir but the grandchild, *et hoc certum est*."⁹

6. Intestacy — Law of descent.

Section 1 of the act of April 8, 1833, P. L. 316, provides:

"The real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoyed as follows, viz.:

In Case of Widow and Children.

Article I. Where such intestate shall leave a widow and issue, the widow shall be entitled to one-third part of the real estate for the term of her life, and to one-third part of the personal estate absolutely."

In Case of Widow and No Issue.

Article II. Article 2 of the act of 1833, *supra*, was amended by the act of April 1, 1909, P. L. 87, to read as follows:

"Where such intestate shall leave a widow and collateral heirs or other kindred, but no issue, such widow shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition to the widow's exemption as allowed by law; and if such estate shall exceed in value the sum of five thousand dollars, the widow shall be entitled to such sum of five thousand dollars absolutely to be chosen for her, from the real or personal estate, or both; and in addition thereto, shall be entitled to one-half part of the remaining real estate, for the term of her life, and to one-half part of the remaining personal estate, absolutely: *Provided*, That the procedure for appraising and setting apart the said five thousand dollars in

⁷ Lib. 3, Tit. 1, Justinian.

⁸ Lib. 3, Tit. 1, Justinian; *Shonk v. Brown*, 61 Pa. 320. (See *infra*, this chapter, par. 48.)

⁹ Section 7, Lib. 3, Tit. 1, Justinian.

value of property shall be the same as provided in section 5 of the act of Assembly approved April 14, 1851, relating to widows' exemptions."

In Case the Husband Survives.

Article III of the act of 1833, *supra*, is amended by the act of 1909, *supra*, to read as follows:

"Where such intestate shall leave a husband, the real estate shall descend and pass as now provided by law, saving to the husband his right as tenant by the curtesy, which shall take place, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited. If such married woman shall leave no children, nor descendants of such, living, the husband shall be entitled to such personal estate absolutely. If such married woman shall leave a child or children living, her personal estate shall be divided amongst the husband and such child or children, share and share alike; if any such child or children, being dead, shall have left issue, such issue shall be entitled to the share of the parent."

7. Restriction on wife's power to will — Husband's election.

Section 1 of the act of May 4, 1855, P. L. 430, provides:

"That the power of any married woman to bequeath or devise her property by will, shall be restricted, as regards the husband, to the same extent as the husband's power so to dispose of his property is restricted, as regards the wife, namely: So that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate as she can when surviving, elect to take against his will in his estates, or otherwise to take only her real estate as tenant by the curtesy: *Provided*, That nothing herein contained shall affect the right or power of the wife by virtue of any authority or appointment contained in any deed or will, to grant, bequeath, devise as heretofore, any property held in trust for her sole and separate use."

8. Married woman's separate personal estate.

Section 9 of the act of April 11, 1848, P. L. 537, provides:

"When any married woman, possessed of separate personal property as aforesaid, shall die intestate, her husband shall be first entitled to letters of administration on her estate which said estate shall be distributed as follows: If such married woman shall leave no children, nor the descendants of such, living, the husband shall be entitled to such personal estate absolutely; if such married woman shall leave a child or children living, her personal estate shall be divided amongst the husband and such child or children, share and share alike; if any such child or children being dead, shall have left issue, such issue shall be entitled to the share of the parent."

9. Lineal descent of realty, and distribution of personalty.

Section 2 of the act of April 8, 1833, P. L. 316, provides:

"Subject to the estates and interests given to the widow or the surviving husband, if any, the real estate of such intestate shall descend to, and the personal estate not otherwise hereinbefore disposed of, shall be distributed among his issue, according to the following rules and order of succession, viz.:

In Case of Children Only.

Article I. If such intestate shall leave children, but no other descendant being the issue of a deceased child, the estate shall descend to and be distributed among such children.

In Case of Grandchildren Only.

Article II. If such intestate shall leave grandchildren, but no child or other descendant, being the issue of a deceased grandchild, the estate shall descend to and be distributed among such grandchildren.

Descendants in the Same Degree of Consanguinity.

Article III. If such intestate shall leave descendants in any other degree of consanguinity, however remote from him, and all in the same degree of consanguinity to him, the estate shall descend to and be distributed among such descendants.

Descendants in Different Degrees of Consanguinity.

Article IV. If such intestate shall leave descendants in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild or other descendant, the estate shall descend to and be distributed among them as follows, viz.:

Children.

A. Each of the children of such intestate shall receive such share as such child would have received, if all the children of the intestate who shall then be dead, leaving issue, had been living at the death of the intestate.

Grandchildren.

B. Each of the grandchildren if there shall be no children, in like manner, shall receive such share as he or she would have received, if all the other grandchildren who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner to the remotest degree.

Issue Take by Representation.

C. In every such case, the issue of such deceased child, grandchild, or other descendant, shall take, by representation of their parents respectively, such share only as would have descended to such parent, if they had been living at the death of the intestate."

10. Heir at common law not to take to exclusion of others in the same degree.

Section 11 of the act of April 8, 1833, P. L. 319, provides:

"And whereas, it is the true intent and meaning of this act that the heir at common law shall not take, in any case, to the exclusion of other heirs, and kindred standing in the same degree of consanguinity with him, to the intestate, it is hereby declared, that in every case which may arise, not expressly provided for by this act, the real as well as the personal estate of an intestate shall pass to and be enjoyed by the next of kin of such intestate, without regard to the ancestor or other relation from whom such estate may have come."¹⁰ This section has particular reference to the English law of primogeniture which was never adopted in Pennsylvania.¹¹

¹⁰ Dowell v. Thomas, 13 Pa. 41. (See *infra*.)

¹¹ Anon., 1 Dallas, 20; Kerlin v. Bull, 1 Dallas, 175; Goodright v. Morningstar, 1 Yeates, 317.

11. Inheritance by next of kin.

Section 7 of the act of 1833, *supra*, provides:

"In default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the next of kin to such intestate."

This means such as are next of kin at the time of his death.¹²

Section 8 provided "that there shall be no representation admitted amongst collaterals, after brother's and sister's children." This was changed by section 2 of the act of April 27, 1855, P. L. 368, which is as follows:

"Among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters and the children of uncles and aunts, by representation, such descendants taking equally among them such share as their parent would have taken, if living."

The children of deceased nephews and nieces and of deceased uncles and aunts took *per stirpes* and not *per capita* under this section,¹³ but this was changed by the act of 1885. The grandchildren of a deceased great-uncle do not take by representation where there are children of such great-uncle.¹⁴

12. Distribution to those in the same class.

The act of June 30, 1885, P. L. 251, amending section 14 of the act of 1833, provides:

"That whenever, by the provisions of the intestate laws of this commonwealth, it is directed that real and personal estates shall descend to, or be distributed among, several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree he shall take the whole of such estate, and if there be more than one they shall take in equal shares, and, if real estate, shall hold the same as tenants in common."

Under this act, if the only persons entitled to take, are first cousins, children of deceased uncles and aunts, distribution must be made *per capita* and not *per stirpes*.¹⁵ Where a gift is to persons or classes of persons who stand in the same relation to the testator, the analogy furnished by the intestate laws indicates a division *per capita*, as among nephews and nieces.¹⁶

13. Inheritance per capita and per stirpes.

"A son, a daughter and a grandson or granddaughter by another son, are called equally to the inheritance; nor does the nearest exclude the more remote; for it seems just that grandsons and granddaughters should succeed in the place of their father. By like reason [*pari ratione*] a grandson or granddaughter by a son, and a great-grandson

¹² Baskin's Ap., 3 Pa. 307.

¹³ Lane's Ap., 28 Pa. 487; Brenneman's Ap., 40 Pa. 115; Krout's Ap., 60 Pa. 380; Illig's Est., 3 Luz. L. Obs. 102.

¹⁴ Perot's Ap., 102 Pa. 235.

¹⁵ Cremer's Est., 156 Pa. 40; Mary Rogers' Est., 131 Pa. 382, explained by the Auditor Chapin.

¹⁶ Scott's Est., 163 Pa. 165.

or great-granddaughter by a grandson, are all called together. And since grandsons and granddaughters, great-grandsons and great-granddaughters, succeed in place of their parents, it seemed convenient that inheritances should not be divided into *capita* but into *stirpes*, so that a son should possess one-half, and the grandchildren of another son the other half of the inheritance. So where there are grandchildren by two sons, the one leaving one or two children and the other three or four children, the inheritance must belong, half to the grandchild, or the two grandchildren of the one son; and half to the three or four grandchildren by the other son."¹⁷

14. Inheritance by females per stirpes.

"But as the old law ordered that every inheritance should be divided *in stirpes* and not *in capita*, between the son of the deceased and his grandsons by a son, so we also ordain that similar distribution shall be made between sons and grandsons by a daughter, and between grandsons and granddaughters, great grandsons and great granddaughters and all other decendants in a right line; so that the issue, either of a mother or a father, or of a grandmother or a grandfather, may obtain their portions without diminution; and, if on the one part, there should be one or two claimants, and on the other part three or four, that the greater number shall be entitled to one-half, and the less number to the other half of the inheritance."¹⁸ These excerpts from Justinian are given as illustrative of the source of our present laws, and not as binding.

15. Distribution per capita and per stirpes.

Under section 1, act of June 30, 1885, P. L. 251, the rule of distribution *per capita* applies only where the heirs are of the same class. Therefore where the intestate leaves brothers and sisters and children of deceased brothers and sisters, the nephews and nieces take *per stirpes* and not *per capita*.¹ This act did not change the act of 1855, *supra*, where the distributees are not in the same class,² and it applies whether the parties stand in the ascending as well as descending line.³ But as to those in the same class, the act of 1833 as well as 1855 was changed and the distribution becomes *per capita*.⁴ Those standing in different degrees of consanguinity take *per stirpes*; those in the same degree *per capita*.⁵ This act declaring that they should hold the land as tenants in common, there can be no hostile interest.⁶

The latter act created two new classes of collateral heirs, as dis-

¹⁷ Section 6, Lib. 3, Tit. 1. Justinian.

¹⁸ Section 15, Liber 3, Titulus 1. Justinian.

¹ Shreiner's Est., 8 Lanc. L. R. 287.

² McConnell's Est., 5 Supr. C. 120; Sutton's, 44 Pits. L. J. 291.

³ Fister's Est., 2 Woodward, 323.

⁴ Cremer's Est., 156 Pa. 40, explaining Rogers' Est., 131 Pa. 382. These cases also are modified: Brenneman's Ap., 40 Pa. 115; Hayes' Ap., 89 Pa. 256, as to this point.

⁵ De Haven's Est., 1 Clark, 336; Miller's Ap., 40 Pa. 387; Lebo's Ap., 3 Luz. L. Obs. 103; Krout's Ap., 60 Pa. 380; Hoch's Est., 154 Pa. 417; P. & L. Dig., vol. 9, col. 15585; Beck's Est., 225 Pa. 578.

⁶ McGowan v. Bailey, 179 Pa. 470.

tinguished from next of kin, in which the rule of distribution was *per stirpes*.⁷ It extended representation to grandchildren of brothers and sisters⁸ and the children of uncles and aunts.⁹ Before this act was passed no representation was allowed among collaterals after the children of brothers and sisters.¹⁰ The act of May 25, 1887, P. L. 261, only extends the act of 1855, *supra*, to embrace a living grandparent, and leaves the order of cousins as before.¹¹

Children of a deceased uncle or aunt take to the exclusion of grandchildren of the same.¹² Grandchildren of brothers and sisters of the intestate, being children of deceased nephews and nieces, are entitled to the shares which their parents would have taken if living.¹³

16. Next of kin, defined.

"When a man dies without having made a will, he is to be considered his next of kin to inherit from him who was so at the time of his death. But when the deceased hath actually made a testament, then that person is esteemed his nearest of kin who was so when it became certain that there was no testamentary heir, for, until then, a man who hath made a testament cannot be said to have died intestate. And this sometimes may not appear for a long time; during which, the proximate kinsman [*proximior*] dying, some one becomes the next of kin who was not so at the death of the testator."¹⁴

"Next of kin" in a residuary devise means those who take under the intestate laws.¹⁵ In a statute it means those who were living heirs at the time of passing the act, and not those then dead.¹⁶ It is the nearest degree of consanguinity.¹⁷ In ascertaining who is nearest in kinship the rule of the civil law obtains, and not the common or the canon law. Thus by counting the degrees in the collateral lines, the grandparents are more nearly related than the uncles and aunts.¹⁸

17. Real estate to vest in the blood of the ancestors from whom derived.

It is provided in section 9 of the act of 1833, *supra*, "That no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate of inheritance therein, but such real estate, subject to such life

⁷ McConnell's Est., 5 Supr. C. 120.

⁸ Kingston's Est., 28 W. N. C. 284.

⁹ Danner v. Shissler, 31 Pa. 289; Brennaman's Ap., 40 Pa. 115; Stewart's Est., 147 Pa. 383; Clendaniels' Est., 12 Phila. 54; Rogers' Est., 131 Pa. 382; Haines' Est., 2 D. R. 104.

¹⁰ Parr v. Bankhart, 22 Pa. 291; Woods' Ap., 18 Pa. 478; Montgomery v. Petriken, 29 Pa. 118.

¹¹ Bamber's Est., 2 D. R. 536; Whitaker's Est., 175 Pa. 139; White's Est., 5 D. R. 103.

¹² Smith's Est., 10 D. R. 92; May's Est., 11 D. R. 178.

¹³ Umstead's Est., 21 Montg. Co. 190.

¹⁴ Section 7, Lib. 3, Tit. 2. Justinian.

¹⁵ Kane's Est., 185 Pa. 544.

¹⁶ Clement's Est., 160 Pa. 391.

¹⁷ Swasey v. Jaques, 144 Mass. 135; Blagge v. Balch, 162 U. S. 439.

¹⁸ McDowell v. Addams, 45 Pa. 430; Sturgeon v. Hustead, 196 Pa. 148.

estates as may be in existence by virtue of this act, shall pass to and vest in such other persons as would be entitled by this act, if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate."

18. "The blood of the ancestors."

This rule of inheritance has been often up for interpretation in our courts. Primarily, one who claims real estate by descent must show that he is heir to him from whom it descended as *perquisitor*.¹ If the descent be broken, as by a devise to executors to sell and pay the proceeds to the heir, if he elect to take the land it is a new *perquisition*, and it will therefore descend to his heirs *ex parte materna* as well as *ex parte paterna*.² The line of descent from the ancestor is also broken by a devise from a husband to his wife, she not being of the blood of the ancestor.³

There is a distinction, however, between this and the case where one takes land under a will subject to a charge created therein.⁴ A reservation of a ground rent has, however, been held to be a new acquisition.⁵ A child taking by descent is not a purchaser but an heir.⁶ So a mother cannot inherit from her daughter lands which descended from the father.⁷

19. Rule as to blood of the first purchaser.

A half-brother of the intestate may not inherit land when he is not of the blood of the first purchaser;⁸ but if he is half-brother by a common mother he inherits land to the exclusion of intestate's paternal uncles and aunts, even though the land descended to the intestate from her father, when the intestate and half-brother are of the blood of the first purchaser, by reason of their respective fathers being brothers. When the son is the devisee of his father he takes by descent and not by purchase, although there are children who would have inherited in case of intestacy and the devise is subject to charges in favor of the other children.⁹ The rule excluding heirs not of the blood of the first purchaser applies only to estates of inheritance and not to a life estate,¹⁰ nor to personalty.¹¹

¹ Lewis v. Gorman, 5 Pa. 166; Parr v. Bankhart, 22 Pa. 291.

² Burr v. Sims, 1 Wharton, 252; Simpson v. Kelso, 8 Watts, 247. (See Allison v. Wilson, 13 S. & R. 330.)

³ Culbertson v. Duly, 7 W. & S. 195.

⁴ Hartman's Est., 4 Rawle, 39; Clepper v. Livergood, 5 Watts, 113; Lewis v. Gorman, 5 Pa. 166; Kinney v. Glasgow, 53 Pa. 141.

⁵ Skerrett v. Burd, 1 Wharton, 250; Bobb v. Beaver, 8 W. & S. 107.

⁶ Moffit v. Clark, 6 W. & S. 262.

⁷ Shippen v. Izard, 1 S. & R. 222; Simpson v. Hall, 4 S. & R. 337; Bevan v. Taylor, 7 S. & R. 397; Baker v. Chalfant, 5 Wharton, 477; Walker v. Dunshee, 38 Pa. 430; Roberts' Ap., 39 Pa. 417; Danner v. Shissler, 31 Pa. 289.

⁸ Henderson's Est., 51 Pitts. L. J. 98. (See vol. 9, P. & L. Dig., col. 15568.)

⁹ Banes v. Finney, 209 Pa. 191.

¹⁰ Miles v. Smith, 27 C. C. 218; Maffit v. Clark, 6 W. & S. 258; Roberts' Ap., 39 Pa. 417; Moyer v. Thomas, 38 Pa. 426.

¹¹ Macer's Ap., 3 Walker, 107.

A purchaser at an Orphans' Court sale who pays part of the purchase money and goes into possession, is a first purchaser, although after his death his administrators pay the balance and take title in their names.¹² Where a parent conveys land to a child, the consideration being "one dollar, as well as in consideration of natural love and affection," it is a gift and not a sale. Therefore, not being a purchaser, when he dies intestate only those of the blood of the ancestor can take.¹³

A sister of the whole blood of the ancestor will take to the exclusion of the maternal half-brother.¹⁴ So the mother cannot take to the exclusion of the paternal grandparents.¹⁵ In order to inherit the next of kin must trace his right entirely within and through the blood of the perquisitor and not collaterally.¹⁶

If the father and mother of the intestate are not competent to take an estate of inheritance as provided in section 6 of the act of 1833, *supra*, because not of the blood of the first purchaser, the estate goes to next of kin who are of such blood.¹⁷ Section 9, *supra*, must be read with the remainder of the act in view and it covers all kindred, and section 11 of the same act only comes into play when the whole line of the blood of the perquisitor is exhausted.¹⁸

Under the Connecticut law the rule applies to both real and personal estate.¹ When "the blood of the ancestor" is mentioned it means any blood of the first ancestor even to the great-grandfather from which the land descended or came by devise.²

20. Purchaser defined.

The word purchaser when used in this connection means one who acquired the land by purchase and not by inheritance; or to whom it came by gift or devise from a stranger to the blood.³ In its application to the law of descent, the claimant must trace himself in blood to the first purchaser in the line.⁴ The rule applies to the whole estate.⁵ If a widow takes a devise in lieu of dower, she becomes a purchaser and thereby establishes a new line of ancestral descent.⁶ If, in partition, a son takes the land at the valuation, he becomes a

¹² Frick Coke Co. v. Laughead, 203 Pa. 168.

¹³ Lynch's Est., 220 Pa. 14.

¹⁴ Henszey v. Gross, 185 Pa. 353, followed in Henszey v. Parker, 185 Pa. 355.

¹⁵ Nichol v. Hall, 28 Pitts. L. J. 239; Glass v. Glass, 6 C. C. 408.

¹⁶ Ranck's Ap., 113 Pa. 98.

¹⁷ McWilliams v. Ross, 46 Pa. 369.

¹⁸ Parr v. Bankhart, 22 Pa. 291; Roberts' Ap., 39 Pa. 417.

¹ Welles' Est., 161 Pa. 218.

² Hart's Ap., 8 Pa. 32; May v. Espenshade, 1 Pearson, 139; Baker v. Chalfant, 5 Wharton, 477. (But see Irwin v. Covode, 24 Pa. 162. Woodward, J.)

³ Lewis v. Gorman, 5 Pa. 164; Eckert's Est., 5 W. N. C. 451; Lee's Est., 14 Lanc. Bar, 11.

⁴ Maffit v. Clark, 6 W. & S. 258; Hart's Ap., 8 Pa. 32; Shippen v. Izard, 1 S. & R. 222.

⁵ Kinney v. Glasgow, 53 Pa. 141.

⁶ Culbertson v. Duly, 7 W. & S. 195; Walker v. Dunshee, 38 Pa. 430; Opdyke's Ap., 49 Pa. 373.

purchaser as to all of it which he would not have inherited and his mother becomes his next of kin therein.⁷

21. Husband or wife as heir.

Section 10 of the act of 1833, *supra*, provides:

"In default of known heirs or kindred, competent as aforesaid, the real estate of such intestate shall be vested in his widow, or if such intestate were a married woman, in her surviving husband, for such estate as the intestate had therein; and in such case, the widow shall be entitled to the whole of the personal estate absolutely." Where one dies leaving only a widow and a mother, the land vests in the widow.⁸ The widow has been held entitled though she deserted and lived with her paramour in adultery.⁹

Personalty bequeathed to a married woman for her sole and separate use during life, passes to her husband and children in equal shares at her death,¹⁰ since the act of April 11, 1848, P. L. 536. But where she had no issue, the husband was awarded the whole share arising from the sale of real estate as her "heir," excluding other heirs and next of kin.¹¹ Where a trust was created for her husband during his life and at his death the estate to be paid to others named, his wife was held not entitled to an interest in the fund.¹² In the case of partial intestacy of a wife, the husband electing to take against the will, is entitled to only one-half of the estate.¹³

Where a husband or wife dies intestate without any known heirs, the court will order notice to be given to heirs by advertisement and if none appear, the land will be decreed in fee simple to the survivor.¹⁴ The wife's equitable right in her husband's personalty is superior to that of the heirs, as where the husband attempts to dispose of it by covin in fraud of such marital right,¹⁵ which is contrary to the statute of Elizabeth.¹⁶ But if the husband adopts an heir, legally, after marriage, the widow can claim only one-third of the personal estate.¹⁷ And this is also the rule in case of testacy.¹⁸

22. How husband may lose his right.

The husband may deprive himself of his right to participate in his wife's estate by desertion under section 5 of the act of May 4, 1855, P. L. 430, and one year's unexplained absence is sufficient to bring him within its terms. This is especially so where he executed a bond for her weekly support, in which his desertion is alleged.¹ Section 5, *supra*, reads as follows:

⁷ Hartman's Est., 4 Rawle, 39.

⁸ Broadtop, Etc., Co. v. Riddlesburg, Etc., Co., 65 Pa. 435.

⁹ Adose v. Frassit, 1 Pearson, 304.

¹⁰ Page's Est., 75 Pa. 87.

¹¹ Eby's Ap., 84 Pa. 241.

¹² Watson's Est., 139 Pa. 461.

¹³ Lee's Ap., 124 Pa. 74.

¹⁴ Rogers' Est., 2 Chester Co. 500.

¹⁵ Hummel's Est., 161 Pa. 215.

¹⁶ See Dower, vol. 2. Johnson.

¹⁷ Nulton's Est., 4 Kulp, 155. Rhone, P. J.

¹⁸ Johnson's Ap., 88 Pa. 346; Rowan's Est., 132 Pa. 299.

¹ Birchard's Est., 154 Pa. 89; Grubb's Est., 10 D. R. 443.

"That no husband who shall have as aforesaid, for one year or upwards previous to the death of his wife, willfully neglected or refused to provide for his wife or shall have for that period or upwards willfully and maliciously deserted her, shall have the right to claim any right or title in her real or personal estate after her decease, as tenant by the curtesy, or under the intestate laws of this commonwealth." The desertion required must be for one year continuously prior to her death.² Mere drunkenness does not constitute desertion;³ nor the entering by the aged husband into a soldiers' home, meantime contributing to his wife's support.⁴ If a husband has left his wife, in order to excuse his leaving he will have to show that the causes were sufficient to sustain a suit for divorce.⁵ If he lives apart from her with her consent it is not such a desertion as will cut him out of the right of inheritance.⁶

23. Proceedings by husband or wife to obtain the inheritance.

Section 1 of the act of April 6, 1833, P. L. 207, provides as follows:

"If any person shall die, or hath died intestate, leaving a wife or husband, and no heirs or other known kindred, such surviving husband or wife, his or her heirs or legal representatives, may, at any time, after the expiration of one year from the death of such intestate, and after final settlement of the administration accounts of such intestate, present his, her or their petition to the Orphans' Court of the proper county, setting forth that the said intestate died, leaving no other heirs or other known kindred, and that he or she died seised of real or personal estate, which, by virtue of an act relative to escheated estates, passed the 21st of January, 1819, vested in such surviving husband or wife, which petition shall be verified by the oath or affirmation of the party petitioning, or by some other person knowing the facts, whereupon the said court shall grant a rule upon all the heirs or other persons interested or claiming any interest in said estate, to appear in said court, at some time certain, and show cause why a decree should not be made, ordering and directing the administrator or administrators of the estate of such decedent to pay over to such surviving wife or husband, or to his or her legal representatives, the balance of such intestate's estate in his or their hands, which rule shall be published for such length of time and in such manner as the said Orphans' Court, in their discretion, shall think proper; and if upon the return of the said rule, and due proof of the publication thereof, agreeably to the order of the said court, no heirs claiming said estate shall appear, nor any good cause be shown to the contrary, the said court shall order and decree as aforesaid; and if upon the return of any such rule, any person or persons shall appear in court claiming to be heirs to such estate, whose right to the same shall be disputed by such surviving wife or husband, his or her legal representatives, then

² Willis' Est., 51 Pitts. L. J. 243; Hilker's Est., 5 C. C. 142.

³ D'Arras' Ap., 89 Pa. 51; Cremer's Est., 12 Phila. 153; Coyle's Est., 31 Pitts. L. J. 461. *Quære* whether it would not be well to make drunkenness of either and non-support by the husband such bar.

⁴ Grubb's Est., 10 D. R. 443; O'Neill's Est., 46 Leg. Int. 220.

⁵ Dusenbury's Est., 16 D. R. 369; Brown's Est., 36 C. C. 13.

⁶ Charlton's Est., 3 W. N. C. 305.

the court may direct an issue to determine the matter, or may take such order therein as they shall think proper."

24. Who are proper and necessary heirs.

At the civil law, from which we have derived our system of inheritance, "Proper and necessary heirs are sons, daughters, grandsons or granddaughters by a son or other direct descendants, in the power of the deceased at the time of his death." * * * Heirs are called *sui* or proper because they are domestic; and in the very lifetime of their father are reputed masters in a certain degree. Hence the children of an intestate are first in succession; and are called necessary heirs because, willing or unwilling, they become the heirs of their parent according to the laws of the twelve tables, whether under a testament or on intestacy."⁶

The qualification "in the power of the deceased," does not apply under our inheritance laws.

25. Adoption of children as Heirs.

Section 7 of the act of May 4, 1855, P. L. 430, as amended by the act of May 19, 1887, P. L. 125, provides:

"That it shall be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs to present his or her petition to such court⁷ in the county where he or she may be resident, declaring such desire, and that he or she will perform all the duties of a parent to such child; and such court, if satisfied that the welfare of such child will be promoted by such adoption, may, with the consent of the parents or surviving parent of such child or if the father or mother from drunkenness, profligacy or other cause shall have neglected or refused to provide for his child or children for the period of one year or upwards, proven to the court, with the consent of the non-neglecting father or mother alone, or if none, of the next friend of such child, or of the guardians or overseers of the poor, or of such charitable institution as shall have supported such child for at least one year, decree that such child shall assume the name of the adopting parent and have all the rights of a child and heir of such adopting parent, and be subject to the duties of such child, of which the record of the court shall be sufficient evidence: *Provided*, That if such adopting parent shall have other children, the adopted shall share inheritance only as one of them in case of intestacy, and he, she or they shall respectively inherit from and through each other, as if all had been the lawful children of the same parent."

It has been held when a man adopts as his child a grandchild and he dies intestate the adopted child inherits as a child only.⁸

Neither the act *supra*, nor the acts of May 19, 1887, P. L. 125, and April 13, 1887, P. L. 53, confers the right of an adopted child to inherit from collateral kindred of the adopter.⁹

⁶ Section 2, Lib. 2, Tit. 19. Justinian, p. 150, Cooper's Ed.

⁷ The Court of Common Pleas.

⁸ Morgan v. Reel, 213 Pa. 81.

⁹ Burnett's Est., 219 Pa. 599.

ADOPTION OF ADULT.

No. 198.

Approved—The 1st day of June, A. D., 1911.

AN ACT

Relating to the adoption of adult persons as heirs.

Section 1. Be it enacted, &c., That whenever any person shall desire to adopt an adult person as his or her heir, or as one of his or her heirs, he or she may present his or her petition to the court of common pleas of the county in which he or she resides, or to a law judge of such court at chambers, setting forth such desire, and declaring that if such adoption be approved the petitioner will perform all the duties of a parent toward such adult person; and shall present, with such petition, the written declaration of such adult person consenting to such adoption, and agreeing if such adoption be approved to perform all the duties of a child toward the petitioner; and also, if such adult person be married, the written consent of such adult person's husband or wife, to such adoption.

Section 2. The said court, or judge, if approving of such adoption, shall make a decree that thenceforth such adult person shall have all the rights and be subject to all the duties of a child and heir of the petitioner, and that the petitioner shall have all the rights and be subject to all the duties of a parent of such adult person, as fully to all intents and purposes as if such adult person had been born the lawful child of the petitioner; and also, if the parties so desire, that the person thus adopted shall take and be known by the surname of the petitioner; and the record of said court, or an exemplification thereof, shall be sufficient evidence of such adoption and change of name.

Section 3. Upon the making of such decree the person thus adopted shall be taken and deemed in law to be a child and heir of the adopting parent, having all the rights and being subject to all the duties of a child and heir, and the adopting parent shall be taken and deemed in law to be the parent of the person thus adopted, having all the rights and being subject to all the duties of a parent; and they shall respectively inherit and take by devolution, from and through each other, property of whatsoever nature, as fully as if the person adopted had been born the lawful child of the adopting parent, subject only to payment of the collateral inheritance now or hereafter required by law.

Section 4. If such adopting parent have another child or other children, either by birth or adoption, the person adopted, as aforesaid, shall share the estate of the adopting parent, upon the death of such parent intestate, only as one of his or her children; and such children shall respectively inherit and take by devolution, from and through each other, property of whatsoever nature as fully as if all were by birth the lawful children of the adopting parent.

Section 5. The act entitled, "An act relating to the adoption of any person as an heir," approved the ninth day of May, one thousand eight hundred and eighty-nine, and all other acts or parts of acts inconsistent herewith, be and the same are hereby repealed.

INSERT, P. 469, VOL. 3.

26. Inheritance under adoption.

By the civil law it was provided:

"When a natural father hath given his son in adoption, the rights of the son shall be preserved entire, as though he had still remained under the power of the natural father, and there had been no adoption; except only, that the person adopted may succeed to his adopter, if he die intestate. But, if the adopter make a will and omit to name his adopted son, such son can neither by the civil nor the prætorian law obtain a part of the inheritance, whether he demand possession of the effects, *contra tabulas* (against the will), or allege that the testament is inofficious; for, an adopter is under no obligation to institute or disinherit his adopted son, there being no natural tie between them."¹⁰

The act of April 13, 1887, P. L. 53, provides:

"That whenever hereafter any child, adopted according to law, shall die intestate and without issue, in the distribution and division of any personal or real estate of such child, the adopting parents and their lawful heirs and kindred shall be treated and shall inherit from such adopted child, according to the intestate laws of this commonwealth, the same as though such adopted child were the natural child and heir at law of such adopting parents, to the exclusion of the natural parents, kindred and heirs at law of such adopted child, reserving to the husband or wife of such adopted child all his or her respective rights, under the said intestate laws; and in case either or both such adopting parents shall die intestate, said adopted child shall inherit the property of said parent or parents, the same as though the said adopted child were the lawful child and heir at law of such adopting parents: *Provided, however,* that this act shall only apply to such property, as the adopted child shall have inherited or derived from the adopting parents or their kindred."

27. Adoption of adult as heir.

The act of May 9, 1889, P. L. 168, provides:

"That it shall be lawful for any person desirous of adopting any adult person as his or her heir, or as one of his or her heirs, to present his or her petition to the Court of Common Pleas of the county where he or she may be resident, declaring such desire, and such court may, with the consent of such adult person whom it is proposed to adopt, and of the parents or surviving parent of such adult person, if any, and with the consent also of the husband or wife of such adult person, if married, decree that such adult person shall have all the rights of a child and heir of such adopting parent and be subject to the duties of such child. And such court may also, if the adult person so adopted desire, decree that such adult person may assume and bear the name of the adopting parent aforesaid. And the record of the said court shall be sufficient evidence of such adoption and change of name: *Provided,* That if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them in case of intestacy, and he, she or they shall respectively inherit from and through each other as if all had been the lawful children of the same parent: *Provided further,* That nothing contained in this

¹⁰ Sec. 14, Lib. 3, Tit. 1. Justinian.

act shall deprive the commonwealth of the right to collect collateral inheritance tax."

In Pennsylvania, if the adopted child dies intestate without issue and leaves an estate not derived from the adopter, his natural parents are entitled to preference in the inheritance.¹¹ The right of the adopted child to inherit fully from the adopting parent is not restricted, however, to the property derived from the blood of the ancestor.¹² But, under the proviso of the act of 1855, as to inheriting from natural children of the adopting parent, the adopted child can only take personalty where both the parents are dead. Hence, also, the natural children cannot inherit personalty from a deceased adopted child which she received from her father, when there are natural brothers or sisters to take it.¹³ Under the law in Massachusetts the adopting parent takes the personalty of the adopted child absolutely, although such child should die intestate in Pennsylvania.¹⁴ Although a child claiming to be "adopted" in Pennsylvania, without the formalities of the law, may not inherit as such, it has been held that under a contract to adopt and proof of the relation in the family, the contract might be given effect, as against collaterals but not to affect the rights of the widow.¹⁵ An act of adoption although intended to be retrospective cannot become retroactive so as to divest any right which had vested under the intestate laws by the death of the decedent.¹⁶

28. Illegitimates may inherit.

Section 17 of the act of 1833, *supra*, excluded illegitimates from the inheritance. But section 3 of the act of April 27, 1855, P. L. 368, provided that illegitimates "shall take and be known by the name of their mother, and they and their mother shall respectively have capacity to take or inherit from each other personal estate, as next of kin, and real estate as heirs in fee simple; and as respects said real or personal estate so taken and inherited, to transmit the same according to the intestate laws of this state."

This inheritance from the mother puts the bastard on an equality with the legitimate children who are issue of her body.¹ But the inheritance was held to stop with him so that if he dies before his mother, his children do not take his place in the distribution.² This doctrine was considered too narrow as construed by the courts,³ so that the act of June 20, 1883, P. L. 88, was passed to enlarge the inheritance. It provided:

¹¹ Comth. v. Powel, 16 W. N. C. 297.

¹² Johnson's Ap., 88 Pa. 346.

¹³ Daisey's Est., 15 W. N. C. 403.

¹⁴ Foley's Est., 1 W. N. C. 301.

¹⁵ Susman's Est., 45 Pitts. L. J. 101.

¹⁶ Ballard v. Ward, 89 Pa. 358.

¹ Opdyke's Ap., 49 Pa. 373. (See Neil's Ap., 92 Pa. 193.)

² Steckel's Ap., 64 Pa. 493.

³ Grubb's Ap., 58 Pa. 55; Woltemate's Ap., 86 Pa. 219. By the Roman law, "Although a son or daughter be of spurious birth, yet the mother by the *Tertyllian senatus consultum* may be admitted to succeed to the goods of either." Section 7, Lib. 3, Tit. 3. Justinian.

"Illegitimate children, born of the same mother, and leaving neither mother nor issue capable of inheriting, surviving, shall have capacity to take and inherit from each other, personal property, as next of kin, and real estate as heirs in fee simple, in the same manner as children born in lawful wedlock." It was applied to pending cases, by way of construction.⁴

The act of June 10, 1901, P. L. 551, provided that illegitimate as well as legitimate children "shall have capacity to inherit from each other to the exclusion of the grandmother of the said illegitimate child or children."

The act of July 10, 1901, P. L. 639, provides that "the common law doctrine of *nullius filius* shall not apply as between the mother and her illegitimate child or children. But the mother and her heirs, and her illegitimate child and its heirs, shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner and to the same extent, as if the said child or children had been born in lawful wedlock."

29. Capacity to inherit.

Section 2 of the act of 1901, last *supra*, provides:

"The mother of an illegitimate child, her heirs and legal representatives, and said illegitimate child or children, its or their heirs and legal representatives, shall have capacity to take or inherit from or through each other personal estate, as next of kin, and real estate as heirs in fee simple, or otherwise, under the intestate laws of this commonwealth, in the same manner and to the same extent, subject to the distinction of half bloods, as if said child or children had been born in lawful wedlock."

30. Half-blood relation defined.

Section 3 of the act of 1901, *supra*, provides:

"Each illegitimate child shall be considered as of the half blood to each and every other child of said mother, legitimate or illegitimate, notwithstanding any repute or conviction as to who may be the father of such illegitimate child or children, save and except where the said child or children shall be legitimated as to their father by subsequent marriage, under existing laws."

31. Intent of act of 1901.

Section 4 of the same act, *supra*, as amended by act of March 26, 1903, P. L. 70, provides:

"The intent of this act is to legitimate an illegitimate child and its heirs as to its mother and her heirs; but is not intended to change the existing law with regard to the father of such child, or their respective heirs and legal representatives. This act shall apply to all cases, now pending, where the estate of such illegitimate or its mother has not been actually paid to and received by collateral heirs or relatives or the commonwealth, as well as to all such cases happening after the passage of this act."

⁴ Herbein's Est., 2 Chester Co. 449.

32. The status of spurious children.

"It is manifest that spurious children [*vulgo quaesitos*] have no *agnates* [collaterals], inasmuch as agnation proceeds from the father and cognation from the mother; and such children are looked upon as having no father. And, *eadem ratione*, consanguinity cannot be said to subsist between the bastard children of the same woman; because consanguinity is a species of agnation. They can therefore only be allied to each other as they are related to their mother, that is, by cognation.⁵

Prior to the acts of 1901 and 1903, *supra*, it was held that the legitimate children of the mother could not inherit from the illegitimate one of the same mother;⁶ nor could brothers or sisters of the mother inherit from such spurious child, though a genuine child of love.⁷ The illegitimate could not inherit from the brother of its mother by representation, being excluded by section 17 of the act of April 8, 1833, P. L. 315.⁸

The act of June 14, 1897, P. L. 142, extended the right of inheritance to the grandmother by the mother's side, which was held to exclude the grandfather on the mother's side.⁹ This changed the law as declared in Steckel's Ap., 64 Pa. 493, *supra*. The rights of illegitimates to inherit under these laws are the same whether they be residents or nonresidents of the state,¹⁰ a foreign law on the subject having no relevancy.¹¹ It was held under the act of May 14, 1857, P. L. 507, that the child of an illegitimate mother in England might inherit land in Pennsylvania from the maternal uncle who died in Pennsylvania, the parents of the spurious born mother having subsequently married in England.¹²

Under section 3 of the act of July 10, 1901, P. L. 639, an illegitimate son of an intestate's mother inherits from the intestate as a brother of the half blood only,¹³ and under sections 1 and 2 of said act an illegitimate may inherit the share which its deceased mother might have taken in the estate of her uncle.¹⁴ So it may inherit from its maternal grandmother under this act and that of June 14, 1897, P. L. 142.¹⁵

It may through its mother also inherit from a maternal great-grandfather.¹⁶

⁵ Lib. 3, Tit. 4, section 4. Justinian.

⁶ Kennedy's Est., 9 C. C. 230; McCully's Est., 12 Supr. C. 78; Glasz's Est., 43 Leg. Int. 46.

⁷ Grubb's Ap., 58 Pa. 55.

⁸ Rees' Est., 166 Pa. 498.

⁹ Yarnall's Est., 3 Foster, 62.

¹⁰ Waesch's Est., 166 Pa. 204; Oliver's Est., 184 Pa. 306.

¹¹ Smith v. Derr, 34 Pa. 126.

¹² Oliver's Est., 184 Pa. 306.

¹³ Kilburn's Est., 21 Lanc. L. R. 246.

¹⁴ Umstead's Est., 31 C. C. 209, holding Rees' Est., 166 Pa. 498, no longer applicable.

¹⁵ Dawson's Est., 11 D. R. 247; Diehl's Est., 29 C. C. 288.

¹⁶ Hoover v. Mummert, 16 D. R. 852.

33. Posthumous children to inherit, equally.

Section 13 of the act of 1833, *supra*, provides:

"Descendants and relatives of an intestate, begotten before his death and born thereafter, shall in all cases inherit and take in like manner as if they had been born in the lifetime of such intestate." But a child *in ventre sa mere*, at the death of its father, which is still born does not transmit the inheritance as if it were born alive.¹⁷

34. Posthumous child as proper heir.

"And although a child be born after the death of his grandfather, yet, if he were conceived in the lifetime of his grandfather, he will at the death of his father and after his grandfather's testament is deserted by the instituted heir, become the proper heir of his grandfather. But a child both conceived and born after the death of his grandfather, could not become the proper heir, although his father should die and the testament of his grandfather be deserted, because he was never allied to his grandfather by any tie of cognation, neither is the adopted son of an emancipated son, to be reckoned among the children of his adoptive father's father. So that the adopted children of an emancipated son can neither become the proper heirs of their father's father in regard to the inheritance, nor demand the possession of goods as next of kin [*proximi cognati*]." ¹⁸

35. Inheritance by father and mother.

Section 3 of the act of 1833, *supra*, provides:

"In default of issue as aforesaid, and subject also as aforesaid, to the estates and interests hereinbefore given to the widow or surviving husband, if any, the real estate shall go to the father and mother of such intestate, during their joint lives and the life of the survivor of them; and the personal estate not otherwise hereinbefore disposed of shall be vested in them absolutely; or if either the father or mother be dead at the time of the death of the intestate, the parent surviving such intestate shall enjoy such real estate during his or her life and such personal estate absolutely."

This section is a recognition of the Roman law of inheritance by ascent as well as descent, the common law only adopting lineal descent. The ancestor is therefore nearer than collaterals as kin to the intestate¹ even to the maternal great-grandfather.²

Under this section the father and mother take the personal estate where the intestate leaves neither wife nor issue.³ A son dying without issue, but leaving a widow, transmits the realty to his parents subject to the widow's dower, and statutory claims of exemption and \$5,000 inheritance.⁴ When father and mother both survive they take the land by entireties subject to the principle of survivorship, i. e.,

¹⁷ Martin's Est., 3 C. C. 212. (See P. & L. Dig., vol. 9, col. 15565.)

¹⁸ Section 8, Lib. 3, Tit. 1. Justinian.

¹ May v. Espenshade, 1 Pearson, 139; McDowell v. Addams, 45 Pa. 430.

² Sturgeon v. Hustead, 196 Pa. 155; Sturgeon v. Frick Coke Co., 196 Pa. 155.

³ Robinson v. Martin, 2 Yeates, 525; Kemp's Est., 2 Woodward, 428; Mechling's Ap., 42 Pa. 156.

⁴ Danhouse's Est., 130 Pa. 256.

that the whole estate passes to the survivor.⁵ A mother, being divorced, takes from her deceased daughter one-half of the income from land while the father lives and after his death, the whole income during her life.⁶ The law of survivorship applies also to the personal estate;⁷ but not where the parents have been divorced.⁸

36. Degrees of cognation.

"Father and mother are of the first degree upward; son and daughter, downward; grandfather and grandmother, in the second degree ascending, and grandson and granddaughter in the second degree descending; also brother and sister are in the second degree collaterally. A great-grandfather and a great-grandmother are in the third degree ascending; and a great-grandson and great-granddaughter in the line descending, and also a son or daughter (nephew or niece) of a brother or sister is in the third degree collaterally; as also, an uncle or an aunt whether paternal or maternal. A paternal uncle is called in Greek *patradelpho*, and a maternal uncle *matredelphe*." ⁹

37. The mother's right to inherit.

"These narrow limits of the law were afterwards enlarged by the Emperor Claudius, who first gave the legal inheritance of deceased children to their mothers, in assuasion of their grief for so great a loss." ¹⁰

"We, therefore, not regarding any fixed number of children, have given a full right to every mother, whether ingenuous or freed, of being called to the legitimate succession of her child or children, deceased, whether male or female." ¹¹

"As we have preferred the mother to all other legitimate persons, we are willing to call all brothers and sisters, legitimate or otherwise, to the inheritance, together with the mother; yet in such manner, that if only the sisters, *agnate* or *cognate*, and the mother of the deceased survive, the mother shall have one-half of the effects, and the sisters the other. But, if a mother survive, and also a brother or brothers, or brothers and sisters, legitimate or cognate, then the inheritance of the intestate son or daughter must be distributed *in capita*." ¹²

Section 6 provided that if the mother neglected for one whole year, to have a tutor for her children, she should lose her right to the succession.

38. Inheritance of agnates — Collaterals.

"When there is no proper heir nor any person whom the *prætor* or the constitutions would call to inherit as proper heirs, then the inheritance, by a law of the twelve tables, appertains to the nearest *agnate*."

⁵ Nichol v. Hall, 28 Pitts. L. J. 239.

⁶ Duffee's Est., 13 Phila. 334.

⁷ Gillan v. Dixon, 65 Pa. 395; Frankenfield v. Gruver, 7 Pa. 448; Weir's Est., 13 W. N. C. 518.

⁸ Hecht's Est., 9 C. C. 564.

⁹ Lib. 3, Tit. 6, section 1. Justinian.

¹⁰ Lib. 3, Tit. 3, section 1. Justinian.

¹¹ Lib. 3, Tit. 3, section 4. Justinian.

¹² Lib. 3, Tit. 3, section 5. Justinian.

"*Agnates* * * * are those who are related or cognated by males, *quasi a patre cognati*; and, therefore brothers, who are the sons of the same father, are *agnates* in regard to each other, who are called *consanguinei* (of the same blood); but it is not required that they should have the same mother. An uncle is also *agnate* to his brother's son, and the brother's son to his paternal uncle; and brothers *patrui*, *id est*, the children of brothers who are also called *consobrini*. *Qua ratione*, many degrees of agnation might also be named. Also those, who are born after the decease of their parents, obtain the rights of consanguinity. The law, notwithstanding, does not grant the inheritance to all *agnati* alike; but to those who are in the nearest degree, when it becomes certain that the person has died intestate."¹³

39. Agnation by adoption.

"The right of agnation arises also through adoption; thus the natural and adopted sons of the same father are *agnates*; but such persons are without doubt improperly called *consanguinei*. Also, if a brother, a paternal uncle, or any of your more remote *agnates*, should adopt, then the person so adopted is undoubtedly to be reckoned among your *agnati*."¹⁴

40. Females as agnates.

Under the old Roman law females could only inherit by consanguinity, if sisters, and not in a more remote degree. "But the law of the twelve tables did not introduce these dispositions; for that law, according to the plainness and simplicity, which are agreeable to all laws, called the *agnates* of either sex, or any degree, to succession in the same manner. * * * We, therefore, reducing all things to an equality [*in plenum omnia*] and making our disposition conformable to the laws of the twelve tables, have by our constitution ordained, that all legitimate persons, that is, descendants from males, whether male or female, shall be equally called to the rights of succession, *ab intestato*, according to the prerogative of their degree, and be by no means excluded although they possess not the rights of consanguinity in so near a degree as sisters."¹⁵

By section 4, cousins by sisters are excluded. With these preliminaries, we are now prepared to consider the law of collaterals in Pennsylvania.

41. Inheritance by collateral heirs.

Section 4 of the act of 1833, *supra*, provides:

"In default of issue as aforesaid, and subject to the estates and interests hereinbefore given to the widow or surviving husband, father and mother of the intestate, if any, the real estate shall descend to, and the personal estate not otherwise hereinbefore disposed of, shall be distributed among the collateral heirs and kindred of such intestate according to the following rules and order of succession, viz.:

In case of brothers and sisters only.

I. If such intestate shall leave brothers and sisters, or either, of the

¹³ Lib. 3, Tit. 2, section 1. Justinian.

¹⁴ Lib. 3, Tit. 2, section 2. Justinian. (See Adoption, *supra*.)

¹⁵ Section 3, Lib. 3. Tit. 2.

whole blood, and no nephew or niece, being the issue of a deceased brother or sister, of the whole blood, the real estate shall descend to and vest in such brothers and sisters.

In case of nephews and nieces, only.

II. If such intestate shall leave neither brother nor sister of the whole blood, but nephews or nieces, being the children of such deceased brother or sister, the real estate shall descend to and vest in such nephews and nieces.

In case of brothers and sisters and nephews and nieces.

III. If such intestate shall leave brothers or sisters of the whole blood and also nephews or nieces, being the children of any such deceased brother or sister, the real estate shall descend to and vest in such brothers and sisters and nephews and nieces, as follows, viz.: Every such brother and sister shall receive such share as he or she would have received, if all the brothers and sisters who shall then be dead, leaving children, had been living at the death of the intestate, and such nephews and nieces shall take by representation of their parents, respectively, such share only as would have descended to such parents, if they had been living at the death of the intestate."

In case of failure of brothers and sisters.

"IV. If such intestate shall leave neither brother nor sister of the whole blood, nor any nephew or niece, being the child of such deceased brother or sister, the real estate shall descend to and vest in the next of kin of such intestate, being the descendants of his brothers and sisters of the whole blood."

Personalty to be divided without distinction of blood.

"V. The personal estate of such intestate, not otherwise hereinbefore disposed of, shall, in the several cases mentioned in this section, be distributed among the brothers and sisters of the intestate, and their issue, in like manner, in each of the said cases, as is provided for the descent and division of the real estate of the intestate, but without any distinction of blood."

42. Father and mother to take real estate in fee.

Section 5 of the act of 1833, *supra*, provides:

"In default of issue, and brothers and sisters of the whole blood and their descendants as aforesaid, and subject to the estates and interests hereinbefore given to the widow or surviving husband, if any, the real estate shall go to and be vested in the father or mother of the intestate, or, if both be living at the time of his death, in the father and mother, for such estate as the said intestate had therein."

43. Descent of realty to collaterals of the half-blood.

Section 6 of the act of 1833, *supra*, provides:

"In default of issue, and brothers and sisters of the whole blood and their descendants, and also of father and mother, competent by this act to take an estate of inheritance therein, the real estate of such intestate, subject to the life estates hereinbefore given, if any, shall descend to and be vested in the brothers and sisters of the half blood of the intestate and their issue, in like manner, respectively, as is hereinbefore provided for the case of brothers and sisters of the whole blood and their issue."

By this act, when there are brothers and sisters of the whole blood,

those of the half blood are excluded from inheritance of the land though equally of the blood of the purchaser;¹ but as to personalty there is no distinction between those of the whole or the half blood.² If there are no brothers or sisters of the whole blood, as to collaterals there is no distinction of bloods;³ so that children of deceased uncles and aunts of the half blood are entitled to share equally with children of deceased uncles and aunts of the whole blood.⁴ There being neither father nor mother nor brothers nor sisters of the whole blood, the inheritance goes to the brothers and sisters of the half blood.⁵ Section 2 of the act of April 27, 1855, P. L. 368, did not change the rule that as to cousins those of the half blood inherit equally with those of the whole blood.⁶ Brothers and sisters of the half blood are entitled to preference over more remote kindred, whether the estate be of the blood of the ancestor or not.⁷

44. Representation of deceased grandparents.

Section 1 of the act of May 25, 1887, P. L. 261, provides:

"That whenever by the provisions of the intestate laws of this commonwealth it is directed that the real and personal estate shall descend to and be distributed among the next of kin to such intestate, and such next of kin shall be one or more than one grandparent of such intestate, and there shall be living, at the time of the decease of such intestate, children or other descendants of any deceased grandparent, then the children or other descendants of any such deceased grandparent shall represent the grandparent so deceased, and shall take the share of the real or personal estate to which such deceased grandparent would be entitled if living:

Provided, however, That the issue of any such deceased grandparent shall take according to the following rules of succession, namely:

First. If there be only children of such deceased grandparent, the share of such deceased grandparent shall descend to and be distributed among such children.

Second. If there be grand-children of such deceased grandparent and no other descendants and no child, the share of such deceased grandparent shall descend to and be distributed among such grand-children.

Third. If there be descendants of such deceased grandparent in any other degree however remote from him and all in the same degree of consanguinity to him, the share of such deceased grandparent shall descend to and be distributed among such descendants.

Fourth. If there should be descendants of such deceased grandparent in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grand-child or other descendant, the share of such deceased grandparent shall descend to and be distributed among them as follows, namely:

¹ Stark v. Stark, 55 Pa. 62.

² Mifflin v. Neal, 6 S. & R. 460; Miller's Est., 2 Woodward, 174; Hayes' Ap., 89 Pa. 256; Preston v. Hoskins, 2 Yeates, 545.

³ Danner v. Shissler, 31 Pa. 289; Lynch v. Lynch, 132 Pa. 422.

⁴ Kiegel's Ap., 12 W. N. C. 179.

⁵ Emes v. Brown, 1 Am. L. R. 634.

⁶ Dorsey v. Van Horn, 9 W. N. C. 95.

⁷ Baker v. Chalfant, 5 Wharton, 477.

(a.) Each of the children of such deceased grand-parent shall receive such share as such child would have received if all the children of such deceased grand-parent, who shall then be dead leaving issue, had been living at the death of the intestate.

(b.) Each of the grand-children, if there shall be no children of such deceased grand-parent, in like manner shall receive such share as he or she would have received if all the other grand-children, who shall then be dead leaving issue, had been living at the death of the intestate and so in like manner to the remotest degree.

(c.) In every such case, the issue of such deceased child, grand-child or other descendant of such deceased grand-parent shall take, by representation of their parents respectively, such share only as would have descended to such parents, if they had been living at the death of the intestate.

45. Restricted to the blood of the ancestor.

Section 2 of the act, *supra*, is as follows:

"*Provided also*, That no person, who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate therein, but such real estate shall pass to and vest in such other persons as would be entitled by this act, if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate."

46. Right of accretion — Lapsed inheritance.

"When there are many legitimate heirs, and some renounce the inheritance, or are prevented by death or any other cause, then the portions of such persons fall by right of accretion to those who accept the inheritance: And, although the accepters happen to die even before the refusal or the failure of their coheirs, yet the portions of such coheirs will appertain to the heirs of the accepters."⁸

47. Murderer not disinherited by his act.

The murder of the intestate by his heir is not a bar to his right to inheritance, as under our constitution there is no corruption of blood by conviction of crime.⁹ So, even if a son murders his father, notwithstanding the heinous character of the crime, his right to inherit is not destroyed thereby.¹⁰

48. Rights of heirs fixed at death of decedent.

The rights of heirs are fixed at the death of the decedent;¹¹ and this is true where the intestacy occurs by reason of the failure of a contingent remainder.¹² Nor is it competent for the legislature by a retrospective act to change a right so vested.¹³ Section 7 of article 3

⁸ Lib. 3, Tit. 4, section 4. Justinian.

⁹ Johnson's Est., 29 Supr. C. 255.

¹⁰ Carpenter's Est., 170 Pa. 203.

¹¹ Section 7, Lib. 3, Tit. 2. Justinian. Gibson's Ap., 108 Pa. 244; De Silver's Est., 142 Pa. 74; Stewart's Est., 147 Pa. 383.

¹² Bell's Est., 147 Pa. 389; M'Comb v. Dills, 5 S. & R. 304.

¹³ Ballard v. Ward, 89 Pa. 358; Journeay v. Gibson, 56 Pa. 57; Shonk

of the constitution prohibits the legislature from passing any local or special act changing the law of descent or succession, and it cannot do so under the guise of a general law.¹⁴ A validating statute may be passed which applies to the remedy, to cure a formal defect, after jurisdiction has attached;^{14a} but the general rule is that a statute acts prospectively only.^{14b}

49. Distribution of proceeds of real estate.

Section 18 of the act of 1833, *supra*, provides:

"The residue of the proceeds of the sale of any real estate of an intestate, made by authority of law, for the payment of debts, shall vest in the persons entitled by this act to such real estate, in such proportions, and for the like interests, respectively, as they may have had in such realty."

This surplus is personalty distributable to the first takers the same as if it had remained real estate,¹⁵ but does not carry this quality any further.¹⁶

An heir overpaid out of one fund, real or personal, must account to the other heirs for such overpayment, upon distribution of another fund.^{16a} No one can claim on a distribution in the Orphans' Court, except through the decedent as creditor, legatee or next of kin.^{16b} A judgment creditor stands on the feet of his debtor^{16c} nor does he acquire a higher right than the heir had at the entry of the judgment.^{16d}

50. Seven years limitation on claimants.

Section 19 of the act of 1833, *supra*, provided:

"All such of the intestate's relations and persons concerned who shall not lay legal claim to their respective shares, within seven years after the decease of the intestate, shall be debarred from the same forever: *Provided*, That if any such relation or person shall, at the time of the decease of the intestate, be within the age of twenty-one years, or a married woman, he or she shall be entitled to receive and recover the same, if he or she shall lay legal claim thereto, within seven years after coming to full age or discoveriture."

This section was held to apply only to personalty,¹⁷ and operates only on distributees and not creditors.¹⁸

v. Brown, 61 Pa. 320. (See brief of Woodward and Harding in this case.)

¹⁴ Cope's Est., 191 Pa. 1, declaring the act of May 12, 1897, P. L. 56, unconstitutional. (See Hagy's Est., 191 Pa. 26; Graff's Est., 191 Pa. 28; Portuondo's Est., 191 Pa. 28; and others; P. & L. Dig., vol. 9, col. 15597.)

^{14a} Kiskaddon v. Dodds, 21 Supr. C. 351.

^{14b} Martin v. Greenwood, 27 Supr. C. 245.

¹⁵ Grider v. McClay, 11 S. & R. 224.

¹⁶ Dyer v. Cornell, 4 Pa. 359; Ebbs v. Comth., 11 Pa. 374; Biggert v. Biggert, 7 Watts, 563.

^{16a} Grim's Est., 147 Pa. 190; Armstrong v. Walker, 150 Pa. 585; Yetter's Est., 160 Pa. 506; Landmesser's Est., 13 Supr. C. 467.

^{16b} McBride's Ap., 72 Pa. 480; Braman's Ap., 89 Pa. 78.

^{16c} Cover v. Black, 1 Pa. 493; Dimm's Ap., 90 Pa. 367.

^{16d} Horner v. Hasbrouck, 41 Pa. 169; Smith v. Seaton, 11 Atl. 661.

¹⁷ Man v. Warner, 4 Wharton, 481; Logan v. Richardson, 1 Pa. 372; Blackmore v. Gregg, 2 W. & S. 182; Carter v. Trueman, 7 Pa. 315.

¹⁸ Burd's Exs. v. McGregor's Exs., 2 Grant, 353.

It can only be pleaded where there has been a distribution without notice.¹⁹

Section 20 of the same act provided that it should not apply to the distribution of the personal estate of an intestate whose domicile, at the time of his death, was out of the commonwealth.

The proceeds of a sale for the payment of debts remains realty as to the heir and he is not barred by this act.²⁰ The provisions of the act, *supra*, apply equally to lineal and collateral kin.²¹

51. Proof of inheritance, on petition, for record purposes.

The act of June 30, 1883, P. L. 13, provides:

"Whenever it shall, upon the petition of an interested party, be made to appear, to the satisfaction of the Orphans' Court of any county of this commonwealth, having jurisdiction of the estate of the decedent, that the petitioner has become possessed of land under the intestate laws of this commonwealth, and that the last holder thereof died intestate, and that no petition or other process has been or is liable to be had, to designate the share or shares of the present owner or owners, which it may be desired to place on record; upon the presentation of said petition it shall be the duty of said Orphans' Court to make an order by which a time shall be fixed when proof of the fact or facts alleged may be made, and said court shall prescribe such notice or notices to the parties in interest, if any, who may not have joined in said petition, of the time and place thereof, as may be deemed reasonable and just, personal notice to be given thereof to all parties in interest residing within the county, and notice by publication or otherwise to those residing outside of said county, of which notice due proof shall be made and filed in the record of said proceeding; and at the time and place which may be fixed by the court proof shall be made under such general rules or special orders as the said court may prescribe, touching the title of the alleged intestate, the time of his or her death, whether married or unmarried, the names and residence of the next of kin and heirs, and as to what property said intestate possessed at the time of death, and when said proofs so made shall be approved by the Orphans' Court wherein such proceeding is pending, the same shall be filed in the records thereof and recorded in the office of the recorder of deeds of said county, and that the record of said facts shall be deemed and held to be *prima facie* proof thereof with like force and effect as the record of a deed: *Provided*, That any person who shall feel aggrieved by the facts so set forth may, within six months after the same shall be brought to his or her notice, have a right to apply to the said Orphans' Court in said matter, and that said court, upon being satisfied that injustice has been done, shall make such order for rehearing and for such other relief as to right and justice may belong: *And it is further provided*, That the mode of proof herein directed shall not prevent other evidence of the same facts in any proceeding in court, and that the provisions of this act shall not compel anyone to resort to this mode of proof unless they shall petition for the same: *Provided, however*, That

¹⁹ Logan v. Richardson, 1 Pa. 372; Chandler v. Lamborne, 2 Clark, 124.

²⁰ Carter v. Trueman, 7 Pa. 315.

²¹ Pennepacker v. Pennepacker, 2 Clark, 114.

any proceedings had under the provisions of this act shall not prejudice the interests of any person not a party thereto, and the costs in any such proceedings shall be paid by the petitioner unless otherwise adjudged by the court."

This marvelous piece of legislative patchwork (such as is far too common in late acts of assembly) is hedged about with provisos in such a manner as to render it the less harmful.

52. Advancements.

Section 16 of the act of 1833, *supra*, provides:

"If any child of an intestate shall have any estate by settlement of such intestate, or shall have been advanced by him in his lifetime, either in real or personal estate, to an amount or value equal to the share which shall be allotted to each of the other children of such intestate, such child shall have no share of the real or personal estate of such intestate; and if such settlement or advancement be to an amount or value less than the share to which he would otherwise be entitled, if no such advancement had been made, then so much only of the real and personal estate of such intestate shall be allotted to such child, as shall make the estate of all the said children to be equal, as near as can be estimated."

This act mentions "children" and thereby excludes "grand-children" from its terms;¹ and does not apply to the widow.² The Orphans' Court's jurisdiction of advancements is full³ and exclusive.⁴ In order to be an advancement the gift must have been so intended at the time, in anticipation of the child's distributive share;⁵ and not a payment in performance of a parental duty, as for education or maintenance.⁶ But the purchase of land for the son in his name is *prima facie* an advancement;⁷ and a deed for a consideration beyond the nominal sum may be shown to have been an advancement;⁸ or the acquittance of a bond and mortgage to a daughter and her husband, by her father.⁹ Advancements do not bear interest,¹⁰ unless the settlement of the estate has been postponed for a longer period than ordinary.¹¹ A child who has received an advancement may bring it into the estate, in "hotch potch," as it is termed, but it is not obliged to do so for the benefit of the widow.¹² The evidence of an

¹ Eshelman's Est., 74 Pa. 42; Boyd's Est., 34 Leg. Int. 59.

² Greiner's Ap., 103 Pa. 89.

³ Blanchard v. Comth., 6 Watts, 310; Comth. v. Stubb, 11 Pa. 156.

⁴ Holliday v. Ward, 19 Pa. 485; Springer's Ap., 29 Pa. 208; Bucknor's Est., 9 W. N. C. 511.

⁵ Levering v. Rittenhouse, 4 Wharton, 130; Lentz v. Hertzog, 4 Wharton, 523; King's Est., 6 Wharton, 370; Hengst's Est., 6 Watts, 87; Riddle's Est., 19 Pa. 431; Craig v. Morehead's Exs., 14 Pa. 97; Merkel's Ap., 89 Pa. 340; Christy's Ap., 1 Grant, 369.

⁶ Riddle's Est., 19 Pa. 431; Miller's Ap., 40 Pa. 57.

⁷ Phillips v. Gregg, 10 Watts, 458; Wagner's Ap., 38 Pa. 122.

⁸ Hayden v. Mentzer, 10 S. & R. 329.

⁹ Wentz v. Dehaven, 1 S. & R. 312.

¹⁰ Oyster v. Oyster, 1 S. & R. 425; Earnest v. Earnest, 5 Rawle, 213; Miller's Ap., 31 Pa. 337.

¹¹ Thompson's Est., 8 W. N. C. 16; Sharpe's Est., 13 Phila. 360; Ford's Est., 11 Phila. 97.

¹² Miller's Est., 2 Brewster, 355; Murray's Est., 2 Pearson, 473.

advancement must clearly disclose the intent of the parent to have it so considered.¹³ If a bond be taken for repayment it becomes a debt and is not an advancement.¹⁴ The value of an advancement is to be taken as of the time of making it, and not the time of the death of the parent.¹⁵ Advancements made to a father must be deducted from the share of his children in the estate of their grandfather.¹⁶

53. Escheat of estate.

Section 12 of the act of 1833, next *supra*, provides:

"In default of all such known heirs or kindred, widow or surviving husband as aforesaid, the real and personal estate of such intestate shall go to and be vested in the commonwealth by escheat."

(See Escheats.)

54. Ante-nuptial contracts.

An ante-nuptial contract is one "where a man and a woman, in contemplation of marriage, agree to relinquish all or a portion of their right to each other's estate which would afterwards accrue by virtue of the marriage in the absence of such contract. There is no reason why the law should regard such contracts with disfavor, especially where they are entered into by parties, each of whom is advanced in years, with separate children and separate estates. Persons so situated do not usually act from mere impulse, or contract without due consideration. Such agreements in many instances, reconcile differences and avoid unpleasant family relations. But it is essential in all cases that they be free from fraud, concealment or over-reaching. Such parties do not deal at arm's length like buyer and seller, but stand in a confidential relation, calling for the exercise of the richest good faith."¹ It may not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each; yet if the provision secured for the wife be unreasonably disproportioned to the means of the intended husband, it raises a presumption of designed concealment, and throws upon him the burden of proof of fairness.² A contract of this kind is binding whether it concerns land, personal property or the exemption allowed widows by law,³ and if it relates to personalty it need not necessarily be in writing, but it must be established by clear and convincing proof.⁴ The parties may abandon their contract.⁵ As to a minor, the weight of authority is that she is not bound by such a contract and may disaf-

¹³ *Watson v. Watson*, 6 Watts, 258; *Yundt's Ap.*, 13 Pa. 575; *Myers v. Leas*, 101 Pa. 172.

¹⁴ *High's Ap.*, 21 Pa. 283; *Jones' Est.*, 29 Pitts. L. J. 89; *Harris' Ap.*, 2 Grant, 304; *Whitman's Ap.*, 2 Grant, 323.

¹⁵ *Phillips v. Gregg*, 10 Watts, 153.

¹⁶ *Hughes' Ap.*, 57 Pa. 179; *Parson's Ap.*, 74 Pa. 121; *Ragan's Est.*, 7 Watts, 440.

¹ *Rhone's O. C.*, vol. 3, p. 44. *Mauk's Est.*, 19 Supr. C. 338; *Yost's Est.*, 23 Supr. C. 183; *Warner's Est.*, 210 Pa. 431; *Robinson's Est.*, 222 Pa. 113; *Whitmer's Est.*, 224 Pa. 413.

² *Kline's Est.*, 64 Pa. 122; *Bierer's Ap.*, 92 Pa. 265.

³ *Tiernan v. Binns*, 92 Pa. 248.

⁴ *Gackenbach v. Brouse*, 4 W. & S. 546; *Hunt's Ap.*, 101 Pa. 590.

⁵ *Gangwere's Est.*, 14 Pa. 417.

firm it, especially as to her real estate, and if she dies before her husband, her heirs may ratify it.

The husband is bound in any event.⁶ Such agreement is binding although the man was previously married and his wife still living, when the woman with whom he makes it is ignorant of such marriage.⁷ Where the evidence sufficiently establishes such a contract, each relinquishing the right to participate in the other's estate, it will be enforced.⁸ Such agreement does not give way because the wife, who survives, becomes executrix under the will which provides for her also.⁹ Where the husband agrees, prior to marriage, to make his intended wife beneficiary in lieu of his sister, the agreement will be enforced, although he neglected to have the name of the beneficiary changed by the association.¹⁰ It was long since decided by Chief Justice Gibson that the expectation of succeeding by descent or devise to the property of another is such an interest as may be bound in equity by a marriage settlement.¹¹

If the agreement be openly and fairly made, it will be valid although it does not fully state the means of the husband.¹² Marriage is in itself a good consideration for the waiver by agreement, of a woman's right in her anticipated husband's estate. The Orphans' Court, in the settlement of an estate, may give effect to or declare invalid such an agreement.¹³

A deed to husband and wife as tenants in common, creates an estate by entirety.¹⁴ Under the act of June 8, 1893, P. L. 345, husband and wife are competent to sue each other in law or in equity.¹⁵ But a married woman cannot by joinder with her husband, convey her land to him.¹⁶

⁶ Whichcote v. Lyle, 28 Pa. 73.

⁷ Broadrick v. Broadrick, 25 Supr. C. 225.

⁸ Krug's Est., 196 Pa. 484. (See P. & L. Dig., vol. 8, col. 13571.)

⁹ Bowman v. Knorr (No. 1), 206 Pa. 270.

¹⁰ Penna. R. Co. v. Wolfe, 203 Pa. 269.

¹¹ Wilson's Est., 2 Pa. 325.

¹² Birbeck's Est., 215 Pa. 323.

¹³ Livengood's Est., 15 D. R. 239.

¹⁴ Hoover v. Potter, 42 Supr. C. 21.

¹⁵ Dorsett v. Dorsett, 226 Pa. 334.

¹⁶ Alexander v. Shalala, 228 Pa. 297.

CHAPTER XXIII.

ESCHEATS.

1. What estates and when they escheat.
2. Property in court, after seven years.
3. When *cestui que trust* is unknown for seven years.
4. Auditor general to appoint an escheator.
5. Jurisdiction of the Orphans' Court.
6. Jurisdiction of court having custody.
7. Register to issue letters to escheator.
8. Proceeding by petition and citation.
9. Statement and description of real estate.
10. Power of court over account and questions.
11. Notice in case of real estate.
12. Recovery of property of intestate.
13. Estate of commonwealth limited.
14. Issue on dispute, trial, appeal, etc.
15. Finding and adjudication.
16. Exceptions.
17. Appeals — supersedeas.
18. Reversal or modification.
19. Bond by escheator.
20. Filing of copy of final decree.
21. Surrender of moneys — sale of personalty.
22. Collection of rents.
23. Sale of real estate — security.
24. Title of purchaser — incumbrances.
25. Application of purchase money.
26. Proceedings when real estate is in another county.
27. Tax title saved.
28. Money to be paid into state treasury.
29. Traverse within three years — Practice.
30. Orders and decrees may be enforced by attachment.
31. Informant to receive one-third, on giving bond to refund.
32. Dispute about the reward.
33. Bar after 21 years.
34. Fees.
35. Aliens and corporations.

1. What estates and when they escheat.

Section 1 of the act of May 2, 1889, P. L. 66, provides:

"From and after the publication of this act, if any person, who at the time of his death, was seised or possessed of any real or personal estate within this commonwealth, has died or shall die intestate, without heirs or known kindred, a widow or surviving husband, such estate of whatsoever kind the same may be, whether legal or equitable, or whether the same was held by the said person in severalty or as tenant in common, co-tenant, joint tenant or in partnership with any other person or persons, shall escheat to the commonwealth, subject to all legal demands on the same."

2. Property in court, after seven years.

Section 2. "Whensoever any money, estate or effects shall have been, or shall hereafter be paid into, or deposited in the custody of any court of this commonwealth, or shall be in the custody of any depository, or of any receiver or other officer of said court, and the

ESCHEATS.

AMENDMENTS OF THE ACT OF 1889, BY ACT OF MAY 11, 1911.

Section 3 is amended by adding thereto the following:

"and whensoever the trustee or trustees under a dry trust, and whensoever on the termination of an active trust, or afterwards, the trustee or trustees thereunder is, are, or shall be seized or possessed of any property or estate, real or personal, either the subject of the trust or in any wise arising from the possession of the trust property, or the exercise of the trust, or resulting after the termination of the trust and before distribution is actually made under the terms of the trust or decree of court, from rents, accretions, profits, or interest from, of, or on the trust property, or any part thereof, which property or estate is or shall be without a lawful owner, such property or estate shall be escheat to the Commonwealth, subject to all legal demands on the same."

Section 5 is amended by adding thereto:

"and whensoever any property, estate, or effects held by any trustee or trustees under any trust, or held by and resulting to such trustee or trustees from the exercise of the trust, or resulting after the termination of the trust and before distribution is actually made under the terms of the trust or decree of court, from rents, accretions, profits, or interest from, of, or on the trust property, or any part thereof, shall escheat or be supposed to escheat by reason of the fact that such property, estate, or effects has no lawful owner, the court of common pleas of the county in which such property, estate, or effects, or the greater part thereof, shall be located, shall have jurisdiction, except in cases where the trustee shall be a corporation, in which cases the court of common pleas of the county wherein the principal office of such corporation is located shall have jurisdiction."

Section 7 is amended by adding "trustee" after "Executor," as a fiduciary to be cited or summoned.

Section 24 is amended by inserting after "husband" in the sixth line, "or by reason of any other fact"; and after "shall be entitled to," the following:

"one-fourth part of the proceeds of all property, real, personal or mixed, that has been declared escheated to the Commonwealth in pursuance of such information, after deducting therefrom all debts and expenses with the payment of which said property is charged, and all proper costs and charges incident to the establishing of such escheat and the converting of the escheated property into money; the amount so due to be paid out of the State Treasury, by warrant of the Auditor General, in the customary manner:"

and changing "one-third" to "one-fourth" in the remainder of the section.

Section 27 is amended to give the Escheator fifteen per centum instead of five per centum, and all expenses incurred by him "under the direction of the auditor general."

INSERT, P. 484, VOL. 3, JOHNSON.

rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the commonwealth, subject to all legal demands on the same."

3. When cestui que trust is unknown for seven years.

Section 3. "Whensoever any trustee or other person is or shall be seised of any property or estate, real or personal, in a fiduciary capacity, and shall file an account of the same in any court of this commonwealth and whensoever it shall appear that the *cestui que trust* or beneficial owner of said property or effects, or any part thereof, has been unknown for a period of seven years, and still remains unknown, then and in such case, so much of said property or effects as belonged to said unknown *cestui que trust*, or beneficial owner, shall escheat to the commonwealth, subject to all legal demands on the same." This act has been held to be constitutional;¹ but the funds of a beneficial society against which a judgment of ouster has been entered, do not escheat;² nor funds which were deposited in a national bank by a savings bank, liquidated before the passage of the act.³

Where land is conveyed in trust to a married woman with power of appointment which she exercises in favor of her husband for life and in favor of her own heirs, but dies before him, without heirs, the trust is a dry trust and the trustee holds the property for the commonwealth by escheat under act of April 17, 1869, P. L. 71.⁴

4. Auditor general to appoint an escheator.

Section 4. "Whensoever, by information or otherwise, the auditor-general of the commonwealth shall become aware of the fact that any property, real or personal, hath escheated or is supposed to have escheated to the commonwealth under the provisions of this act, he shall appoint, by commission under his hand and the seal of his office, some suitable person, resident in the county where he shall have reason to suppose that the escheated property or the greater part thereof is situate, to act as escheator of said property; which said escheator shall have the powers and duties, and shall be entitled to the fees and rewards, hereafter nominated and specified in this act."

After appointing an escheator, this act does not empower the auditor-general to remove him.⁵

Section 2 of the act of June 27, 1864, P. L. 951, provided that it was not necessary for the informer "to give the individual names of tenants in common, co-tenants, joint tenants, or partnerships, nor their individual interests, where the same are unknown; but the same shall escheat in the name by which their joint interests were or are held: *Provided*. That where such names or interests are not known, affidavit to that effect shall be made by the informant and filed of record." Forms are prescribed by the auditor-general. The act of 1889, *supra*, repealed only such parts of laws as were inconsistent with it.

¹ Alton's Est., 220 Pa. 258.

² Comth. v. Order of Solon, 192 Pa. 498.

³ Sixpenny Savings Fund Soc., 12 D. R. 418.

⁴ Linton's Est., 198 Pa. 438.

⁵ Kelly's Est., 8 D. R. 635.

5. Jurisdiction of the Orphans' Court.

Section 5. "The jurisdiction in all cases of escheat under the provisions of this act, shall be vested in the courts of this commonwealth, as follows, namely: Whenever an escheat shall occur or be supposed to occur by reason of any person dying intestate, without heirs or known kindred, a widow or surviving husband, the Orphans' Court of the county wherein said decedent was resident at the time of his death, or in case said decedent was not at the time of his death resident within this commonwealth, then the Orphans' Court of the county in which the greater part of his property, real and personal, shall be situate, shall have jurisdiction."

6. Jurisdiction of court having custody.

Section 5, continued. "Whenever an escheat shall occur, or be supposed to occur, of any property, estate or effects deposited in the custody of any court, or with any depository, receiver or other officer thereof, the owner whereof shall be unknown, and whenever any escheat shall occur or be supposed to occur of any property, estate or effects held by any trustee or other person in a fiduciary capacity, who shall have filed an account thereof in any court of this commonwealth, by reason of the fact that the *cestui que trust* or beneficial owner thereof shall be unknown, then and in such case, the court in which, or in the custody of any depository, receiver or other officer of which, said property, estate or effects may have been or shall be deposited, whether the same be real or personal, or in which said account has been or may be duly filed, shall have jurisdiction."

7. Register to issue letters to escheator.

Section 6. "Whensoever any escheator shall be duly commissioned by the auditor-general, of and concerning any property, real or personal, escheated or supposed to have escheated by reason of the fact that the person who was last seised or possessed of the same, has died intestate, without heirs or known kindred, a widow or surviving husband, and no letters of administration have been granted upon the estate of the said decedent, it shall be the duty of the said escheator to apply to the register of wills of the county wherein the said decedent was resident at the time of his death, or in case the said decedent was at the time of his death resident within this commonwealth, to the register of wills of the county in which the greater part of the property escheated or supposed to have escheated is or may be situate, for a grant of letters of administration to him the said escheator upon the estate of the said decedent. And the said register of wills shall, if no next of kin or creditor of said decedent entitled under existing laws to letters of administration shall appear and demand such letters, forthwith grant the same to said escheator, in like manner and form as letters of administration are now granted by existing laws, and said escheator shall be entitled in such case to letters of administration, even though said decedent was not at the time of his death possessed of any personal property, but was seised of real estate only, situate within this commonwealth."

8. Proceeding by petition and citation.

Section 7. "Whensoever any escheator shall be duly commissioned by the auditor-general of and concerning any property, real or per-

sonal, escheated or supposed to have escheated to the commonwealth under the provisions of this act, he shall apply by petition to the court having jurisdiction in the premises, to hear and determine whether an escheat has occurred or not, and shall, in his petition, set forth the facts of his appointment, and the nature and character of the alleged escheat, and shall also state as far as he conveniently can, the location, character and amount of the property, real and personal, alleged to have escheated, together with the name and address of the person or persons having the same in his or their possession; whereupon, the said court shall have power to issue a summons or citation, directed to any administrator or executor, depository of the court, receiver or other officer of the court, to show cause, if any they have, why they should not file a true and accurate account of all and singular, the said property alleged to have escheated as aforesaid, and if upon sufficient proof by oath or affirmation of the service of said summons or citation, no good and valid cause be shown to the contrary, the said court shall proceed to direct said administrator or executor, depository of the court, receiver or other officer of the court, to file said account." This obviates proceeding by inquest, as under the old law.

9. Statement and description of real estate.

Section 7, continued. "And in all cases where any real estate has escheated, or is supposed to have escheated, by reason of the death of the person last seised thereof without heirs or known kindred, the said court shall have power to order the administrator or executor of said person to file a true and accurate statement of all the real estate whereof said decedent died seised, describing the same by metes and bounds, together with the buildings and improvements thereon erected, as far as he has been able to ascertain the same. And whensoever it shall appear by the account of any executor or administrator, or any receiver or other officer of the court, or any trustee or other person in a fiduciary capacity, or upon the audit of any such account, that the said receiver or other officer, trustee or other person has in his possession, or has any knowledge of the existence of any real estate which shall have escheated or is supposed to have escheated to the commonwealth, the said court shall have power to order and direct the said administrator or executor, receiver or other officer, trustee or other person filing an account as aforesaid, to file a true and accurate statement of all said real estate, describing the same as aforesaid, so far as he has been or shall be able to ascertain the same; and any and all accounts and statements filed under the provisions of this act, shall be verified by oath or affirmation in the customary manner."

10. Power of court over account and questions.

Section 8. "Whensoever any proceedings in escheat have been instituted as aforesaid, the court having jurisdiction in the premises shall, upon the filing of any account or statement by any administrator, executor, depository of the court, receiver or other officer of the court, or of any trustee or other person in a fiduciary capacity, of any property or estate, real or personal, escheated or supposed to be escheated, proceed to the audit and adjudication of said account or

statement in the same manner as the said court commonly proceeds upon the audit and adjudication of the accounts of executors, administrators and trustees; and shall upon said audit, proceed to inquire and determine whether there has been any escheat or not, and if so, in what manner and for what cause said escheat has occurred, and also what estate, real or personal, has escheated, and what is the value thereof." If heirs turn up, the escheator can recover nothing from the estate.⁶

11. Notice in case of real estate.

Section 8, continued. "And the said court shall, in all cases where any real estate has escheated, or is alleged to have escheated, before proceeding finally to hear and determine the question of escheat, order and direct notice of said proceedings to be served upon the person or persons in possession of said real estate, in such form as the court shall direct, and the said court shall have full power and authority to summon any person or persons who shall be at any time alleged to have any knowledge touching any escheat or any interest therein, to appear before it, and said court shall have full power and authority to examine any and all of said persons upon their oaths or affirmations, as to any fact or facts, matter or thing touching said escheat, and shall suffer and permit the escheator and all parties claiming to have any interest in said proceedings, to appear therein by counsel or otherwise and to produce and examine such witnesses under oath or affirmation, as they may see fit, touching said escheat, and the said court shall have full power at any stage of said proceedings, when they may think it wise so to do, to make such orders relative to advertisements and notices of the proceedings, as shall best serve to inform and advise all parties having an interest, or who may have an interest in said proceedings, of the pendency thereof."

12. Recovery of property of intestate.

Section 8 of the act of September 29, 1787, 2 Sm. L. 425, provides: "If any person, at the time of the death of any intestate as aforesaid, shall be indebted to such intestate, or if any part of the estate, real or personal, which was of such intestate, and not mentioned and included in such inquisition, be in the hands or possession of any person dwelling within this state, the same shall be recovered to the use of the commonwealth, by information of debt, intrusion, or action in the nature of trover and conversion, or upon the case, for money received to the use of the commonwealth, as the case may require, in which proceedings, respectively, the inquisition, touching the estate of such intestate shall be admissible evidence, to prove that the same intestate died without heirs or known kindred, as hereinbefore described."

13. Estate of commonwealth limited.

Section 11 of the act of 1787, *supra*, provides:

"In every case wherein goods or chattels, or lands be holden in common with any person whose estate shall escheat, as aforesaid, the commonwealth shall not acquire by such escheat any other or greater

⁶ Neubert's Est., 19 York, 38; vol. 6, P. & L. Dig., col. 9010.

title to the same than the person who shall die intestate, without heirs or known kindred, as aforesaid."

14. Issue on dispute, trial, appeal, etc.

Section 9 of the act of 1889 provides:

"Whenever any proceedings in escheat shall have been instituted or shall be pending in any court of this commonwealth, and there shall be any disputed fact or facts touching said escheat, then and in that case the said court shall, upon application of the escheator, or any other person interested or claiming to be interested in the said proceedings, prior to the filing of a finding or adjudication therein, frame an issue or issues to determine said disputed question or questions of facts; which said issue or issues shall be tried in the Court of Common Pleas of the same county in which the proceedings in escheat shall have been instituted, and shall, if necessary, be certified to said court for that purpose.

"In cases where escheat proceedings are instituted in the Supreme Court, such issue or issues shall be certified to and shall be tried by the Court of Common Pleas of such county as the Supreme Court shall designate. Any party to said issue may, upon the trial thereof, except to the ruling of the court upon any point of evidence or of law, which exception shall be noted by the court and filed of record in the cause; and a writ of error to the Supreme Court may thereupon be taken by any party to said issue, with the usual force and effect. And after the determination of such issue, the Court of Common Pleas in which the same shall have been tried, shall certify the result thereof to the court in which the said proceedings in escheat have been instituted."

An administratrix may challenge escheat proceedings notwithstanding an auditor has found adversely to her claim in the Orphans' Court.^{6a}

15. Finding and adjudication.

Section 10. "Every court having jurisdiction in cases of escheat shall, after the determination of each and every case, file of record a finding or adjudication which shall set forth:

First. Whether an escheat hath occurred or not.

Second. In what manner and for what cause the said escheat hath occurred, with the full name of the intestate, if any there be, or of the person who was last seised or possessed of the property in question.

Third. What estate, real or personal, hath escheated and what is the value thereof.

Fourth. Where said estate, real or personal, is situated, and in whose possession the same then is.

And in case the said court shall find that any property, real or personal, hath escheated, the same shall be awarded to the escheator for and on behalf of the commonwealth."

16. Exceptions.

Section 11. "Whensoever any adjudication or finding in escheat shall have been filed by any court, exceptions may be filed thereto

^{6a} Comth. v. Crompton, 137 Pa. 138.

by the escheator or any other party or parties interested in said proceedings, within the same time, and in the same manner, as exceptions are commonly filed in cases of accounts of administrators, executors and trustees, in the court having jurisdiction in the premises. And the court shall proceed to the hearing and determination of said exceptions, in the like manner as in the cases of exceptions to the accounts of administrators, executors and trustees as aforesaid; and if said exceptions are, after hearing, sustained in whole or in part, the court shall forthwith proceed to file an amended adjudication or finding, in accordance with its determination upon such exceptions. But if no such exceptions are filed within the time limited as aforesaid, then the adjudication or finding of escheat shall be deemed to be confirmed absolutely."

17. Appeals — Supersedeas.

Section 12. "The commonwealth, or any person aggrieved or claiming to be aggrieved by a final adjudication or finding in escheat, may appeal from the same to the Supreme Court: *Provided*, That any party, other than the commonwealth, so appealing, shall give bond with sufficient security, to be approved by the court, conditioned to prosecute the appeal with effect, and to pay all costs that may be adjudged against him, and shall make oath or affirmation that the appeal is not intended for delay. No appeal shall be allowed unless the same shall be entered and security given within thirty days after the filing of the amended adjudication or finding, or the absolute confirmation of the original adjudication or finding by the court having jurisdiction in the premises. And in cases where said appeal shall be duly entered and security given within the time above limited, no further proceeding shall be had touching the said escheat, until the same be determined by the Supreme Court, and the record be remitted therefrom."

18. Reversal or modification.

Section 13. "If, upon appeal to the Supreme Court, any portion or the whole of any finding or adjudication of escheat shall be reversed or modified, the court in which said escheat proceedings have been instituted shall, immediately upon the remission of the record thereof by the Supreme Court, prepare and file a corrected adjudication or finding, in accordance with the determination of the Supreme Court upon said appeal."

19. Bond by escheator.

Section 14. "From and immediately after the final determination of any escheat proceedings as aforesaid, the escheator shall file, in the court wherein said proceedings in escheat have been instituted, a bond to the commonwealth, with sufficient security to be approved by the court, conditioned for the faithful performance by him of his duties as escheator, and also that he will faithfully account for and pay over to the state treasury, the proceeds of all property, real or personal, found to have escheated, which shall come into his possession as escheator."

20. Filing of copy of final decree.

Section 15. "From and immediately after the final determination of any escheat proceedings as aforesaid, the escheator shall cause a duly

certified copy of the final adjudication or finding in escheat, under the seal of the court filing the same, to be transmitted to the auditor-general, and shall also cause a copy thereof, duly certified in like manner, to be filed in the court of Common Pleas of every county in which any of the real estate escheated is situate, other than the county in which the proceedings in escheat have been instituted."

The proceedings in escheat are separate and distinct from administration and the court cannot open the decree of distribution entered on the audit of the administrator's account and order restitution by the state without having vacated the decree in the escheat case. Where the Orphans' Court has conformed to the act of 1889, and given the notice required by it, although actual personal notice was not given to the relatives, and the money was paid over to the state, the decree will not be opened more than three years after its entry.⁷

21. Surrender of moneys — Sale of personalty.

Section 16. "At the expiration of thirty days from and after the filing of the final finding or adjudication in escheat, or the absolute confirmation of the same, the person or persons having in their possession any moneys found to have escheated, shall forthwith pay the same to the escheator, upon receiving from him an acquittance and discharge therefor; and if any person or persons shall have in their possession any personal property found to have been escheated, other than moneys, the escheator may forthwith apply by petition to the court for an order directed to the person or persons having the same in his possession, to sell and dispose of the same, in such manner and form and upon such advertisement as the court shall direct. And the court shall thereupon, if no valid cause be shown to the contrary, order and direct such sale to be made as aforesaid, and shall further order an account thereof to be duly returned to the court. And upon return of said sale the court may order and direct such compensation as it may deem proper, to be paid to the person or persons effecting the same, and shall also order and direct all the expenses of said sale to be deducted from said proceeds, and shall thereupon further order and direct the residue of said proceeds to be paid to the escheator, upon the receipt from him of an acquittance and a discharge therefor.

22. Collection of rents.

The act of April 27, 1909, P. L. 197, provides:

"That in all cases where any lands or tenements have escheated, or may hereafter escheat to the commonwealth, it shall be lawful for the duly appointed escheator to collect all rents accruing for the same from and after the death of the intestate, by landlord's warrant, or any other process or action at law that would be available to the intestate if living."

Such lands may be sold for taxes.⁸

23. Sale of real estate — Security.

Section 17. "At the expiration of thirty days from and after the

⁷ Alton's Est., 220 Pa. 258.

⁸ Phila. v. Linton, 10 D. R. 329.

filing of the final finding or adjudication in escheat, or the absolute confirmation of the same, the escheator may apply by petition to the court having jurisdiction of the proceedings in escheat, for an order directing the sale of all real estate found to have escheated, situate in the county where the escheat proceedings have been instituted, and the said court shall thereupon, if no valid cause be shown to the contrary, order and direct the administrator or executor of the person who has died last seised or possessed of said real estate, or the receiver or other officer or trustee, or person acting in a fiduciary capacity, having possession of the same; or if for any reason they cannot act, then some other proper person or persons to sell said real estate, in such manner and form and upon such advertisement as the court shall direct and to execute and deliver a good and sufficient deed or deeds to the purchaser thereof: *Provided, however,* That no sale or sales shall be ordered or made under the provisions of this act in any case, until security, to be approved by the court, shall be duly entered by the person or persons ordered and directed to make such sale, in at least double the value of the real estate proposed to be sold, conditioned for the faithful application of the purchase money according to the decree of the court, which security shall inure to the benefit of all parties interested; and such security being so given, no purchaser of said real estate shall be bound to see to the application of said purchase money."

The practice here is analogous to that in other sales of real estate in the Orphans' Court, which see, this volume.

24. Title of purchaser — Incumbrances.

Section 18. "The title acquired by all purchasers of real estate, sold under and by virtue of the provisions of this act, shall be absolute and indefeasible for all such estate or estates as shall have been found to have escheated to the commonwealth. And the sales shall have like effect as to the discharge of mortgages, judgments, liens or other incumbrances upon the said real estate, as sales made by decree of any of the several Orphans' Courts of this commonwealth for the discharge of the debts of decedents now have or may hereafter have, in the several counties of this commonwealth under existing laws." [See sales for the payment of debts for practice and forms.]

25. Application of purchase money.

Section 18 continued:

"And it shall be the duty of the court to decree the proper application of the purchase money of said property, with the aid of an auditor when deemed necessary, to the discharge of the various mortgages, judgments, liens or other incumbrances upon said real estate. And the said court shall further order and decree that the residue of the proceeds of the said real estate, after the payment of all expenses of sale, and the payment and discharge of said mortgages, judgments, liens and incumbrances thereon, shall be forthwith paid to the escheator upon the receipt from him of an acquittance and discharge therefor.

26. Proceedings when real estate is in another county.

Section 19. "Whenever any real estate, found to have escheated, shall or may be situate in any other county than that in which the

proceedings in escheat shall have been instituted, the escheator may apply by petition, to the Court of Common Pleas of said county, for an order directing the sale of the property aforesaid, and the said court shall thereupon proceed in the premises in like manner and form as is hereinbefore provided relative to sales of real estate by order of the court having original jurisdiction⁹ in escheat proceedings, and said sales shall be made by the same person or persons upon the entry of like security. in like manner and form, and with the same force and effect, and the like proceedings shall be had touching the distribution of the proceeds of said sales: *Provided nevertheless*, That no court other than that in which the proceedings in escheat have been originally instituted, shall have power to make any order touching the sale of escheated real estate, until a duly certified copy of the final finding or adjudication of escheat is filed therein."

27. Tax title saved.

Section 20. "No sale of escheated real estate, under the provisions of this act, shall be deemed or taken to invalidate any title previously acquired thereto under a sale thereof for unpaid taxes, or to authorize the purchaser to redeem said real estate in such case."

28. Money to be paid into state treasury.

Section 21. "The escheator shall, immediately after the receipt by him of any moneys escheated to the commonwealth, or the proceeds of any property, real or personal, escheated to the commonwealth, account for and pay over into the state treasury, the full amount received by him as aforesaid."

29. Traverse within three years — Practice.

Section 22. "Any person or persons interested, or claiming to be interested, in any property, real or personal, which shall be found to have escheated to the commonwealth, who have had no actual notice by citation, advertisement or otherwise of the pendency of any proceedings in escheat, prior to the conclusion of the audit of the account of the person having the escheated property in his possession, and who shall not have subsequently appeared either in person or by attorney in said escheat proceedings, may at any time within three years next after the filing of the final adjudication or finding in escheat, or the absolute confirmation thereof, traverse the same under oath or affirmation, by writing filed in the court finding the same, setting forth his, her or their interest in said property, and in what particular said finding or adjudication is not true and correct, which said traverse shall be tried in the Court of Common Pleas of the same county in which the original proceedings have been instituted, or where the proceedings have been instituted in the Supreme Court, in the Court of Common Pleas of such county as said Supreme Court may designate. And where said escheat proceedings have not been instituted in the Court of Common Pleas, the courts wherein they have been instituted shall certify the finding or adjudication of escheat and the traverse thereof, to the proper Court of Common Pleas for

⁹ Section 17 vests jurisdiction in the court in which escheat proceedings are commenced. This section vests it in the Common Pleas alone.

trial. And said traverse shall be tried in like manner and form, and with like effect, as traverses of inquisitions in escheat have been heretofore commonly tried under existing laws. And a writ of error shall lie in such case to the Supreme Court at the suit of any traverser or of the commonwealth.

And upon the determination of such traverse, the court trying the same shall, if necessary, certify the final result thereof to the court in which the original proceedings have been instituted, and in case upon the trial of said traverse, it shall be found that the property in question or any part thereof had not escheated, and that the person or persons filing said traverse are entitled to the same, or any part thereof, then and in such case, said person or persons shall be entitled to receive and to have delivered to them, possession of all such property, real or personal, as shall not have been sold or paid into the treasury of the commonwealth; and in case the same has been sold or paid into the treasury of the commonwealth, to receive back again from the commonwealth such sum or sums of money, as may have been realized from the sale or payment thereof, after deducting all expenses, or a proportionable part of said sum or sums, according as his or their interest shall be made to appear: *Provided nevertheless*, That if at the time of the institution of the proceedings in escheat as aforesaid, any person having any claim to any of the property, real or personal, found to have escheated, shall be insane or a minor, then and in such case, said person, whether he has had actual notice of the pendency of the proceedings in escheat or not, may, if he has not appeared in said proceedings by his committee or guardian or by the attorney of such committee or guardian, at any time within three years after recovering his sound mind and memory, or attaining full age, as the case may be, traverse the said finding or adjudication of escheat, in like manner and form and with like force and effect as is hereinbefore provided."

30. Orders and decrees may be enforced by attachment.

Section 23. "The various courts of this commonwealth having jurisdiction in escheat proceedings, shall have full power and authority to enforce all orders and decrees made by them therein, by attachment or other proper process as the case may require."

31. Informant to receive one-third, on bond to refund.

Section 24. "Any person who shall first inform the auditor-general by writing, signed by such person in the presence of two subscribing witnesses, that any escheat hath occurred by reason of the fact that any person hath died intestate without heirs or known kindred, a widow or surviving husband, and who shall procure necessary evidence to substantiate the fact of said escheat, and shall prosecute the right of the commonwealth to the property escheated with effect, shall be entitled to one-third part of the price which such property, real or personal, shall produce, after all costs of prosecution and charges of sale are deducted therefrom: *Provided nevertheless*, That before such third part be paid to said person or his representative, he, she or they shall give bonds to the commonwealth with sufficient security, to be approved by the auditor-general, conditioned to refund the same, or any part thereof, as may be, if any claimant to the estate upon which

such one-third shall become payable, appear within the time hereinbefore limited touching said estate and traverse the finding or adjudication of escheat and establish the title to the property, real or personal, found to have escheated as aforesaid."

The fee to the informer applies under prior acts to an equitable estate and may be collected on the basis of assumpsit when the state has accepted the services of such informer.¹⁰ But the informer's right depends upon the right of the commonwealth to escheat.¹¹ The commonwealth under the old law paid no costs when the proceedings failed.¹²

32. Dispute about the reward.

Section 25. "In all cases of dispute, where two or more persons shall claim the reward allowed by the preceding section of this act, in consequence of information given to the auditor-general of an escheat, it shall and may be lawful for such person or persons, or either of them, to petition the court having jurisdiction of the escheat proceedings, stating the facts, whereupon the said court may proceed to determine the matter of dispute, and if the case require it, may direct an issue to be framed between the parties to try their right to the reward aforesaid, which shall be paid according to the final determination of said court, or of said issue, as the case may be."

33. Bar after 21 years.

Section 26. "Whensoever any property hath escheated or shall escheat to the commonwealth by reason of the death of the owner last seised or possessed thereof, intestate without heirs or known kindred, a widow or surviving husband, and there have been no proceedings had, as and for an escheat, for the period of twenty-one years after the decease of the said owner, the commonwealth shall thereafter forever be debarred from claiming the same as escheated, and that whether such period hath already elapsed, or whensoever hereafter it shall have fully elapsed."

After forty years from the death of the testator and failure of a legatee to claim his legacy, the commonwealth is barred.¹³

34. Fees.

Section 27. "The fees in cases of escheat shall be as follows: To the escheator five per centum on all moneys paid into the state treasury from the sales of escheated property, together with all expenses incurred by him for, in and about the prosecution of the escheat, and the performance of the duties imposed upon him by this act. And the fees of the prothonotaries and the clerks of the several courts, and the sheriffs and witnesses, shall be the same which they are entitled to receive for similar services in the same court. The above fees and expenses shall be paid out of the state treasury by a warrant from the auditor-general in the customary manner."

¹⁰ McPherson, J., in *Comth. v. Gregg*, 1 Dauphin Co. 203.

¹¹ Burns' Est., 11 D. R. 363.

¹² Reynold's Case, 8 Haz. Reg. 197.

¹³ Bousquet's Est., 206 Pa. 534; 11 D. R. 198.

35. Aliens and corporations.

It was formerly held that when an alien died and had not declared his intention, his property escheated to the state, he being incapable of transmitting land by hereditary descent.¹⁴ But section 7 of the act of June 2, 1887, P. L. 298, and the act of June 6, 1887, P. L. 350, gave aliens the right to acquire and hold lands under restrictions, and confirmed conveyances by them before inquisition had. The act of June 9, 1891, P. L. 294, further confirmed such conveyances. As to foreign corporations, the act of April 17, 1889, P. L. 35, provided the manner in which they might hold real estate.^{14a}

On death of an alien resident of another state, who had acquired land in this state, by descent from her sister, but had never been a resident here, the land does not escheat but goes to the blood relatives of such alien who reside in Ireland, under section 1 of the act of February 23, 1791, 3 Sm. L. 4. Judge Terry distinguishes *Rubeck v. Gardner*, 7 Watts. 455, as being a case where no legal estate had been acquired.^{14b}

The later laws enable aliens to acquire lands legally and when once so acquired they may be inherited also.¹⁵

A nonresident alien has no standing to sue for and recover damages for the death of a relative by negligence in Pennsylvania¹⁶ and this is so regardless of treaties giving aliens the same rights as citizens as to person and property.¹⁷ (See "Negligence.")

¹⁴ *Rubeck v. Gardner*, 7 Watts, 455.

^{14a} *Comth. v. R. Co.*, 132 Pa. 591, reversing 114 Pa. 340.

^{14b} *Bradley v. Comber*, 19 D. R. 130.

¹⁵ *Cooke v. Doran*, 215 Pa. 393.

¹⁶ *Deni v. Penna. R. Co.*, 181 Pa. 525.

¹⁷ *Maiorano v. B. & O. R. Co.*, 216 Pa. 402; affirmed, U. S. Supreme Court. (See also *Mayer Leiger v. R. Co.*, U. S. Circuit Court, W. D. of Pennsylvania.)

CHAPTER XXIV.

INJUNCTIONAL ORDERS.

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|---------------------------------------|------------------------------------|
| 1. Power to grant injunctonal orders. | 6. Form of order of allowance. |
| 2. Manner of exercising power. | 7. Form of writ to administratrix. |
| 3. Bond a prerequisite. | 8. Form of writ to purchaser. |
| 4. Form of bond for injunction. | 9. Form of rule to show cause. |
| 5. Form of petition. | 10. Procedure. |

1. Power to grant injunctonal orders.

Section 7 of the act of May 19, 1874, P. L. 206, provides:

"The said courts shall have power to prevent by order, in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction: *Provided*, That security shall be given as is now required by law in cases of writs of injunction."

This power is not as broad as that vested in the Common Pleas in Equity;¹ but once having jurisdiction, it can grant all equitable relief necessary in the premises,² and it may restrain the sale of the property of the decedent for the debt of the administrator,³ when such property is within the jurisdiction.⁴ The injury threatened must be imminent and it must appear that irreparable damage would result by delay, and that there is no complete and adequate remedy at law.⁵ If this does not appear, the court will be loath to enjoin.⁶ But where irreparable injury to the property within its jurisdiction would result, it will order such a course as will amply protect it.⁷

2. Manner of exercising power.

The power thus conferred upon the Orphans' Court is exercisable similarly to that in the Common Pleas and agreeably to like rules.⁸ It must, however, be made to appear that there is no adequate remedy at law and that irreparable injury is threatened.⁹ This power is

¹ Klein's Est., 11 W. N. C. 354.

² Odd Fellows' Savings Bank's Ap., 123 Pa. 356.

³ Klein's Est., *supra*.

⁴ Portuondo's Est., 10 W. N. C. 174.

⁵ Courtright's Est., 16 W. N. C. 443.

⁶ Neal's Est., 16 W. N. C. 441.

⁷ Swayne v. Lyon, 67 Pa. 436; Kennedy's Est., 35 W. N. C. 544; Tobin Minors' Est., 11 W. N. C. 483; Gilkeson v. Thompson, 210 Pa. 355.

⁸ Bunn's Est., 1 Kulp, 230. (See vol. 4 of this series for procedure.)

⁹ Courtright's Est., 16 W. N. C. 443. It is to be noted, however, that the new form of a bill in equity prescribed by the Supreme Court of Penna. eliminates this averment. It is still required in the Federal Courts which preserve the distinction between law and equity.

limited "to property over which they shall have jurisdiction,"¹⁰ such as stock of the decedent which the executor pledged for his own debt¹¹ and where the property of estates is in course of settlement in such court;¹² or where there is an appeal from the probate of a will and it is alleged an assignment of a mortgage was fraudulently procured from the decedent;¹³ or where it would enjoin an action in the Common Pleas on a matter finally adjudicated in the Orphans' Court in the settlement of the account of a trustee.¹⁴ The Orphans' Court may make an order restraining a sale by an executor when his power is conditional and the devisees have partitioned the land among themselves.¹⁵ An administrator cannot invoke this power after he has sold the land by order of court.¹⁶ The Orphans' Court has power over the proceeds of a life insurance policy to order it paid to the administrator.¹⁷ Having found that a mortgage was paid, it may order its satisfaction and restrain the sale of the premises under a judgment on the bond.¹⁸ If the estate is not within the jurisdiction of the court no order can be made.¹⁹ A bill for discovery will not lie in the Common Pleas, when the Orphans' Court has control of the fund in controversy.²⁰ It will enjoin the sheriff from selling goods of the estate for the personal debt of the administrator.²¹ The proceeding in the Orphans' Court is not by a bill for an injunction, as under the Equity rules, but a petition, verified, and asking for an injunctive order directed to the specific relief consequent upon the facts recited.²² The Orphans' Court is not a court of Equity.²³

3. Bond a prerequisite.

Section 1 of the act of May 6, 1844, P. L. 564, provides:

"No injunction shall be issued by any court or judge until the party applying for the same shall have given bond with sufficient sureties, to be approved by said court or judge, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction."

4. Form of bond for injunction.

Know all men by these presents, etc. [Same as obligation in any bond.]

Whereas the above bounden James Mason has applied to the Orphans' Court of Lackawanna county for an injunction to restrain

¹⁰ Giffin's Est., 33 Pitts. L. J. 310.

¹¹ Odd Fellows' Savings Bank's Ap., 123 Pa. 356.

¹² Tyson v. Rittenhouse, 186 Pa. 137.

¹³ Gilkeson v. Thompson, 210 Pa. 355.

¹⁴ Alexander's Est., 214 Pa. 369.

¹⁵ Deierler's Est., 10 Kulp, 525.

¹⁶ Tomlinson v. Trenton, Etc., R. Co., 31 C. C. 81.

¹⁷ McClean's Est., 11 D. R. 103.

¹⁸ Lawrence's Est., 3 D. R. 356, reversed on the fact of payment, 169 Pa. 185.

¹⁹ Brader's Est., 2 Kulp, 107; Gaul's Est., 9 Phila. 333.

²⁰ Reeser's Est., 4 C. C. 417; People's Bank's Ap., 93 Pa. 107.

²¹ Klein's Est., 15 Phila. 538; Turner's Est., 7 Kulp, 481.

²² Hamilton's Est., 4 D. R. 231.

²³ See Chapter I, this volume.

Amanda Boorem, administratrix of the estate of Robert Boorem, deceased, from receiving, collecting, satisfying or in any way proceeding to collect, satisfy or dispose of the mortgage given to said administratrix by the purchasers of the real estate of said decedent at Orphans' Court sale; and also, to restrain William Fields from paying anything on the mortgage given by him to said administratrix as a purchaser, aforesaid:

Now the condition of this obligation is such that if the said James Mason shall well and truly indemnify the said Amanda Boorem, administratrix, and William Fields, for all the damages that may be sustained by them, by reason of such injunction, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

Goldie Hunsicker,

George Pappas.

James Mason,
[Seal.]
William Fields,
[Seal.]
John L. Cole.
[Seal.]

5. Form of petition for injunction.

To the Honorable President Judge of the Orphans' Court of Erie County.

The petitioner William P. Atkinson respectfully represents that he is one of the bondsmen upon the bond given by Rose Greiner, administratrix of the estate of Catherine Greiner, deceased, pursuant to an order of this court directing said administratrix to sell certain real estate of said decedent.

That upon the sale of said real estate, the said administratrix, as directed by this court took a mortgage from Catherine Livingstone the purchaser thereof, to secure the unpaid balance amounting to the sum of five thousand dollars, which mortgage is recorded in the office of the recorder of deeds, etc., in said county, in mortgage book M., at page 965 *et seq.*

That the said administratrix is wasting and mismanaging the said estate, in that she has taken the purchase-money already paid on the sale aforesaid, and used the same for the payment of her own personal debts, and is demanding payment of said mortgage before it is due, for the purpose, as your petitioner is informed and believes, of investing the same in stocks for her own benefit, and that she hath neglected and refused to file an account of the proceeds of such sale, although often requested to do so.

Your petitioner therefore prays the court to grant an injunction restraining the said administratrix, and all persons in her behalf, from receiving or collecting any portion of the said purchase-money due from the purchasers of the real estate as aforesaid, and also restraining the said Catherine Livingstone, one of the purchasers as aforesaid, from paying any sum whatever upon the purchase-money aforesaid. And he will ever pray, etc.

William P. Atkinson.

(Affidavit of truth.)

6. Form of order allowing injunction.

Now, — day of —, A.D. 19 — an order in the nature of a preliminary injunction issued as prayed for. Bond in the sum of — dollars to be filed, with sureties to be approved by the court.

Same day rule is granted to show cause why the injunction shall not be dissolved.

Returnable on the — day of —, A.D. 19 —, at 10 o'clock A.M.
By the Court.

7. Form of writ of injunction to administratrix.

Erie County, ss.

The Commonwealth of Pennsylvania, to Rose Greiner, administratrix of the estate of Catherine Greiner, deceased, her agents and attorneys, greeting:

Whereas, It hath been represented to us in our Orphans' Court, for the county of Erie, as aforesaid, in a certain cause there depending, wherein William P. Atkinson, Esq., one of the bondsmen on the bond of Rose Greiner, administratrix, aforesaid, in the matter of the sale by said administratrix of the real estate of decedent, under proceedings in our Orphans' Court, is complainant, and you, the said Rose Greiner, are defendant, on the part of the said complainant, that he has lately exhibited his bill of complaint in our said Orphans' Court, against you, the said Rose Greiner, administratrix, praying to be relieved touching a matter therein contained, and that thereupon, upon motion for injunction and hearing thereof, and upon said complainant filing a bond in the penal sum of — dollars, with surety, to be approved by the court, as required by the acts of Assembly in such case made and provided, it was ordered that a preliminary injunction issue, pursuant to the prayer of the said bill, to restrain you, the said defendant, until further order, and also all persons in your behalf, from receiving or collecting any portion of the unpaid purchase-money from the purchaser of the real estate of decedent, sold by you as administratrix aforesaid, under direction of the Orphans' Court, etc. We, therefore, in consideration of the premises aforesaid, do strictly command and enjoin you, the said Rose Greiner, administratrix of the estate of Catherine Greiner, deceased, your agents or attorneys, and all and every of you, that you do from henceforth altogether absolutely desist from the collection of any portion of the purchase-money now remaining unpaid, in the matter of sale of real estate of decedent, by you, as administratrix aforesaid, in any manner whatsoever, until our said Orphans' Court shall make other order to the contrary.

Witness the Honorable — —, President Judge of our said Orphans' Court, at Erie, this — day of —, A.D. one thousand nine hundred and — —.

_____,
Clerk Orphans' Court.

(Indorse on writ.)

Now, — day of —, A.D. 19 —, rule is granted to show cause why the injunction shall not be dissolved.

Returnable on the — day of —, A.D. 19 —, at —.

By the Court.

8. Form of injunction to purchaser.

Erie County, ss.

The Commonwealth of Pennsylvania, to Catherine Livingstone, her agents and attorneys, greeting:

Whereas, It hath been represented to us in our Orphans' Court, in and for the County of Erie aforesaid, in a certain cause there depending, wherein William P. Atkinson, one of the bondsmen on the bond of Rose Greiner, administratrix of the estate of Catherine Greiner, deceased, in the matter of the sale by said administratrix of the real estate of said decedent, under proceedings in our said Orphans' Court, against you, the said Catherine Livingstone, one of the purchasers of real estate of the decedent, are defendant, on the part of said complainant, that he has lately exhibited his bill of complaint in our said Orphans' Court, against you, the said Catherine Livingstone, praying to be relieved touching the matter therein contained, and that thereupon, on motion for injunction, and hearing thereof, and upon the said complainant filing a bond in the penal sum of — dollars, with surety approved by the court as required by the acts of Assembly in such case made and provided, it was ordered that a preliminary injunction issue pursuant to the prayer of the said bill, to restrain you, the said defendant, until further order, from paying to Rose Greiner, administratrix of the estate of Catherine Greiner, deceased, or to any person for her, any portion whatsoever of the purchase-money now remaining unpaid in the matter of the purchase by you of real estate of decedent from said administratrix, under proceedings in this Orphans' Court, etc. We, therefore, in consideration of the premises aforesaid, do strictly command and enjoin you, the said Catherine Livingstone, your agents and attorneys, and all and every of you, that you do from henceforth altogether absolutely desist from paying over to Rose Greiner administratrix of the estate of Catherine Greiner deceased, or any person for her, any portion whatsoever of the purchase-money now remaining unpaid, in the matter of the purchase by you of real estate of decedent from said administratrix under proceedings issuing out of our said Orphans' Court, until our said court shall make other order to the contrary.

Witness the Honorable — —, President Judge of our said Orphans' Court at Erie, this — day of —, A.D. 19 —,

— —,
Clerk.

9. Form of order for rule to show cause.

Now, — day of —, A.D. 19 —, a rule is granted to show cause why the injunction should not be dissolved.

Returnable on the — day of —, A.D. 19 —, at — o'clock —M.
Per Cur.

Upon this rule the respondent may answer and file *ex parte* affidavits and the rule be heard on such affidavits and counter-affidavits. (See Equity Practice in Vol. IV.)

10. Procedure.

As stated above, the practice assimilates that in the Common Pleas, and, since the subject of Injunctions is fully considered in Vol. IV, it is dismissed from further consideration here.

CHAPTER XXV.

PROCEDURE TO RELIEVE LAND FROM CHARGES.

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| 1. Petition for discharge of lien. | 6. Procedure on petition. |
| 2. Owner may pay charge into court. | 7. Form of notice. |
| 3. Proceedings. | 8. Decree. |
| 4. Jurisdiction. | 9. Deposit of fund with trust company. |
| 5. Moneys paid into court — distribution. | 10. Order of court to deposit. |

I. Petition for discharge of lien.

Section 1 of the act of May 7, 1866, P. L. 1096, as amended by act of March 22, 1907, P. L. 29, provides a method of procedure by petition to relieve land from a charge. It has been held that a dower interest charged by deed is not within this act nor that of 1897, *infra*.¹

The act of 1866 as amended March 22, 1907, P. L. 29, provides:

“In all cases in which, by proceedings in the Orphans’ Court of any county, or by the provisions of a last will and testament, or otherwise, any money has been charged upon real estate, payable at a future period, it shall be lawful for any person, claiming an interest therein, when the same shall have become payable, to apply by bill or petition, to the said Orphans’ Court, for the payment of the same; whereupon such court, having caused due notice to be given to the owner of such real estate, and to such other persons as may be interested, either by service or publication, shall proceed according to Equity, to make such decree or order for the payment of the said charge, out of such real estate as shall be just and proper.”

Sums charged upon land as dower, legacies, etc., are paramount to the claims of creditors, etc., and those who are entitled cannot be compelled to resort to personalty first.²

An administrator *d. b. n. c. t. a.* will not be appointed for the sole purpose of charging a money legacy upon land levied to another.^{2a}

A charge on land by will subject to which a devise is made and taken must be paid by the devisee. Where the widow elects to take against the will, re-marries and dies, a sheriff’s sale of the land divests the right of a daughter to any interest therein at the death of her mother.^{2b}

¹ Farrer v. Denning, 11 Supr. C. 62; Brenneman’s Est., 27 C. C. 478.

² Sergeant, Exr., v. Ewing, 30 Pa. 75; Woodrow’s Est., 144 Pa. 198; Neel’s Est., 88 Pa. 94.

^{2a} Ruddy’s Est., 37 Supr. C. 533.

^{2b} Levengood’s Est., 38 Supr. C. 491.

2. Owner may pay charge into court.

Section 2 of the same act, *supra*, provides:

"It shall be lawful for the owner of such real estate, so charged, when the same shall become payable, to pay the amount of such charge into the said Orphans' Court, which payment shall operate as a complete discharge thereof; and the said Orphans' Court may, thereupon appoint a suitable person as auditor, to distribute the same among those legally entitled thereto, and shall make such decree or order thereon, as shall be just and proper."

On petition, the money may be ordered paid into court.³

3. Proceedings to relieve land of charge.

Section 1 of the act of July 14, 1897, P. L. 269, provides:

"In all cases where any dower, legacy or other charge upon land, or any part thereof, is due and payable, and where the person or persons to whom such dower, legacy or other charge upon land or any part thereof is due and payable cannot be found after diligent and reasonable research, it shall be lawful for the owner or owners of the lands bound by such dower, legacy or other charge upon land or any part thereof, to apply by petition to the Orphans' Court of any county wherein said lands are situate, setting forth the premises, and also the name or names of the person or persons to whom said dower, legacy or other charge upon land or any part thereof is due or payable, if known, and if unknown, then stating that fact, as well as the time when said dower, legacy, charge upon land or any part thereof becomes due and payable. Whereupon the court shall direct the sheriff of said county to give public notice of the facts set forth in said petition, by publication for three successive weeks prior to the first day of the term of court next succeeding the term at which such petition was presented, in at least one nor more than three newspapers published within or nearest said county requiring the person or persons to whom the money or moneys arising therefrom, from said dower, legacy, or other charge upon land, or any part thereof, is due and payable, or who wishes to lay claim to the moneys as aforesaid, to appear before said court at the term of said court, next succeeding the term in which the petition was presented as aforesaid, and show cause why the money or moneys arising therefrom from said dower, legacy or other charge upon land, or any part thereof, as set forth in said petition should not be paid into said court: And in the event of the non-appearance of any person or persons to show cause, as aforesaid, or in the event of the appearance of any person or persons claiming the moneys as set forth in said petition, but who fail to show to said court that they (the persons thus claiming) are entitled thereto, the said court, being satisfied of the truth of the facts set forth in said petition, are hereby authorized, empowered and required to enter a decree that the moneys due and payable, as aforesaid, together with interest thereon from the time that said dower, legacy, or other charges upon land or any part thereof, became due and payable, to the time of final decree, be paid into said court. And upon the payment of the costs, said decree shall be certified by the clerk of said court to the recorder of deeds of said county, whose duty it shall be,

³ Mount's Est., 7 D. R. 713; Neel's Ap., 88 Pa. 94.

upon being paid therefor, to record said decree, indexing it in the name or names of the petitioner or petitioners as grantee or grantees, and thereupon said dower, legacy or other charge upon land or any part thereof which has been paid into said court as aforesaid, shall be satisfied, extinguished and released, and all actions thereon forever barred: *Provided*, That where the amount of such dower, legacy or other charge upon land does not appear as a matter of record, the court may by the appointment of an auditor or investigation in open court, ascertain and fix the amount so alleged to be due."

4. Jurisdiction.

Under the act of May 17, 1866, P. L. 1096, there was no authority to pay into the Orphans' Court the widow's dower charged on the land by deed, at her death for distribution, and if the act of 1897, *supra*, is invoked its terms must be complied with and a case made out to which it applies.¹ The Orphans' Court is not a court of general jurisdiction, but limited, as conferred by act of Assembly.² The limitation arises from the fact that the court has no common law jurisdiction but is the creature of statute. Its jurisdiction, therefore, is purely statutory and when jurisdiction is claimed for it, express statutory authority must be shown.³

5. Moneys paid into court — Distribution.

Section 2 of the act of July 14, 1897, *supra*, provides:

"Said moneys, when paid into said court, according to the provisions of the first section of this act, shall remain therein till some person having a claim thereto shall petition said court for the appointment of an auditor to distribute the same to the person or persons entitled thereto according to law."

6. Procedure on petition.

Upon petition averring the facts, sworn to, the Orphans' Court will grant a rule and direct notice to be given to all parties in interest by publication, to appear on a day certain and show cause to the contrary, if any.

7. Form of notice.

In the Orphans' Court of Lancaster County.

In the estate of Philip Zecher, deceased.

December Term, 1910. No. 16.

Notice is hereby given to the creditors, if any, of the estate of Philip Zecher, late of Lancaster City, Pa., deceased, and all other parties interested therein, that a petition has been presented to the Orphans' Court of Lancaster County, setting forth that there are just and reasonable grounds for believing that the said Philip Zecher left no debts not of record, and that it is desirable to have certain real estate of said decedent, consisting of an undivided half interest in premises known as Nos. 424 and 426 North Queen Street, and in

¹ Farrar v. Denning, 11 Supr. C. 62.

² President, Etc., v. Groff, 14 S. & R. 181; Weyand v. Weller, 39 Pa. 443.

³ Farrar v. Denning, 11 Supr. C. 62.

the two-story brick dwelling house situated at the southwest corner of Liberty and Market streets, in the city of Lancaster, Pa., relieved from any lien now given by law for any such debts of the said Philip Zecher, deceased, and that a hearing on said application will be held before the Orphans' Court of Lancaster County on Thursday, January 5, 1911, at 1 o'clock A.M., at which time all parties in interest will be heard and the said Orphans' Court will be asked to decree and direct that the said real estate of Philip Zecher, deceased, shall be held and enjoyed free and clear of any lien of debts of said decedent not of record, and that the order of sale to be issued to the said Charles E. Zecher, trustee, shall provide that the foregoing real estate shall be sold free and clear of any lien of debts not of record of said deceased.

Dated December 8, 1910.

B. Frank Kready,
Attorney for Petitioner.

8. Decree.

If upon the return day no cause be shown to the contrary, the court will satisfy itself by hearing the petitioner, if deemed necessary, and enter a decree accordingly, so discharging the land from the lien or liens mentioned in the petition.

9. Deposit of funds with trust companies.

The act of April 21, 1903, P. L. 223, amending clause 4 of section 29 of the act of April 29, 1874, empowers certain corporations as follows:

"Four. To act as assignees, receivers, guardians, administrators, and to take and receive and execute trusts of every description not inconsistent with the laws of this state or of the United States, and to receive deposits of money, and to issue their obligations therefor, to invest their funds, other than funds committed to their care by the Orphans' Court, in and to purchase real and personal securities and to loan money on real and personal securities, and to invest funds committed to their care by the Orphans' Court in such securities as shall be approved by such courts."

10. Court to order deposit.

Section 2. "That every court into which money may be paid by parties, or to be placed by order or by judgment may, by order, direct the same to be deposited with any such corporation."

(See Wills, etc., *infra*.)

CHAPTER XXVI.

DECREES AND POWERS TO ENFORCE.

1. Character of decree — conclusiveness.
2. *Res judicata* as applied to accounts.
3. *Res judicata* as to decrees of distribution.
4. Conclusiveness as to other matters.
5. Decree as evidence.
6. Enforcement of decrees.
7. Application for order to pay over.
8. Form of petition for attachment.
9. Form of order for rule to show cause.
10. Form of order for attachment.
11. Form of attachment.
12. Form of sheriff's return.
13. Form of bond for appearance.
14. Form of petition for attachment execution.
15. Enforcement of decree by execution.
16. Manner of issuing writ.
17. Proceedings when defendant has left or is about to leave.
18. Dissolution of writ when security is given.
19. Proceedings when defendant is wasting trust property.
20. Form of petition for attachment.
21. Order to deliver property.
22. Disposition of trust property.
23. Non-appearance — sequestration.
24. Time within which to defend.
25. When final decree may be entered.
26. Form of writ of sequestration.
27. Duties of sheriff on writ of sequestration.
28. Form of petition for *fi. fa.*
29. Form of petition of ward for execution.
30. Form of *fi. fa.*
31. Form of *vend. ex.*
32. Form of petition to stay writ against administrator, etc.
33. Form of order staying writ.
34. Form of decree of distribution to foreign administrator.
35. Form of petition of foreign guardian to take his ward's money away.
36. Form of rule.
37. Form of decree.

1. Character of decree — Conclusiveness.

When the subject matter and the parties are within the jurisdiction of the Orphans' Court, its decree thereon, unappealed from, is as conclusive as a judgment at law and it cannot be attacked collaterally.¹ If appealed from only in part, it remains conclusive as to that not embraced in the appeal.² It can only be attacked for want of jurisdiction.³ Evidence will not be heard collaterally to explain an auditor's report confirmed by the court.⁴ A decree confirming an adminis-

¹ *McPherson v. Cunliff*, 11 S. & R. 422; *Lockhart v. John*, 7 Pa. 137; *Hoopes' Est.*, 10 W. N. C. 223; *Handy's Est.*, 9 D. R. 475; *Beesom v. Beesom*, 9 Pa. 279; section 2, act of March 29, 1832, P. L. 190, *supra*; P. & L. Dig., vol. 14, col. 24573.

² *Comth. v. McDonald*, 170 Pa. 221.

³ *Kennedy v. Wachsmuth*, 12 S. & R. 171.

⁴ *Stecher v. Comth.*, 6 Wharton, 60.

tration account is within the rule,⁵ but it is conclusive only as to the matters and things embraced in it.⁶ It will not protect a legal representative who settles before the end of the year and pays out the money without taking refunding bonds,⁷ since he does so at his own risk. A decree must be certain to be binding. If it leaves the parties uncertain it can have no force.⁸ After it has been executed the power of amendment is gone.⁹ Interest is an incident of a decree.¹⁰ But it commences only from the absolute confirmation and not the *nisi*, on an account.¹¹

2. Res judicata as applied to accounts.

The rule as to a confirmation of an account in the Orphans' Court is that it is conclusive only as to such questions as arise in stating, considering and confirming it;¹² otherwise it could not be reviewed; which it may be for either mistake or fraud.¹³ Questions which might have been previously raised will not move the court to open a decree after the legal representatives have been discharged;¹⁴ nor upon a subsequent account when they should have been raised on a former one.¹⁵ An administration account only concerns that which it contains or ought to contain. It has no relation to legacies or distribution.¹⁶ But the refusal of the Orphans' Court to surcharge an administrator is *res judicata*,¹⁷ and so is an award by the auditor confirmed absolutely and not appealed from;¹⁸ and the award of a fund to a trustee for the sole and separate use of a female.¹⁹ A decree awarding rents from land in distribution is not *res judicata* upon the question of title to the land itself.²⁰

3. Res judicata as to decrees of distribution.

The rule as to a decree of distribution is that it is conclusive, if

⁵ Schaeffer's Ap., 119 Pa. 640; Young's Est., 3 D. R. 282; Galloway's Est., 5 Supr. C. 272; Patton's Est., 19 Supr. C. 545; P. & L. Dig., vol. 14, cols. 24578-80.

⁶ Jones' Ap., 99 Pa. 124; Leslie's Ap., 63 Pa. 355; Shindel's Ap., 57 Pa. 43; Shaffer's Ap., 46 Pa. 131; Fross' Ap., 105 Pa. 258.

⁷ Robins' Est., 180 Pa. 630; Rastaetter's Est., 15 Supr. C. 549.

⁸ Purviance v. Comth., 17 S. & R. 31; Watson v. Monroe, 12 D. R. 570.

⁹ Hassler's Ap., 5 Watts, 176.

¹⁰ Wither's Ap., 16 Pa. 151; Bannar's Ap., 12 Phila. 129.

¹¹ Wainwright's Est., 13 Phila. 336; Yundt's Ap., 13 Pa. 575; Bruner's Ap., 57 Pa. 46.

¹² Keech v. Rinehart, 10 Pa. 240; Townsend's Ap., 106 Pa. 268; Lehigh's Est., 11 D. R. 176. (See also Haberman's Ap., 101 Pa. 329; Moyer's Est., 141 Pa. 125.)

¹³ Pry's Ap., 8 Watts, 253; M'Lenachan v. Comth., 1 Rawle, 356; Fidelity, Etc., Co. v. Gazzam, 161 Pa. 536; Brooks v. First Pres. Church, 135 Pa. 137.

¹⁴ Irvine's Est., No. 2, 209 Pa. 325.

¹⁵ Brown's Est., 190 Pa. 464.

¹⁶ Kelly's Est., 37 Supr. C. 320.

¹⁷ Alexander's Est., 214 Pa. 369.

¹⁸ Good's Est., 11 Dauphin Co. 279.

¹⁹ McCown's Est., 221 Pa. 324; Jacoby's Est., 54 Pitts. L. J. 237.

²⁰ Metzger's Est., 222 Pa. 276. (See P. & L. Sup. C. R. A. 4, col. 1851, for lower court cases. Also 2 C. R. A. 3717.) A finding that a claim was a forgery will not be reviewed. Rorabaugh's Est., 229 Pa. 377.

unappealed from,²¹ as to the fund which is distributed;²² but not as to a subsequent fund.²³ If upon distribution a question is raised and adjudicated, it cannot be again raised on a different account.²⁴ But an exclusion of a husband on the ground of non-support from participating in his wife's personalty is not conclusive on his right as tenant by the curtesy.²⁵ An award to a mortgage is conclusive as to its payment.²⁶ Unsettled estates cannot be settled in a suit on the administrator's bond in the Common Pleas.²⁷ An attaching creditor who submits his claim to the Orphans' Court is bound by its adjudication thereon.²⁸ The administratrix may challenge escheat proceedings, notwithstanding an auditor in the Orphans' Court has found adversely to her claim.²⁹ An order of the Orphans' Court discharging executors was held not to protect them from an action by a creditor on a *devastavit*.³⁰ But a decree dismissing executors can only be inquired into upon their own motion.³¹

4. Conclusiveness as to other matters.

A decree assigning dower cannot be attacked collaterally;¹ so also confirming a widow's claim to exemption out of the real estate;² or in cash.³ A decree confirming the appraisement to the widow is as conclusive as a judgment *in rem*, and is binding on all the world.⁴ But the court must have jurisdiction.⁵ The appointment of an executor as guardian cannot be attacked collaterally, especially where his active duties as executor were ended.⁶ A dismissal of a bill of review "without prejudice" is not conclusive of any right.⁷ In order that a decree may be conclusive there must be identity of parties as well as subject matter.⁸ The rule of conclusiveness and immunity from

²¹ *Wentz v. Wentz*, 1 Wharton, 201; *Bradshaw's Ap.*, 3 Grant, 109.

²² *Guenther's Ap.*, 4 W. N. C. 41; *Kline's Ap.*, 86 Pa. 363; *Ray's Est.*, 31 Pitts. L. J. 72; *Pepper's Est.*, 2 D. R. 533; *Bruch's Est.*, 6 Northam. 183, 185 Pa. 194; *Lease v. Ensminger*, 5 Supr. C. 329.

²³ *Haviland v. Fidelity, Etc., Co.*, 108 Pa. 236.

²⁴ *Robinett's Ap.*, 36 Pa. 174.

²⁵ *Lease v. Ensminger*, 5 Supr. C. 329.

²⁶ *Jackson v. Dickerson*, 5 Phila. 356.

²⁷ *Miller v. Comth.*, 5 Atl. 438.

²⁸ *Otterson v. Gallagher*, 88 Pa. 355; *Otterson v. Middleton*, 102 Pa. 78; *Handy's Est.*, 9 D. R. 475; *James v. Milne*, 3 Penny. 394.

²⁹ *Comth. v. Crompton*, 137 Pa. 138.

³⁰ *Thomas v. Reigel*, 5 Rawle, 266; *Clark's Est.*, 1 Kulp, 32. Rhone, P. J.

³¹ *Buehler v. Buffington*, 43 Pa. 278; *McNeal v. Holbrook*, 25 Pa. 189.

¹ *Evans' Est.*, 150 Pa. 212.

² *Seaman v. Hoover*, 1 Chester County, 178. (See *Burk v. Gleason*, 46 Pa. 297; *Shumate v. McGarity*, 83 Pa. 38.)

³ *Carr's Est.*, 3 D. R. 740.

⁴ *Runyan's Ap.*, 27 Pa. 121.

⁵ *Shumate v. McGarity*, 83 Pa. 38.

⁶ *Kramer v. Mugele*, 153 Pa. 493; *Dull's Ap.*, 103 Pa. 604.

⁷ *Townsend's Ap.*, 106 Pa. 268.

⁸ *Lightner's Est.*, 176 Pa. 150; *Old's Est.*, 150 Pa. 529; *Chandler's Ap.*, 100 Pa. 262; *Hall's Ap.*, 112 Pa. 42, P. & L. Dig., vol. 14, cols. 24607-8; *Comth. v. Ruhl*, 199 Pa. 40; *Comth. v. McDonald*, 170 Pa. 221; *Comth. v. Kean*, 19 Supr. C. 576.

collateral attack does not apply to cases of fraud⁹ or want of jurisdiction.¹⁰

5. Decree as evidence.

A decree is evidence of what it contains and will of itself sustain a verdict.¹¹ But it is not conclusive of incidental matters arising out of the proceedings.¹² It is *prima facie* evidence of an advancement found;¹³ or payment to an administrator, but not his counsel;¹⁴ or that a claim was presented and compromised;¹⁵ or that one was a distributee and made no claim for a sum.¹⁶

6. Enforcement of decrees.

When the Orphans' Court has awarded a distributive share it has exclusive jurisdiction to enforce the same,¹⁷ by rule, order to pay, and attachment. But if the distribution is made within the year, it cannot be enforced until a full year has expired.¹⁸ The proper practice is to present a petition to the Orphans' Court reciting the decree and ask for a rule on the fiduciary to show cause why he should not pay over the amount forthwith. Upon the return day of this rule, if no answer be made or no sufficient cause be shown, the court will enter a formal order to pay. Upon default to obey this order the respondent is in contempt and an attachment will issue upon application.¹⁹ An attachment should never issue without warning, where a party is under bond. If there be willful and unexplained disregard of any order of the Orphans' Court, it may be enforced by attachment.²⁰ This applies to an order to deliver unconverted securities.²¹ An administrator cannot justify his refusal to pay over to a distributee, by saying that the latter holds personal effects which belong to the estate. It is his right and duty to sue for and recover such effects.²² Upon a proper showing in answer to the rule the court may revoke an order to pay,²³ and an order to pay will be refused where there has been long delay under circumstances which justify the inference that a settlement was made.²⁴ It is error to require a trustee to pay, before accounting and ascertainment of the fund, as to how much is

⁹ Mitchell v. Kintzer, 5 Pa. 216, 8 Pa. 64; Phelps v. Benson, 161 Pa. 418; Chambers v. Baugh, 26 Pa. 105.

¹⁰ Smith v. Wildman, 178 Pa. 245; P. & L. Dig., vol. 14, col. 24612.

¹¹ Phillips v. Allegheny V. R. Co., 107 Pa. 465.

¹² Rittenhouse v. Levering, 6 W. & S. 190.

¹³ Carpenter's Est., 4 Pa. 222.

¹⁴ Sager v. Lindsey, 118 Pa. 25.

¹⁵ Miller v. Hulme, 126 Pa. 277.

¹⁶ Fullam v. Rose, 160 Pa. 47.

¹⁷ Black v. Black, 34 Pa. 354.

¹⁸ Rastaetter's Est., 15 Supr. C. 549.

¹⁹ Eberle's Est., 21 Lanc. L. R. 407; Thomas' Est., 4 Kulp, 445.

²⁰ Emig's Est., 18 York, 157, citing the act of 1832; although a writ of sequestration has issued. Tome's Ap., 50 Pa. 285.

²¹ McCullough's Est., 14 D. R. 7.

²² Homeyard's Est., 13 D. R. 259.

²³ Steinman's Est., 5 D. R. 346.

²⁴ Ralston's Est., 8 D. R. 328.

principal and how much income.²⁵ A reversal of the decree includes an order to pay.²⁶ An order to a fiduciary to pay to his successor may be made without first serving upon him a certified copy of the award and a subsequent demand. The order is all-sufficient to enforce obedience unless cause be shown to the contrary.²⁷ In response to such rule it is incompetent to set off a claim for personalty which the distributee retains alleged to belong to the estate.²⁸ A legatee by laches and long delay may lose his right to enforce a trust which the administrator *c. t. a.* notified him that he had repudiated.²⁹ An attachment will issue to enforce an order to pay, although the respondent is a bankrupt and proceedings are pending to declare him insane.³⁰ An administratrix cannot be attached as for contempt, for counsel fees awarded, which are in form a debt, for which, under the act of February 8, 1819, 7. Sm. L. 750, a woman cannot be subjected to arrest.³¹ It was held that an action at common law might be maintained upon a decree discharging an executor and fixing the balance in his hands to be paid to the administrator *d. b. n. c. t. a.*³² The form is *assumpsit*.³³

7. Application for order to pay over.

The person entitled to payment or his assignee has a standing to petition the court for an order on the fiduciary to pay;³⁴ but if a distributee accepts due-bills or other evidences of debt, he is relegated to his remedy thereon.³⁵ The court will not make an order to pay until after final confirmation of the adjudication,³⁶ as a rule; however, it is within its discretion to order payment to one, pending exceptions, which do not affect his right to be paid out of the fund in court.³⁷ Where a distributee has agreed that the personal estate might be used in repairing the realty, an order will be refused, after five years.³⁸ So also in other cases of delay,³⁹ or doubtful right.⁴⁰ But where the claim is clear, as where the fund is awarded to the guardian of minors, an order will be granted.⁴¹

Against an order to pay, the fiduciary may not answer an attach-

²⁵ Scott's Est., 215 Pa. 353.

²⁶ Graham's Est., No. 3, 218 Pa. 357.

²⁷ Boning's Est., 217 Pa. 306.

²⁸ Sweeney's Est., 15 D. R. 191; Homeyard's Est., *supra*.

²⁹ Kelly's Est., 37 Supr. C. 320.

³⁰ Rathbun's Est., 3 Lehigh, 57.

³¹ Quinn's Est., 9 Del. Co. 582. Johnson, P. J. But the act of 1819 does not cover cases of contempt; Gilchrist's Est., 6 Luz. L. R. 57. Rhone, P. J.

³² Weld v. McClure, 9 Watts, 495.

³³ Bowman v. Herr, 1 P. & W. 282.

³⁴ Odenwelder's Est., 3 Northam. 12.

³⁵ Arbuckle's Est., 16 Phila. 404.

³⁶ De Haven's Est., 13 W. N. C. 179; Ward's Est., 34 Leg. Int. 248; Harvey's Est., 11 D. R. 83; Vautier's Est., 14 Phila. 259; Wainwright's Est., 13 Phila. 336; Greedy's Est., 11 W. N. C. 418.

³⁷ Pomeroy's Ap., 127 Pa. 493.

³⁸ Mackey's Ap., 21 W. N. C. 293.

³⁹ Stroud's Est., 15 Phila. 591.

⁴⁰ Walton's Est., 2 W. N. C. 493.

⁴¹ Brown's Est., 13 C. C. 413.

ment execution subsequent to an assignment of the fund, when the order is to pay to the assignee.⁴² But if the attachment were laid by the executrix upon the fund in her hand, making herself as executrix garnishee, the order to pay may be suspended.⁴³ One who fails to show his interest, is not entitled to an order or attachment.⁴⁴ The court may discharge one committed for contempt.⁴⁵

8. Form of petition for attachment.

To the Honl. the Judges of the Orphans' Court of Dauphin County:

The petition of Ernest P. Bierly of the city of Harrisburg, County of Dauphin, State of Pennsylvania, respectfully represents that he is the administrator *de bonis non* of the estate of Wilkes Booth, late of said county, deceased; that Henry Law, the former executor, was on the — day of —, A. D. 19—, removed from his trust and it was then decreed that he the said Henry Law should "pay over and deliver to his successor all the goods and chattels, effects and estates of the said decedent in his hands or possession"; that an account has since been filed, showing a balance in his hands, belonging to said estate, of — dollars, which account has been finally confirmed by this court; that a copy of said decree was on the — day of —, A. D. 19—, served personally upon said Henry Law, and that a demand was then made upon him by your petitioner to pay over to him, the sum so appearing to be due the said estate; that, nevertheless, the said Henry Law, has, up to this time, neglected and refused to comply with the said order of court in any particular.

He therefore prays the court to award an attachment against the said Henry Law for his contempt as aforesaid, as provided by article 11 of section 57 of the act of March 29, 1832, and he will ever pray.
Ernest Peter Bierly.

[Affidavit to the truth.]

9. Order for rule to show cause.

Now, to-wit, — day of —, A. D. 19—, a rule is granted to show cause why an attachment should not issue against Henry Law, as prayed for. Returnable on the — day of —, A. D. 19—, at — o'clock — M. By the Court.

This rule must be served personally and a return of service made under oath, unless served by the sheriff. If no attention is paid to the rule and no answer made on the return day, an affidavit is presented showing service and default, whereupon the court will award the attachment.

10. Form of order for attachment.

Now, to-wit, — day of —, A. D. 19—, it appearing to the court that due service was made of the rule to show cause why an attachment should not issue against Henry Law, and he having failed to appear or answer, said rule is hereby made absolute and an attachment is ordered to be issued accordingly. By the Court.

⁴² Lex's Ap., 97 Pa. 289.

⁴³ Cotton's Est., 6 D. R. 268.

⁴⁴ Patton's Est., 19 Supr. C. 545; P. & L. Dig., vol. 14, col. 24631.

⁴⁵ Kuntz's Est., 2 Lehigh V. L. R. 241.

11. Form of attachment.

The clerk will issue an attachment in the following form:
Dauphin County, ss.

The Commonwealth of Pennsylvania.

To the Sheriff of said County, greeting:

We command you to attach Henry Law, so as to have his body before our Orphans' Court of the said county on the — day of —, A. D. 19—, then and there to answer us as well touching a contempt, which — —, as it is alleged, hath committed against us, in not — as commanded by our Orphans' Court, as also such other matters as shall be laid to — charge, and to abide the further order our said court shall make in this behalf. And hereof fail not.

Witness the Honorable — —, President Judge of said court, at — aforesaid, this — day of —, A. D. one thousand nine hundred and —.

[Seal]

— —,
Clerk of Orphans' Court.

12. Form of sheriff's return.

To the Honorable, etc.

In obedience to the within writ, to me directed, I have attached the said Henry Law, and have his body before the court —.

So answers, — —,
Sheriff.

13. Form of bond for appearance.

— day of —, 19—.

The sheriff may take a bond for appearance on the return day and so return. Following is a form of such bond:

Estate of — —.

Sur attachment against —.

Know all men by these presents, that we —, —, —, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of — dollars, lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania, her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this — day of —, A. D. 19—.

Now the condition of this obligation is such, that if the above bounden — — — shall appear before the Honorable the Judges of the Orphans' Court of — — County, on the — — day of — —, A. D. 19—, at 10 o'clock A. M., and shall not depart without the leave of the court, and shall abide the order of the court in the premises, then this obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in presence of:

— —, [Seal.]
— —, [Seal.]
— —, [Seal.]

14. Form of petition for attachment execution.

To the Honorable, etc.

The petition of R. P. Hanks, of said county, respectfully represents:

That in the distribution of the estate of A. Hewit, deceased, there was adjudged to be due your petitioner, and in the hands of P. Catlin, administrator of the said estate, the sum of \$——, as will appear by reference to a distribution audit and report made by R. Jones, an auditor, filed in said court, on the —— day of ——, 19——, and confirmed on the —— day of ——, 19——, when final judgment was entered thereon.

That the administrator aforesaid hath neglected and refused to pay your petitioner the said sum of money, or any part thereof.

That your petitioner is informed and believes, that James Rex, of the city of ——, county aforesaid, is indebted to the said P. Catlin in a large sum.

Your petitioner therefore prays the court to issue a writ in the nature of an attachment execution against the said P. Catlin, with a summons to the said James Rex, and all other persons who may be found to be indebted to the said P. Catlin, as provided by the 1st section of the Act of 27th March, 1873. And he will ever pray, etc.

R. P. Hanks.

(Affidavit of truth.)

Indorse on petition:

Now —— September, 19——, attachment execution awarded as prayed for. Returnable first day of next term at 2 P. M.

By the Court.

15. Enforcement of decree by execution.

Article 25 of Section 57 of the act of March 29, 1832, P. L. 190, provides:

“When any executor, administrator or guardian shall reside or move out of the county in which his appointment shall have taken place, or shall not possess real or personal estate in such county, sufficient to satisfy any decree or order of the Orphans’ Court of such county, it shall be lawful for the Orphans’ Court of such county to issue process to the county in which such executor, administrator or guardian may be, or in which he may have any real or personal estate, amenable to such process, and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such executor, administrator or guardian may be, or may possess real or personal estate as aforesaid.”

Section 2 of the act of April 21, 1846, P. L. 430, provides that writs of *venditioni exponas* and writs of *testatum fieri facias* and *venditioni exponas* may issue in the same manner as *fi. fas.*, “and the sheriff or other officer to whom any such writ is directed, shall proceed to levy and sell the real and personal property of the person or persons against whom the same shall be issued, and convey the real estate sold to the purchaser or purchasers thereof, in the same manner in all respects, as if such writ had issued out of a court of Common Pleas.”

[The remainder of the section validated prior levies and returns.]

Under these acts and by such process both real estate and personal property may be levied upon and sold,¹ wherever found.²

¹ Weyand’s Ap., 62 Pa. 198.

² Helfrich v. Stem, 17 Pa. 143.

16. Manner of issuing writ.

Executions do not issue out of the Orphans' Court on præcipe of an attorney, as is the case in the Common Pleas. Application must be made to the court for an order, and in awarding the writ the court will prescribe the notice to be given, the date and terms of sale and fix the return day, without which an execution will be set aside.³ A *fi. fa.* may be issued notwithstanding a previous issuance of an attachment.⁴ A rule for a *fi. fa.* cannot be answered by respondent, by setting up an old claim which should have been presented before the auditor.⁵ Where land has been extended on a *fi. fa.* and the plaintiff had failed to file his consent in writing, to the defendant's holding, he may file it *nunc pro tunc* by leave and still have his *vend. ex.* even after five years, without a *sci. fa.*⁶ The form of the *fi. fa.* is similar to that used in the Common Pleas, but must recite the decree upon which it issues and is attested by the clerk, with the seal of the court.⁷ If it appears that counsel for claimant has sufficient money in his hands to satisfy the claim, the court will, on a rule, set it aside.⁸ The entire proceedings are within the Orphans' Court and the record must be completely made up in it, down to the confirmation of the sale and acknowledgment of the deed.⁹

17. Proceeding when defendant has left or is about to leave.

Article 17 of section 57, act of March 29, 1832, P. L. 190, provides:

"When proof shall be made, on oath or affirmation, to the satisfaction of the court, if in session, or to any judge thereof in vacation, at the time of filing a petition as aforesaid, that the defendant has absconded, or is about to abscond or depart from his usual place of abode, to the prejudice of the complainant, it shall be lawful for the court, or for such judge, to allow the issuing of a writ of attachment, or a writ of sequestration, or both, in the first instance, against such defendant, and on the return thereof, the like proceedings may be had as are authorized on the return of a citation."

18. Dissolution of writ when security is given.

"XVIII. If such attachment or sequestration, issued in the first instance, be executed, the court, or any judge thereof in vacation, may dissolve the same, on the defendant giving security, to the satisfaction of the court, or of such judge, to appear on a day certain, to answer to the petition and to abide the orders and decrees of the court in the premises."

19. Proceedings when defendant is wasting trust property.

"XIX. When proof shall be made on oath or affirmation, to the satisfaction of the court, or of any judge thereof in vacation, at the time of presenting a petition, or at any stage of the cause, that the de-

³ Oviatt's Est., 3 D. R. 620.

⁴ Miles' Est., 4 Kulp, 152. Rhone, P. J.

⁵ Siegfried's Est., 1 Woodward, 77.

⁶ Weyand's Ap., 62 Pa. 198.

⁷ Peckham's Est., 1 Kulp, 353. Elwell, P. J.

⁸ Miles' Est., 4 Kulp, 152.

⁹ Oviatt's Est., 3 D. R. 620. For acknowledgment of deed, see vol. 2.

fendant therein named has in his possession trust property or effects, which he is wasting or otherwise disposing of contrary to his duty and trust, or that he is about to abscond, and carry such trust property or effects out of the jurisdiction of the court, it shall be lawful for the court, or such judge in vacation, to award a writ in the name of the commonwealth, to the sheriff or coroner, as the case may require, of the proper county, returnable on a day certain, to an Orphans' Court, to be convened for the purpose, if the said court shall not then be in session, commanding him to take possession of all such trust property and effects specified in such writ, and to hold the same subject to the order of the court, and also to attach all debts due to such trust, whether by bond, mortgage, or otherwise, and all stocks in incorporated companies, and serve a copy of such writ upon each debtor, and upon each company in which stock may be held, belonging to the trust as aforesaid: *Provided*, That before the execution of such writ, the sheriff or coroner, as the case may be, may require of the party at whose instance such writ may have been issued, sufficient security to indemnify him against any damages arising from the execution thereof: *And provided also*, That if the party against whom such writ may issue, shall give sufficient security to such sheriff, or coroner, that the trust property or effects specified in such writ shall be forthcoming at the return thereof, then such sheriff or coroner shall not execute the same, but shall make return of the facts to the court."

20. Form of petition for attachment, etc.

To the Honorable, etc.:

The petition of Florence Reed, a daughter and heir at law of Willis Reed, late of Berks County, deceased, respectfully represents:

That she is interested in the estate of said Willis Reed, deceased, as heir at law and daughter; that said decedent died intestate [or testate] on the — day of — A. D., 19—; that letters of administration [or testamentary] were issued to John K. Hays on the — day of — A. D., 19—, and by virtue thereof he has taken into his possession trust property of said deceased to the amount of — dollars, for which he has not accounted; that the defendant has resided at —, until recently and there conducted the business of —; that he has disposed of all his property and is about to depart from the jurisdiction of this court and locate in Grand Forks, North Dakota, and is about to take and carry away with him all the property belonging to the said estate (or state that he is wasting such property, giving particulars of mismanagement).

Your petitioner therefore prays the court to issue a writ of attachment against the said John K. Hays, to attach the said trust estate as provided by the XIX. Article of the 57th section of the act of 29th March, 1832. And also to issue a citation commanding the said administrator to file an account (or to show cause why he shall not be removed from his said trust). And she will ever pray, etc.

Florence Reed.

(Affidavit of truth.)

Form of writ, see *supra*. The form of the bond for the forthcoming of the property is similar to that given under Foreign Attachment, Vol. I, P. 686, to restore the property.

21. Order to deliver property.

"XX. The like proceedings may be had, where the court has made a final order and decree for the delivery of the trust property and effects by the defendant to any persons who may be designated by law, or by the order of the court, to receive them."

22. Disposition of trust property.

"XXI. On the return of such writ, the court may take such order, respecting the disposition of such trust property and effects, as may be necessary and proper, according to the principles of justice and equity."

23. Non-appearance and sequestration.

"XXII. When a decree shall have been had against any defendant, who shall not have appeared according to the requisitions of the citation, and a sequestration shall have issued against the real or personal estate of such defendant, the court may order the decree to be satisfied out of the estate and effects sequestered: *Provided*, That such order shall not be carried into execution until the complainant shall have given security to the satisfaction of the court to abide the order of the court, touching the restitution of what he may have received, in case the defendant shall appear, and be admitted to defend the suit, but if such security shall not be given, the estate and effects sequestered, or the proceeds thereof, shall remain subject to the directions of the court, to abide its further order."

24. Time within which to defend.

"XXIII. If the defendant against whom such decree shall have been made, or his representatives, shall within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice shall have been given, present a petition to the same court, praying to be admitted to be heard, and shall pay such costs as the court shall adjudge, the party so petitioning shall be admitted to a defense, and the case shall then proceed in like manner as if such defendant had appeared in due season, and no decree had been made."

25. When final decree may be entered.

"XXIV. If such defendant, or his representatives, shall not within such period present a petition as aforesaid, the court may make such final order and decree, both in respect to any estate or effects that may have been sequestered, and in respect to the matters in controversy in the case, as may be according to justice and equity, and may, if necessary, award a writ in the nature of a *fiery facias*, in the manner hereinbefore provided, as in the case where the defendant appears."

26. Form of writ of sequestration.

Section 57 continues:

"XIII. Writs of sequestration shall be in the following form:

The Commonwealth of Pennsylvania,

To the sheriff of the county of —,

Greeting:

Whereas A. B. [here set out the decree, or so much thereof as

is material to explain the duty to be performed]. Therefore, we command you that you do, at proper and convenient hours in the day-time, go to and enter upon all the messuages, lands, tenements, and real estate of the said A. B. and that you do collect, take and get into your hands, not only the rents, issues and profits of all his said real estates, but also all his goods, chattels and personal estate and detain and keep the same under sequestration in your hands; and also that you attach all stocks held by him in incorporated companies and keep the same under attachment, until our said Orphans' Court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand, of the manner in which you shall have executed this writ, to our said court, on the — day of — next.

Witness the Honorable — —, President Judge of the Orphans' Court of said county, at —, this — day of — A. D., 19—.

[Seal.] Attest:

— —,
Clerk of the Orphans' Court.

27. Duties of sheriff on writ of sequestration.

"XIV. A sequestration shall not abate by the death of the complainant or defendant.

"XV. It shall be the duty of the sheriff or coroner, as the case may be, immediately after receiving any such writ of sequestration, to file a copy thereof in the office of the prothonotary of the Court of Common Pleas of the same county, who shall, forthwith, enter the substance thereof on his docket, with the names of the parties, and the entry thereof shall thenceforward operate to charge the real estate of the defendant, according to the form and effect of such writ, and shall bind the same in the hands of all purchasers and mortgagees, subsequently to such entry, without other notice: *Provided*, That if such sequestration shall be dissolved by the order of the Orphans' Court, the defendant or any person interested in such real estate, may have a certificate of the same from the clerk of the said court, which it shall be the duty of such clerk to furnish, on application, and which, being entered on the docket, shall have the effect of a satisfaction of such lien."

28. Form of petition for fi. fa.

To the Honorable the President Judge of the Orphans' Court of the County of —.

The petition of the undersigned, of counsel for William Allen, a creditor of the estate of John Ross, deceased, respectfully represents:

That Abel Binn was duly appointed administrator, in — County, Pennsylvania, of the said decedent. That the said Abel Binn filed his final account as administrator aforesaid, which was duly confirmed by the court, on the — day of —, A. D. 19—. That said account was audited on the — day of —, A. D. 19—, by the court, and said audit was confirmed on the — day of —, A. D. 19—, and it was therein adjudged and decreed by the court, that the said William Allen was entitled out of the funds in the hands of the said Abel Binn, administrator, to the sum of one thousand dollars. That a copy of said decree of the court was served upon the said Abel

Binn, administrator, and payment was demanded of him, on the — day of —, A. D. 19—, and that said Abel Binn has failed and refused to pay over said sum to the said William Allen, or to any person for him.

The petitioner therefore asks that an execution in the nature of a *fiery facias* may issue from this court against the said Abel Binn, for the collection of the said sum, with interest and costs. And he will ever pray, etc.

A. B—,
Attorney for William Allen.

(Affidavit of truth.)

Indorse on petition:

Now, — day of —, A. D. 19—, *fi. fa.* awarded as prayed for.
Returnable on the — day of —, A. D. 19—, at — o'clock, —M.

By the Court.

Petition for any other execution will be the same, making the necessary changes to suit the facts.

29. Form of petition for execution by a ward against his guardian.

To the Honorable, etc.

The petition of A. B.— respectfully represents:

That the final account of C. D., his guardian, was confirmed by the said court, on the — day of —, 19—, showing a balance due your petitioner from his said guardian of — dollars.

That your petitioner is now over the age of twenty-one years, and entitled by law to receive said sum. That the said guardian hath neglected and refused to pay your petitioner the said sum or any part thereof, although he hath been requested to make payment.

Your petitioner therefore prays the court to award him an execution in the nature of a *fiery facias* against his said guardian to collect said sum with interest and costs. And he will ever pray, etc.

A. B—.

(Affidavit of truth.)

NOTE.—This form is applicable for a beneficiary against his trustee, and by changing the name, etc., to suit the facts it may be readily used for an execution by a guardian against his ward's estate.

30. Form of *fiery facias*.

— County, ss.

The Commonwealth of Pennsylvania, to the High Sheriff of the County of —, greeting:

We command you, that of the goods and chattels, lands and tenements, of — —, in your bailiwick, you cause to be levied a certain sum of — —, which to — lately, in our Orphans' Court for the County of Luzerne, was awarded, adjudged, and decreed by said court, on the — day of —, A. D. 19—, to be paid to the said — —, as and for and on account of the estate of — —, of whose estate the said — — was the —, whereof the said — — is convict, as appears of record, etc.; and to enforce the payment of said sum and costs, in compliance with the said decree, our said court, on the — day of — A. D. 19—, did allow a writ of execution in the nature of a writ of *fiery facias* to issue.

And have you that money before our judges, at our said court at —, there to be held on — next, to render to the said — for — said sum, decree, and costs; and have you then there this writ.

Witness the Hon. —, Judge of our said court, at —, this — day of —, in the year of our Lord one thousand nine hundred and —.

[Seal.]

—, Clerk of Orphans' Court.

31. Form of venditioni exponas.

— County, ss.

The Commonwealth of Pennsylvania, to the High Sheriff of the County of —, greeting:

Whereas, by a writ of execution in the nature of a writ of *facias*, bearing teste the — day of —, A. D. 19—, we did command you, that of the goods and chattels, lands and tenements of —, in your bailiwick, you should cause to be levied a certain sum of —, which to — lately, in our Orphans' Court for the County of —, was awarded, adjudged, and decreed by said court, on — day of —, A. D. 19—, to be paid to the said —, as and for and on account of the estate of —, of whose estate the said — was the —, whereof the said — is convict, as appears of record, etc.; and that you should have that money before our judges, at our said court at Philadelphia, there to be held on the first Monday of — next, to render to the said — for — said sum, decree, and costs; at which day, before our judges at —, you returned that, by virtue of the said writ to you directed, you had seized and taken in execution.

(Here put schedule of levy.)

with the appurtenances, which remained in your hands unsold for want of buyers; so that you could not have the moneys in the said writ mentioned at the day and place therein named, to render to the said —, for the said debt, decree, and costs, as by the said writ you were commanded. And the residue of the execution of said writ appeared in a certain schedule thereunto annexed; by which schedule or inquisition it appears that the rents, issues, and profits of the premises are not of a clear yearly value, beyond all reprises, sufficient within the space of seven years to satisfy the said debt, decree, and costs in the said writ mentioned.

Therefore, we command you, that the said premises and the appurtenances, so seized and taken in execution, you *expose to sale*; and that you have that money before our judges at —, at our Orphans' Court, there to be held on the first Monday of — next, to render to the said —, for the said debt, decree, and costs; and have you then there this writ.

Witness the Honorable — and —, Judges of our said court, at —, this — day of —, in the year of our Lord one thousand nine hundred and —.

—, Clerk of Orphans' Court.

NOTE.— It will be seen that the body of the foregoing writ conforms in the main to those issued by the Common Pleas, hence for execution,

attachment, or testatum *fi. fa.*, or for any alias writ, see the forms which in that court prevail.

32. Form of petition by executor or administrator to stay writ against them in Common Pleas.

— County, ss.

<p>James Lee v. P. Catlin, Administrator of the estate of A. Hewit, deceased.</p>	}	<p>In Common Pleas, No. —, November Term, 19—.</p>
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To the Honorable the Judges of the Court of Common Pleas.

The petition of P. Catlin respectfully represents that he is the defendant in the above-stated judgment.

That an execution has been issued on said judgment, and that the sheriff of this county has levied on and is about to sell the lands of the decedent.

That the personal estate of said decedent, so far as the same has come to the knowledge of your petitioner, does not exceed in value the sum of — dollars. And the debts of the said decedent have come to the knowledge of your petitioner to the amount of — dollars, to which must be added the expenses of settling said estate, which will be about — — dollars.

Your petitioner therefore, showing that the personal assets of said decedent are insufficient to pay all demands against his estate, prays the court to stay said writ of execution, so that he may make application to the Orphans' Court of said county for an order authorizing him to make sale of the real estate of said decedent, as provided by the 36th section of the act of 24th February, 1834.

And he will ever pray, etc.

P. Catlin.

(Affidavit of truth.)

33. Form of order of court staying writ (including order to make application to Orphans' Court for order of sale).

And now, to wit, — — June, 19—, rule is granted to show cause why execution should not be stayed, and same day by consent the same is made absolute at the costs of the estate, and further proceedings thereon are suspended. And it is further ordered, adjudged, and decreed, that P. Catlin, the administrator of the estate of the said defendant, do at the next (or present) session of the Orphans' Court of this county, present his petition to the said court, praying for an order of sale of his real estate for the payment of the debts of the said decedent.

By the Court.

34. Form of decree of distribution of a fund in hands of a resident administrator to a foreign administrator.

Orphans' Court of Allegheny County, ss.

In estate of — —.

Now, to-wit, — day of —, 19—, this matter came on for hearing, audit, and distribution, and thereupon it appearing to the court that the domicil of the decedent was at the time of his death in the State of Iowa, and that there are no claimants on the fund, either as

creditors, heirs, or legatees, who are residents of this state; and it further appearing that letters of administration have been duly issued at the domicil of the decedent to Alexander R. Foster, it is ordered, adjudged, and decreed, that the funds in the hands of James Evans, the resident administrator, after deducting the costs of audit, etc., be paid to the said Alexander R. Foster, administrator of the domicil as aforesaid, upon his giving an additional bond in the sum of \$700, to be approved according to the laws of the State of Iowa, to specially secure this fund, and a certificate of the same being filed in this court.

By the Court.

35. Form of petition of a foreign guardian for leave to take the estate of his ward out of this state.

To the Honorable the Judges of the Orphans' Court of the County of —, State of Pennsylvania.

The petition of R. Stone respectfully represents.

1st. That he is a resident of the County of —, State of Iowa, and was, on the — day of —, 19—, duly appointed by the Probate Court of said county and state, guardian of the estate of Samuel Hewit, a minor child of A. Hewit, deceased, late of the County of —, State of Pennsylvania, as will appear by reference to a duly certified copy of the records of the Probate Court of said county.

2d. That his said ward is entitled to the sum of five hundred dollars, now in the hands of P. Dixon, guardian of the estate of the said Samuel Hewit, in the County of —, State of Pennsylvania, as will appear by the final account of said guardian, approved by your said court, on the — day of —, 19—, and that the same came to him as an inheritance from the estate of his said father.

3d. That your petitioner has given bond, with security, in the said county and state, where he and his said ward reside, in the amount of one thousand dollars, to specially secure any estate of his said ward which may be received by him from the Commonwealth of Pennsylvania; he therefore prays your said court to order and decree that the said P. Dixon, guardian, etc., pay to your petitioner the said sum of five hundred dollars, as provided by the act of 21st April, 1856, and its supplements.

Your petitioner here showing that a similar provision exists in the laws of the Commonwealth of Iowa, as appears by a certified copy of the act of 10th April, 1858 (or some other act) hereto attached.

R. Stone,
Guardian, etc.

(Sworn and subscribed, etc., according to the laws of Iowa.)

NOTE.—Append certificate, as required by acts of Congress, and also the seal of the court.

36. Form of rule.

Now, — day of —, 19—, rule is granted on P. Dixon, guardian of the estate of Samuel Hewit, a minor child of A. Hewit, deceased, to appear and show cause why the prayer of this petition shall not be granted. Returnable — day of —, 19—, at 10 A. M.

By the Court.

37. Form of decree.

In Orphans' Court of the County of —.

Estate of A. Hewit, deceased.

In matter of the application of R. Stone, guardian of Samuel Hewit, residing in the State of Iowa, for leave to remove his ward's estate out of this commonwealth.

Now, — day of —, 19—, it appearing to the court that the petitioner has complied with the requirements of our laws in relation to the matters in his petition contained, and that the removal of such estate will not conflict with the terms or limitations attending the right by which the ward owns the same, and that the laws of the State of Iowa are similar to those of this commonwealth in relation to the said matters, and the court being of the opinion that it will be for the interest of the said minor to have his estate paid to his said guardian, it is ordered, adjudged, and decreed that the said P. Dixon, guardian, etc., do pay and deliver to the said R. Stone, guardian, etc., the sum of five hundred dollars, less the cost of this proceeding, on being tendered a receipt for the same, and that on making such payment, the said P. Dixon, guardian, etc., shall be released and forever discharged from any further liability for or on account of the same.

By the Court.

CHAPTER XXVII.

APPEALS FROM DECREES.

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| 1. Appeals authorized. | 6. The appellate court to try appeal on the merits. |
| 2. Time of taking appeal. | 7. Review by the Orphans' Court. |
| 3. The right of appeal. | 8. Petition for rehearing. |
| 4. Decree must be definitive. | 9. Petition for review. |
| 5. Requisites of appeal. | |

1. Appeals authorized.

Section 59 of the act of March 29, 1832, P. L. 213, provided:

"Any person aggrieved by a definitive sentence or decree of the Orphans' Court, may appeal from it to the Supreme Court [or Superior, now]: *Provided*, That the party appealing shall give security by recognizance with sufficient surety in the Orphans' Court, or before one of the judges thereof, conditioned to prosecute such appeal with effect, and to pay all costs that may be adjudged against him, and shall make oath or affirmation that the appeal is not intended for delay."

Section 8 of the act of May 19, 1874, P. L. 206, provided that "no appeal shall stay the execution of a final decree unless notice of such appeal and security be given within twenty days after the time that such decree has been made."

2. Time of taking appeal.

Section 4 of the act of May 19, 1897, P. L. 67, provided:

"No appeal shall be allowed in any case unless taken within six calendar months from the entry of the sentence, order, judgment or decree appealed from, nor shall an appeal supersede an execution issued or a distribution ordered, unless taken or perfected, and bail entered in the manner herein prescribed within three weeks from such entry." [See Vol. I, P. 107.] Under this act of 1832, *supra*, an appeal was allowed within three years after final decree. The statutory time for an appeal cannot be enlarged by a petition for a bill of review.¹

3. The right of appeal.

A party may lose his right to appeal by enforcement of the decree in the Orphans' Court² and an appeal will not lie when by some act of the party the controversy is superseded.³ The right to appeal may also be lost by having failed to secure the proper entry of the decree so that the matter could come before the appellate court in-

¹ Sherwood's Est., 206 Pa. 465.

² Marten's Ap., 13 W. N. C. 289.

³ Hallowell's Ap., 20 Pa. 215.

telligibly; ⁴ and a party is estopped from appealing from a decree for which he prays and which he is responsible to a large extent.⁵ An appeal does not lie from an order to pay when none was taken from the decree of distribution.^{5a} After decree sustained and redistribution made as directed, an exceptant cannot raise questions, without evidence or claim, as to matters decided in the original adjudication then not excepted to, and his appeal will be quashed.^{5b}

4. Decree must be definitive.

A decree from which an appeal may be taken must be definitive and not interlocutory. The decree of the Orphans' Court confirming any account of a fiduciary, whether final or partial, is definitive;⁶ so is an order dismissing exceptions to an account, but in case of an auditing judge, the practice is to file exceptions and first have the exceptions heard by the court *in banc*.⁷ It has been held that the appointment of a guardian is a final decree, from which an appeal lies, but the discretion of the court in making an appointment will not be reviewed unless some positive rule of law be violated.⁸ Decrees or orders are interlocutory only, which require an accounting,⁹ or dismiss a motion to quash an appeal from an appraisal of collateral tax;¹⁰ or requiring additional security;¹¹ or an order appointing an auditor to pass upon exceptions, restate an account and make distribution;¹² or an order over-ruling a demurrer to a petition to reopen and review an account which has been confirmed;¹³ or an order referring back to an auditor, his report, with instructions to make distribution in accordance with the opinion of the court on exceptions filed;¹⁴ or a rule on the executor to file an inventory and rule for inquest in partition.^{14a} In all such cases, if there be error, the proper practice is to except and bring the exceptions upon the record, and when a final decree is entered, take the appeal from that which reaches back to all matters properly excepted to in the record.

5. Requisites of an appeal.

In order to appeal the party appealing must have an interest in the matter under decree. An administrator has no interest in the distribution of the balance in his hands, as such and therefore cannot appeal from a decree of distribution.¹⁵ Nor has the residuary legatee of a deceased administrator any standing to appeal from a decree

⁴ Dorscheimer's Est., 9 Supr. C. 422.

⁵ Sherwood's Est., 206 Pa. 465.

^{5a} Jennings' Est., 38 Supr. C. 522.

^{5b} Hoffman's Est., 37 Supr. C. 548.

⁶ Rhoads' Ap., 39 Pa. 186; Groff v. Trust Co., 38 Supr. C. 567.

⁷ Patterson's Ap., 104 Pa. 369.

⁸ Pote's Ap., 106 Pa. 574.

⁹ Allen's Est., 20 Supr. C. 32.

¹⁰ Belcher's Est., 205 Pa. 153.

¹¹ Revell's Est., 12 D. R. 138.

¹² Fair's Est., 34 Supr. C. 263.

¹³ Fleming's Est., 217 Pa. 279.

¹⁴ Beach's Est., 30 Supr. C. 572.

^{14a} Tressler's Est., 223 Pa. 281.

¹⁵ Axtell's Ap., 43 Leg. Int. 476.

surcharging the administrator.¹⁶ The rules of the Supreme and Superior Courts in regard to appeals must be observed in appealing from the Orphans' Court.¹⁷ The affidavit that the appeal is not taken for delay must be made as required by the act of May 19, 1897, P. L. 67, *supra*, or the appeal will be quashed.¹⁸ Bail must be entered as required by law in order to effect a supersedeas. The assignments of error must be made with particularity as to the matters complained of,¹⁹ although the appellate court will not be as technical in regard to the proceedings as if they were in a court of common law jurisdiction.²⁰ It has been held that the assignments of error to dismissal of exceptions to an executor's account must give the exceptions in their exact words.^{20a} [For forms, see Vol. I, P. 114.] An appeal will be dismissed when the will in controversy is not printed in the paper book.^{20b}

6. The appellate court to try appeal on the merits.

Section 4 of the act of April 14, 1835, P. L. 275, provided:

"The Supreme Court of this commonwealth shall, in all cases of appeal from the definitive sentence or decree of the Orphans' Court, hear and determine the same, as to right and justice may belong, and refer the same to auditors, when in their discretion they may think proper."

And section 2 of the act of June 16, 1836, P. L. 682, further provided: "It shall be the duty of the Supreme Court of this commonwealth, in all cases of appeals * * * from the several Orphans' Courts to hear, try and determine the merits of such cases and to decree according to the justice and equity thereof."

Although the appellate courts have given these acts a wide scope of construction as to their powers of "justice and equity," regardless of the errors below,²¹ they will not assume jurisdiction where there is none,²² nor disturb the finding of an auditing judge confirmed by the court *in banc*, unless there is no evidence or it is clearly erroneous.²³ Prior to the constitution of 1874 the Supreme Court had considerable original jurisdiction and if it was not satisfied with the record as brought up, it could appoint an auditor to ascertain and report the facts.²⁴ It is at least doubtful whether this power now exists and the practice is to remit the record for correction or further hearing.²⁵ As illustrations of expansive interpretation on appeal as to what

¹⁶ *Fidelity, Etc., Co.'s Ap.*, 115 Pa. 157.

¹⁷ *O'Brien's Est.*, 22 Supr. C. 475.

¹⁸ *Heckert's Ap.*, 13 S. & R. 48.

¹⁹ *Mengas' Ap.*, 19 Pa. 221.

²⁰ *Deaven's Est.*, 32 Supr. C. 205; *Riemensberger's Est.*, 29 Supr. C. 596.

^{20a} *Johnston's Est.*, 222 Pa. 514.

^{20b} *Jenning's Est.*, 38 Supr. C. 522.

²¹ *Schenck's Ac.*, 5 Watts, 84; *Hise's Est.*, 5 Watts, 157; *Irwin's Ap.*, 5 Wharton, 577; *Eyster's Ap.*, 16 Pa. 372; *Hallowell's Ap.*, 20 Pa. 215; *Finney's Ap.*, 37 Pa. 323; *Bierly's Est.*, 81 * Pa. 419.

²² *Miller's Est.*, 159 Pa. 575.

²³ *Barnes' Est.*, 221 Pa. 399.

²⁴ *Kittera's Est.*, 17 Pa. 416; *Wallace's Ap.*, 5 Pa. 103.

²⁵ *Stewart's Ap.*, 86 Pa. 149.

"justice and equity" require, see cases cited below.²⁶ The finding of the court below and its auditor confirmed by the court will be rarely reversed, although "justice and equity" be closely pressed,²⁷ and the law itself being in chancery between conflicting opinions of the appellate court.²⁸ Where there is an action at law pending in regard to the matter in controversy in the Orphans' Court, the appellate court may remit the cause and direct the lower court to open the decree and suspend action until the question is decided in the law court.²⁹ A decree refusing to declare a trust by deed will not be reversed except for manifest error.³⁰ The same rule applies to findings of fact by an auditing judge or an auditor.³¹

7. Review by the Orphans' Court.

Even after appeal and affirmance of an erroneous decree the Orphans' Court has equitable powers to review it and correct errors.¹ Also by act of October 13, 1840, P. L. 1841, P. 1, the right to review by bill may be invoked;² and the appellate court may remit the record for review in a proper case.³ But the court may refuse to review on petition of one at whose instance the decree was made.⁴ The power of the court is not diminished by the filing of a transcript for judgment in the Common Pleas.⁵ This power is inherent and unaffected by the act of 1840, which provides an independent method of review.⁶

8. Petition for rehearing.

Whilst errors apparent upon the face of the decree may be corrected on motion, the usual practice is to present a verified petition setting forth the decree and pointing out the matter complained of for error, how it is proposed to correct the same and upon what facts the motion is justified, and if newly discovered, how and why not formerly produced.⁷ Purely clerical errors in an adjudication of an account may be corrected by a re-statement, approved and annexed by the judge.⁸ Such correction may be made any time before distribu-

²⁶ Parker's Ap., 61 Pa. 478; Van Dusen's Ap., 102 Pa. 224; Dull's Ap., 108 Pa. 604; Maulfair's Ap., 110 Pa. 402; Drennan's Ap., 118 Pa. 176.

²⁷ Keyser's Ap., 124 Pa. 80; Bearmer's Ap., 126 Pa. 77; Comly's Est., 185 Pa. 208; Martin's Est., 184 Pa. 221; Gibson's Est., 228 Pa. 409.

²⁸ Bierly's Est., 81 * Pa. 419.

²⁹ Lindsay's Est., 184 Pa. 262.

³⁰ Bierly v. Sener, 228 Pa. 289.

³¹ Hirsch's Est., 41 Supr. C. 367; Fuller's Est., 41 Supr. C. 417; Campbell's Est., 39 Supr. C. 148; Newhouse's Est., 39 Supr. C. 452; Gibson's Est., 228 Pa. 409.

¹ Parker's Ap., 61 Pa. 478; Young's Ap., 99 Pa. 74; Loxley's Est., 5 W. N. C. 384; Major's Est., 6 Kulp, 222; DeHavens' Est., 41 Supr. C. 382; Ehrhart's Est., 31 Supr. C. 120; Connolly's Est., 51 Pitts. L. J. 301.

² Martin's Est., 7 D. R. 408.

³ Lindemuth's Est., 5 Watts, 145.

⁴ Baldwin's Ap., 112 Pa. 2.

⁵ McNeal v. Holbrook, 25 Pa. 189.

⁶ Ehrhart's Est., 31 Supr. C. 120; Godshalk's Est., 20 Montg. 118.

⁷ Bishop's Ap., 26 Pa. 470.

⁸ Fleming's Est., 10 D. R. 259.

tion,⁹ and it is governed by the principles which pertain to a petition for review under the act of 1840. It will be defeated unless it sets forth due diligence.¹⁰ It was said by Penrose, J.:

"It has often been said that a claim of right not asserted as a legal demand until after the death of the party affected by it, although upon the claimant's own showing it originated and matured many years before, comes before the court — and especially the court established for the protection of those no longer able to protect themselves, discredited on its face, and with every presumption against it; and this applies with increased force where the claim, repudiated in the lifetime of a decedent, not only involves a large portion of the estate, but, if sustained, blasts the decedent's good name, and convicts of the commission of a heinous, most disgraceful crime. A recovery in such case can only be had upon evidence clear and convincing. * * * In cases of this character, discrepancies, even as to seemingly trifling matters, have always been regarded as significant. A notable illustration is reported in a book of very high authority. (Apocrypha, Hist. Susanna, chapter 1.)¹¹ A surcharge erroneously made may be corrected and the guardian relieved by a re-statement of it, the facts being all before the court.¹² But the court will not be moved to set aside the allowance for a tombstone, when it has determined the reasonableness of it.¹³ Adjudications may be opened where justice and equity require it, but principles will be invoked to keep them fixed rather than to unsettle them.¹⁴ Where a trustee has filed an account containing an item claimed to be there improperly, and the account has been confirmed, the proper remedy is by petition for review under the act of 1840,¹⁵ and generally this is the safer practice, instead of asking to file exceptions *nunc pro tunc*;¹⁶ however, a minor's petition for review may be considered as an application for leave to file exceptions *nunc pro tunc*,¹⁷ and so of an administrator who shows no ground of review.¹⁸ A petition to open an audit should be presented to the auditing judge and not to the court *in banc*.^{18a}

9. Petition for review.

This subject has been treated, *supra*, under accounts. Suffice it to add here that a petition of review must both in form and substance

⁹ Walton's Est., 5 Kulp, 32. Rhone, P. J. Schiel's Est., 46 Pitts. L. J. 38.

¹⁰ Groff's Est., 36 Supr. C. 140.

¹¹ Dundas' Est., 213 Pa. 628. (Opinion of Penrose, J., approved and decree affirmed.)

¹² Hertz's Est., 26 Supr. C. 489.

¹³ Lutton's Est., 17 Supr. C. 342.

¹⁴ Smith, J., in Swinhart's Est., 21 Lanc. L. R. 258. (See P. & L. D., vol. 2, C. R. A., col. 3721, and vol. 4, C. R. A., col. 1858, for lower court cases pertinent.)

¹⁵ Suplee's Est., 17 Phila. 519.

¹⁶ Howell's Est., 5 W. N. C. 530; Fletcher's Ap., 125 Pa. 352; Shaw's Est., 7 Montg. Co. 124; P. & L. Dig., vol. 14, cols. 24651-2.

¹⁷ Lang's Est., 30 Pitts. L. J. 97.

¹⁸ Hosfeld's Est., 4 C. C. 257. (See P. & L. Dig., vol. 14, col. 24654, for lower court cases on petition for rehearing.)

^{18a} Devlin's Est., 18 D. R. 47.

come within the act authorizing it and can be had only as a matter of right when it so conforms.¹⁹ It is not intended to correct an error of law which might have been rectified by an appeal.²⁰ A petition will be dismissed where there is no allegation of error apparent on the face of the record, of new matter arisen since the decree, or of after discovered evidence to bring it within said act, or the general equitable powers of review.²¹ But if the rights of third parties have not intervened review will be more readily granted.²² Sureties on the bond of an administrator *d. b. n. c. t. a.* are concluded by his account, and are not entitled to a review.²³ The right to review is affected by laches the same as independently of the act of 1840.²⁴

¹⁹ Bailey's Est., 208 Pa. 594; Frey's Est., 12 Phila. 15; Poh's Est., 12 D. R. 160; Price's Est., 12 D. R. 693; Been's Est., 13 D. R. 695.

²⁰ Sherwood's Est., 206 Pa. 465. (See P. & L., C. R. A., vol. 2, col. 3722; Meek's Est., 24 Montg. 97.)

²¹ Carey's Est., No. 2, 16 D. R. 204; Taylor's Est., 16 D. R. 951; Ruckle's Est., 7 Lack. Jur. 365.

²² Justice's Est., No. 1, 15 D. R. 342.

²³ Sheet's Est., 215 Pa. 164.

²⁴ Stetler's Est., 17 D. R. 60; Dalton's Est., 33 Supr. C. 210.

CHAPTER XXVIII.

WILLS — IN GENERAL.

1. What constitutes a will.
2. Distinction between a gift and a will.
3. *Donatio mortis causa*.
4. *Donatio mortis causa* and gift *inter vivos*.
5. Will in form of a letter.
6. Wills by other forms of direction.
7. Extrinsic evidence as to intent.
8. Conditional and joint wills.
9. Testament distinguished from will.
10. Kinds of wills.
11. Will without naming executor.
12. Lord Coke on making a will.
13. Competency to make a will.
14. Testator must be twenty-one years old.
15. Married woman's competency.
16. Father may will custody of unmarried minor child.
17. Tenant for life may will emblements and rents.
18. Disposing memory.
19. Manner of execution of will.
20. Signature by mark.
21. Signature by another at testator's request.
22. Will in *extremis*, not signed.
23. Publication.
24. Execution of will in New Jersey.
25. Execution of will in New York.
26. Execution of will in Ohio.
27. Execution of will in West Virginia.
28. Execution of will in Maryland.
29. Execution of will in Delaware.

I. What constitutes a written will.

Any writing, whatsoever the form, in which a competent person declares a gift, bequest or devise of property, to take effect after his death, and signed by him, "at the end thereof," or by one for him and at his request is a valid will, in Pennsylvania. It may be an order to his legal representatives to pay a sum at his death to a person named;¹ or, a statement of "a divide to his friends";² a request in a note or letter that he wants a person to have a certain sum at his death;³ an indenture in the form of a deed;⁴ or a codicil written on the stub of a check book, with the checks duly signed in pursuance of the intention;⁵ a codiciliary certificate leaving a sum additional to that mentioned in any last will by him;⁶ or a mortgage made in part payable to his heirs at his death, which is revocable;⁷ or an entry in a "journal cash book," along with other entries indicating testamentary dispositions.⁸ It may be in the form of a deed of trust, if

¹ Frew v. Clark, 80 Pa. 170.

² Long's Ap., 86 Pa. 196.

³ Wilson v. Van Leer, 103 Pa. 600.

⁴ Pritchett's Est., 9 C. C. 600.

⁵ Lambaert's Est., 10 C. C. 10.

⁶ Megary's Est., 206 Pa. 260; Greer's Est., 21 Montg. 26.

⁷ Amrhein v. Cope, 9 Northam. 142.

⁸ Beaumont's Est., 216 Pa. 350.

it passes no present interest and contains a power of revocation.⁹ But a mortgage payable to the legal heirs of husband and wife five years after their death, is not a will.¹⁰ A deed irrevocable, upon a good consideration, with only a reservation of possession during life, is not a will.¹¹ A definition of a will was given by Allison, P. J., to be "a legal declaration of a man's intentions of what he wills to be performed after his death."¹² Therefore the form in which he declares it is not material, so long as the law is complied with.¹³ The difference between a will and a deed is not so much in form as in effect. If it takes effect while the maker is living it is a deed; if only at his death, a will.¹⁴ A written order to pay one for services of a domestic nature is not a will.¹⁵ But a direction to his executors or administrators to pay one a certain sum after his death is and a later will may revoke it.¹⁶ If a testamentary intent is apparent on the face of the writing, it is not necessary to prove the extrinsic circumstances by two witnesses.¹⁷ An order to one to take charge of all the writer has and dispose of it as executor, is a will.¹⁸ An order on an envelope containing corporate bonds and stocks, signed and directing to whom to be given after his death is a valid codicil, where there was a prior will.¹⁹ The intention is the test, and every will must show a testamentary disposition.²⁰ A gift irrevocable accompanied by delivery cannot be called a will.²¹ To be testamentary it must necessarily be revocable in the lifetime of the donor.²² A testamentary writing containing a warranty carries no force in such warranty, nor can the executor be sued upon it;²³ so if it be in the form of a deed and does not take effect in the lifetime of the grantor, it is a will.²⁴ If the title is conveyed *in præsenti* it is otherwise;²⁵ nor will the reservation of the rents and profits to the grantor, change the character of the deed;²⁶ nor the fact that he has incidentally mentioned a

⁹ Beaumont's Est., 214 Pa. 445.

¹⁰ Heilig v. Heilig, 28 Supr. C. 396. (See 215 Pa. 256.)

¹¹ Anspach v. Lightner, 31 Supr. C. 218.

¹² Rorer's Will, 7 Phila. 524.

¹³ Patterson v. English, 71 Pa. 454, P. & L. Dig., vol. 23, col. 39750; Turner v. Scott, 51 Pa. 126; Frederick's Ap., 52 Pa. 338.

¹⁴ Brackbill's Est., 23 Lanc. L. R. 369; Knauff v. Fryer, 23 Montg. 110; Werley v. Werley, 2 Lehigh, 343; Fellbush v. Fellbush, 216 Pa. 141.

¹⁵ King v. McKinstry, 32 Supr. C. 34.

¹⁶ Bleyler's Est., 1 Berks Co. 85. Bland, P. J.

¹⁷ Diehl's Est., 11 Supr. C. 293.

¹⁸ Knowles' Est., 8 D. R. 153.

¹⁹ Harrison's Est., 196 Pa. 576. Similar order on a tin box, containing similar instructions was held to be a mere order to deliver to the attorney. Jacoby's Estate, 190 Pa. 382.

²⁰ Stein v. North, 3 Yeates, 324.

²¹ Mack's Ap., 68 Pa. 231; Book v. Book, 104 Pa. 240; P. & L. Dig., vol. 23, col. 29751.

²² Turner v. Scott, 51 Pa. 126.

²³ Scott v. Scott, 70 Pa. 244.

²⁴ Schad's Ap., 88 Pa. 111; Coulter v. Shelmadine, 204 Pa. 120.

²⁵ Hileman v. Bouslaugh, 13 Pa. 344; Greenfield's Est., 14 Pa. 489; Ritter's Ap., 59 Pa. 9; Fellow's Ap., 93 Pa. 470.

²⁶ Eckman v. Eckman, 68 Pa. 460; Cable v. Cable, 146 Pa. 451; Knowlson v. Fleming, 165 Pa. 10; Wilson v. Anderson, 186 Pa. 531; House's Est., 3 D. R. 359.

contingent remainder in it.²⁷ But an exception is made where a grantor conveys in trust for his own benefit during life and after his death to be distributed to the persons named. This is not an absolute parting from the control of the property and it is revocable by a later disposition.²⁸ But this case, being anomalous, does not support the proposition that "every voluntary trust conveyance of property which reserves to the grantor a life interest, with a direction to convey to others the principal of the estate at his death, is a testamentary instrument and therefore revocable by a subsequent will."²⁹ Chief Justice Woodward placed that case upon the apparent intention of the grantor. It has been held that a voluntary deed of trust of that character is revocable by the settler.³⁰ If the covenants are to be performed before the death of the grantor, it is a deed and not a will;³¹ so if certain provisions for the widow and heirs are charged upon the land conveyed;³² or if personal privileges not assignable are reserved.³³ A trust deed of personal property which passes the present title to the trustee is not testamentary though it reserves a power of revocation.³⁴ A will may be in the form of a letter of attorney.³⁵

2. Distinction between a gift and a will.

A gift outright passes the present title to the thing itself; a will retains control until the death of the donor. Whether a writing is a will or a contract must be determined from the nature of it rather than the form or name given it.³⁶ To be a will it must be revocable and if an interest vests under it which is irrevocable, although to be enjoyed at a future time it is a deed and not a will.³⁷ The delivery of the writing to the beneficiary does not affect its revocability.³⁸ A note or bond payable after death of the maker is not necessarily testamentary.³⁹ Where a check was given not payable until six months after the drawer's death, it was held to be testamentary and neither a gift *inter vivos* nor *donatio causa mortis*, without a direction to the executor to pay it.⁴⁰ A sealed paper which directs the executors to pay a certain sum for moneys advanced, etc., is not a will but an acknowledgment of a debt due which may be claimed out of the estate

²⁷ *Mattocks v. Brown*, 103 Pa. 16.

²⁸ *Frederick's Ap.*, 52 Pa. 338, explained in *Rick's Ap.*, 105 Pa. 528.

²⁹ *Dean, J.*, in *Wilson v. Anderson*, 186 Pa. 531. (See *Rick's Ap.*, 105 Pa. 528; *Chestnut, Etc., Bank v. Fidelity, Etc., Co.*, 186 Pa. 333.)

³⁰ *Gingrich's Ap.*, 1 Mona. 301; *Sturgeon v. Stevens*, 186 Pa. 350; *Pritchett's Est.*, 9 C. C. 600.

³¹ *Dreisbach v. Searfass*, 126 Pa. 32.

³² *Reiff v. Reiff*, 12 Montg. 26.

³³ *Nixon v. Frick Coke Co.*, 27 C. C. 150.

³⁴ *Lines v. Lines*, 142 Pa. 149.

³⁵ *Rose v. Quick*, 30 Pa. 225. (See *P. & L. Dig.*, vol. 23, cols. 39763-5, for further cases illustrating the distinction.)

³⁶ *Cawley's Est.*, 136 Pa. 628.

³⁷ *Book v. Book*, 104 Pa. 240.

³⁸ *Megary's Est.*, 206 Pa. 260; *Lippe's Est.*, 7 C. C. 288.

³⁹ *De Wald's Est.*, 13 Phila. 251; *Sunday's Est.*, 167 Pa. 30; *Brown's Est.*, 4 D. R. 587; *Mack's Ap.*, 68 Pa. 231; *Hummel's Est.*, 161 Pa. 215; *Wagoner's Est.*, 174 Pa. 558.

⁴⁰ *Postley's Est.*, 32 Pitts. L. J. 437.

as such.⁴¹ An unsigned bond is in no sense a will; ⁴² nor is an agreement to sell land, because not to be executed until after the death of vendor,⁴³ nor where partly executed by giving possession; the vendee taking only a devise as provided by a subsequent will.⁴⁴ But if the devisee has been put in possession and executed his part, it is a past contract performed, and not subject to revocation.⁴⁵ An executed contract in the lifetime of both parties cannot be construed into a will.⁴⁶ One who creates a trust for his children and names himself as trustee and has the bonds thus transferred to himself as trustee, gives effect to it at once and it is not a will.⁴⁷ But a present gift of all the maker's property reserving the use of it during life, the gift to take effect then, is a will.⁴⁸ A mere scrap of paper with a statement of a gift signed by the party is a will.⁴⁹ But the transfer of property for maintenance is not a will, but a contract executed.⁵⁰ If a voluntary parol trust, which equity would enforce is created, and it is executed so far that equity would not rescind it, there is no will.⁵¹

3. Donatio mortis causa.

This kind of gift being made in contemplation of death, that being the consideration, it is with the implied trust, that should the donor live, it will revert to him.¹ No further assent of the donor or the executor is necessary.² It has been held that, like a legacy, it shall not prevail against creditors.³ It must be accompanied with actual corporeal delivery,⁴ unless it be of such a nature that only a symbolic delivery can be made, as by delivering bills of sale or keys to a warehouse, trunk, etc.⁵ But a mere constructive delivery has been held insufficient.⁶ There must not only be a delivery but continuing possession.⁷

"A gift in consideration of death is where a man, in consideration of his mortality, doth give and deliver something to another, to be his in case the giver die; but if the giver do not make express mention of his death, they cannot be revoked, but take effect from the time of making the gift if the same be not fraudulent. And if a person deliver goods to be kept until he be dead and then to be disposed or dis-

⁴¹ Holt's Est., 39 Pitts. L. J. 335.

⁴² Hinkle v. Landis, 131 Pa. 573.

⁴³ Meck's Ap., 97 Pa. 313.

⁴⁴ Rowan's Ap., 25 Pa. 292.

⁴⁵ Tuit v. Smith, 137 Pa. 35; Smith v. Tuit, 127 Pa. 341.

⁴⁶ Conlan v. Conlan, 20 Supr. C. 45

⁴⁷ Dickerson's Ap., 115 Pa. 198.

⁴⁸ Kisecker's Est., 190 Pa. 476.

⁴⁹ Tozer v. Jackson, 164 Pa. 373; 154 Pa. 223.

⁵⁰ Wigle v. Wigle, 6 Watts, 522.

⁵¹ Dougherty v. Shillingsburg, 175 Pa. 56.

¹ 11 Viner's Abr. 176; Wells v. Tucker, 3 Binney, 370.

² Tate v. Hilbert, 2 Vesey, Jr., 120.

³ Thompson v. Hodgson, Strange, 777.

⁴ Ward v. Turner, 2 Vesey, 431, 442.

⁵ Wells v. Tucker, 3 Binney, 371, discussing the civil as well as the common law.

⁶ Ward v. Turner, 2 Vesey, 440.

⁷ Plumstead's Ap., 4 S. & R. 545.

tributed in pious uses, in this case the person is executor of those goods so to be by him distributed." ⁸

4. Donatio mortis causa and gift inter vivos.

"A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel, completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and irrevocable purpose into an executed and irrevocable contract. All gifts are necessarily *inter vivos*; for, a living donor and donee are indispensable to a valid donation; but when the gift is prompted by the belief of the donor that his death is impending, and is made as a provision for the donee, if death ensues, it is distinguished from the ordinary gift *inter vivos*, and called *donatio mortis causa*. But by whatever names called the elements necessary to a complete gift are not changed. There must be a purpose to give; this purpose must be expressed in words or signs; and it must be executed by the actual delivery of the thing given to the donee or some one for his use. In every valid gift a present title must vest in the donee, irrevocable in the ordinary case of a gift *inter vivos*, revocable only upon the recovery of the donor in gifts *mortis causa*." ⁹ In either case the donee is incompetent to testify as to what occurred prior to the death of the donor. ¹⁰

5. Will in form of a letter.

In Pennsylvania a writing in the form of a letter — if the *animus testandi* appears and it is signed at the end of the disposition, is a valid will, ¹¹ although the signature is by his mark witnessed by two. ¹² But unsigned letters cannot be probated. ¹³ Parol evidence is admissible to show that a letter written to an attorney was adopted by the writer as his will. ¹⁴ But the letter itself must be produced for probate and not another referring to it. ¹⁵ A letter written from prison directing a temporary provision to be made is not a will. ¹⁶

6. Wills by other forms of direction.

Where an alleged disposition by will is contained in an envelope the writing upon the envelope may be considered in connection with it. ¹⁷ But there must be a satisfactory showing for whom the disposition was made and the time and circumstances to admit it to probate. ¹⁸ An original draft not intended as a will but a memorandum

⁸ Coke on Litt. 111.

⁹ Williams, J., in Walsh's Ap., 122 Pa. 177.

¹⁰ Flanagan v. Nash, 185 Pa. 41.

¹¹ Knowles' Est., 8 D. R. 153; Knox's Est., 131 Pa. 220; Cromwell's Est., 14 D. R. 404.

¹² McGettigan v. Carr, 13 Lanc. L. R. 73.

¹³ Willing's Est., 212 Pa. 136.

¹⁴ Scott's Est., 147 Pa. 89.

¹⁵ Baer's Est., 11 D. R. 471.

¹⁶ Simcox's Est., 56 Pitts. L. J. 78.

¹⁷ Fosselman v. Elder, 98 Pa. 159; Harrison's Est., 196 Pa. 576.

¹⁸ Plumstead's Ap., 4 S. & R. 545; Jacoby's Est., 190 Pa. 382; Patterson v. English, 71 Pa. 454.

may be adopted by the maker as a will.¹⁹ The intention must appear to have been completed;²⁰ if it is not, there is no will.²¹ If the intention to direct is present, it matters not that it is written with a lead pencil and signed on the back of a gas bill.²² But mere memoranda accompanying a will complete in itself, though probated with it are not part of it.²³ The intention to dispose must be drawn from the four corners of the writing itself, it seems.²⁴ A writing in this form was held a legal will reducing a nuncupation to writing: "November 7, 1890. Nuncupation by word of mouth. My will was made on the above date; everything left to my dear wife, Mary E. Fouche; all my real and personal estate and everything I own at my death. William Fouche."²⁵ Under the charter act of the Western Saving Fund Society of February 8, 1847, P. L. 80, a valid will can be made by appointment entered on its books by a depositor, and if subsequent to a will it operates as a republication of it.²⁶ The same is true of the Philadelphia Saving Fund Society, by virtue of its charter, section 2, article 10, act of February 25, 1819, P. L. 32;²⁷ such appointment under the rules of the Employees' Fund of the Pennsylvania Railroad Company may be revocable by a later will, but it must be specifically revoked, general language being held insufficient.²⁸ "Wish" in a will may be mandatory and not merely precatory.²⁹ An endorsement made on a note requesting a deduction to be made after the death of the payee is testamentary and revoked by a subsequent will.³⁰ A paper signed in the following form is a will: "I give all my property to my husband and appoint him executor of this my will."³¹ A will with a diagram of lots devised does not pass a lot not included in the will itself.³²

7. Extrinsic evidence as to intent.

The law in Pennsylvania, following closely the principles of the common law which facilitate the giving of effect to everyone's intention to dispose of his property at his death, has always liberally favored wills; and a testamentary intent, if not clearly apparent from the writing itself has been shown by extrinsic evidence in aid of the purpose therein expressed.³³ "Testamentary intent is the very breath

¹⁹ Plate's Est., 9 C. C. 644.

²⁰ Murry v. Murry, 6 Watts, 353; Arndt v. Arndt, 1 S. & R. 256.

²¹ Barnet's Ap., 3 Rawle, 15.

²² Gaston's Est., 188 Pa. 374.

²³ Bowlby v. Thunder, 105 Pa. 173.

²⁴ Florance's Will, 2 Leg. Gaz. 316.

²⁵ Fouche's Est., 147 Pa. 395.

²⁶ Armstrong's Est., 2 C. C. 166.

²⁷ Knorr's Ap., 89 Pa. 93.

²⁸ Reiff's Est., 16 Supr. C. 80.

²⁹ Carey's Est., 14 D. R. 891. Penrose, J.

³⁰ Kohl's Est., 28 C. C. 552.

³¹ Berg's Est., 43 Pitts. L. J. 90. (For equally laconic wills, see Clingan v. Mitcheltree, 31 Pa. 25; Sullivan's Est., 130 Pa. 342.)

³² Houser v. Moore, 31 Pa. 346.

³³ Scott's Est., 147 Pa. 89; Carson's Ap., 59 Pa. 493; Patterson v. English, 71 Pa. 454; Wineland's Ap., 118 Pa. 37; Kisecker's Est., 190 Pa. 476; Lucas' Est., 35 C. C. 305; Wilson's Est., 55 Pitts. L. J. 11, 115.

of life of a will, and, of course, must be established by two witnesses.”
 * * * If the writing contains no such evidence of intention, it
 “must be proved *aliunde*” by the testimony of two witnesses.³⁴ The
 burden of proof is upon the proponent.³⁵ Whether or not a writing is a
 will, ordinarily is a question for the court, but where the circumstances
 were left to the jury along with it, the action of the court was not
 reviewed.³⁶ Because the material used is a lead pencil, it is no less
 a writing of testamentary power.³⁷ Writing on a slate is a method
 of making a will whose validity has puzzled the learned judges.³⁸ A
 will may be written on separate sheets of paper and be nicely adjusted
 into a component disposition;³⁹ and so detached writings may by refer-
 ence in the will to the same bring them in as part thereof.⁴⁰ A later
 will which revokes a former one may by reference preserve and re-
 publish bequests in the former though the testament of the first fails.⁴¹
 A will may direct that the laws of a foreign country shall prevail⁴²
 in carrying it out. But a will bequeathing a trunk and contents does
 not make a letter in it a component addendum to the will.⁴³ An un-
 delivered deed referred to in a will may be useful in its construction.⁴⁴
 In order to probate a writing as part of a will or a codicil to it, there
 must be a clear connection and identification.⁴⁵ Marginalia as index
 cannot be held to overcome or negate the plain terms within the body.⁴⁶

8. Conditional and joint wills.

A will may be made contingent upon the happening of a certain
 event;⁴⁷ and when so, before it can be probated, it must be proved that
 the contingency has happened.⁴⁸ Such conditional will does not re-
 voke a former one unless it becomes effective.⁴⁹

Persons may join in a will and it will be probated the same as a
 single will, with equal effect as to each person.⁵⁰ But where two
 join in a will giving the estate to the survivor it is not a joint will

³⁴ Bland, P. J., in Sunday's Est., 167 Pa. 30; P. & L. Dig., vol. 23, col. 39794.

³⁵ Scott's Est., 32 Pitts. L. J. 290.

³⁶ Tozer v. Jackson, 154 Pa. 223.

³⁷ Fuguet's Will, 11 Phila. 75; Myers v. Vanderbelt, 84 Pa. 510; Gas-
 ton's Est., 188 Pa. 374; Tomlinson's Est., 133 Pa. 245; Smith v. Beales,
 33 Supr. C. 570.

³⁸ Reed v. Woodward, 11 Phila. 541; Woodward's Will, 1 W. N. C. 177.

³⁹ Wikoff's Ap., 15 Pa. 281; Ginder v. Farnum, 10 Pa. 98; Grubb's
 Est., 174 Pa. 187.

⁴⁰ Baker's Ap., 107 Pa. 381; Butler's Will, 37 Pitts. L. J. 122.

⁴¹ Nelson's Est., 147 Pa. 160.

⁴² Reyles' Est., 5 D. R. 416.

⁴³ Magoohan's Ap., 117 Pa. 238.

⁴⁴ Thompson v. Lloyd, 49 Pa. 127. Woodward, C. J. Headley v. Ren-
 ner, 129 Pa. 542.

⁴⁵ Bright's Est., 212 Pa. 363.

⁴⁶ Hunt's Est., 133 Pa. 260.

⁴⁷ Hamilton's Est., 74 Pa. 69; Forquer's Est., 216 Pa. 331.

⁴⁸ Todd's Will, 2 W. & S. 145; Morrow's Ap., 116 Pa. 440.

⁴⁹ Hamilton's Est., 74 Pa. 69; Jeffries' Est., 18 Supr. C. 439; Whitaker's
 Est., 219 Pa. 646.

⁵⁰ Lowe's Ests., 35 Pitts. L. J. 181. Hawkins, J.

but alternative and the survivor was competent to revoke it after the death of one and make a new will.⁵¹

9. Testament distinguished from will.

"Although a testament and last will in some respects are both one thing, yet in other respects there is a diversity between them. For, as a last will being a general term, agreeth with every several kind of last will or testament; so testament, being generally taken *quasi testatio mentis*, differeth not from a last will; for any last will, be it a codicil, or other kind, may in that sense be termed a testament. But a testament taken strictly, it is understood to be that particular kind of last will wherein an executor is named. By which it appears, that every testament is a last will, but every last will is not a testament. In law most commonly, *ultima voluntas in scriptis* is used where lands and tenements are devised, and *testamentum* when it concerneth chattels."¹

10. Kinds of wills.

Quoting from Wentworth: "Now wills are of two kinds, or may be two ways made, viz.: either by writing or nuncupative; that is, by words not put in writing during the testator's life; for after the testator's death this verbal will must be reduced to writing, * * * and then it is as effectual and of as good validity as if it had been in writing in the testator's lifetime; and so doth the common law allow and approve thereof."²

11. Will without naming executor.

Where there is a will without naming an executor, the will may be proved as it is and an administrator appointed with the will annexed. "Therefore this mind and intention of the intestate being notified and made known to the judge, who is to commit administration, is usually annexed to the letters of administration."³

12. Lord Coke on making a will.

"The Lord Coke adviseth all who have lands to settle and assure them by advice of counsel in time of health, to which they may add such conditions or provisoes of revocations as they please. But if you please to devise lands by will,

1. Inform your counsel truly of the estates and tenures of your lands.

2. It is good to make it indented, and leave one part with a friend, lest it be suppressed.

3. Call credible witnesses to subscribe their names at time of publication.

4. If it may be, let it be written with one hand, and in one parchment or paper.

⁵¹ Cawley's Est., 136 Pa. 628. (See Donaldson's Est., 1 D. R. 235, as to a will mixed with contract. Vogel's Est., 44 Pitts. L. J. 80.)

¹ Coke on Litt. 111.

² Boudinot v. Bradford, 2 Yeates, 171. Revocation is a matter of intention, as held in this case.

³ Wentworth on Executors, p. 4.

5. Let the hand and seal of the devisor be set to it. [The sealing is not essential. Godol. Orph. Leg. 6.]

6. If it bee in several parts, let his hand and seal, and names of witnesses, be to each part.

7. If there be any interlining, or rasure, make a memorandum of it.

8. If you make any revocation of all or part, let it be by writing, with good advice. 3 Rep. 56. Butler and Baker's case.⁴

13. Competency to make a will.

Section 1 of the act of April 8, 1833, P. L. 249, provides:

"Every person of sound mind * * * may dispose by will of his or her real estate, whether such estate be held in fee simple, or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate."

14. Testator must be twenty-one years old.

Section 3 of the act of 1833, *supra*, provides:

"That no will shall be effectual unless the testator were, at the time of making the same, of the age of twenty-one years or upwards, at which age the testator may dispose of real as well as personal or mixed property, if in other respects competent to make a will."

15. Married women made competent.

The act of 1833, *supra*, excepted married women, but the seventh section of the act of April 11, 1848, P. L. 537, provided:

"Any married woman may dispose, by her last will and testament, of her separate property, real, personal or mixed, whether the same accrue to her before or during coverture: *Provided*, That the said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband."

Section 5 of the act of June 8, 1893, P. L. 344, further provides:

"Hereafter a married woman may dispose of her property, real and personal, by last will and testament, in writing signed by her or by her direction, or attested by her mark made by her or by her direction, at the end thereof in the same manner as if she were unmarried: *Provided*, That nothing in this act shall affect her husband's right as tenant by the curtesy, nor his right to take against the will, as provided by existing laws."

As to signature "at the end thereof," see Stinson's *Est. infra*.

16. Father may will custody of minor child, unmarried.

Section 4 of the act of 1833, *supra*, provides:

"Every person competent to make a will as aforesaid, being the father of any minor child unmarried, may devise the custody of such child, during his or her minority, or for any shorter period."

This right is limited to the father only.⁵ A testamentary guardian has not the right to exclude a guardian appointed by the Orphans' Court,⁶ but his right is superior to that of the mother as guardian for nurture, under the common law.⁷

⁴ Wentworth on Executors, p. 7.

⁵ Vanartsdalen v. Vanartsdalen, 14 Pa. 384.

⁶ Robinson v. Zollinger, 9 Watts, 169.

⁷ Comth. v. Hamilton, 1 Pitts. 412.

17. Tenant for life may will emblements and rents.

Section 5 of the act of 1833, *supra*, provides:

"The emblements of crops growing on lands held by a widow in dower, or by any other tenant for life, may be disposed of by will, as other personal estate, also rents and other periodical payments accruing to any such tenant for life, or to any other person entitled under the laws of this commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of the death of such tenant for life, or other person, be disposed of by will, in like manner."

18. Disposing memory.

"A lunatic having *lucida intervalla*, that is, some seasons of enjoying his right mind and freedom from his lunacy, may in those times of his right mind make a will and executors, else not; for even one, by age or sickness become *non sanæ memoriae*, is unable to dispose of lands or goods."⁸ "By law it is not sufficient that the testator be of memory, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, and that is such a memory which the law calleth sane and perfect memory."⁹

19. Manner of execution of will.

Section 6 of the act of 1833, *supra*, provides:

"Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect."

The act of January 27, 1848, P. L. 16, provided that, if in all other respects the execution of the will complied with the law, a will "to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects."

The signature "at the end thereof" has been held to be imperative;¹⁰ which means the actual logical end, regardless of the arrangement of the sheets of paper, or the writing upon them, and it need not be the last page, but may be an intermediate one;¹¹ or in a codicil it may be written transversely.¹² If a clause be added after the signature, it will be inoperative.¹³ A codicil is a part of a will and if it is signed at the end, it does not matter whether the will or part preceding

⁸ 4 Coke, 60 (a).

⁹ *White v. Driver*, n 84; 1 *Phillimore Ec. R.* *Clarke v. Cartwright*, 1 *Phillimore Ec. R.* 90.

¹⁰ *Hays v. Harden*, 6 Pa. 409; *Ginder v. Farnum*, 10 Pa. 98; *Wikoff's Ap.*, 15 Pa. 281; *Heise v. Heise*, 31 Pa. 246; *Baker's Ap.*, 107 Pa. 381; *Wineland's Ap.*, 118 Pa. 37; *Knox' Est.*, 131 Pa. 220; *Vernon v. Kirk*, 30 Pa. 218; *Morrow's Est.*, 204 Pa. 479.

¹¹ *Stinson's Est.*, 228 Pa. 475.

¹² *Swire's Est.*, 225 Pa. 188.

¹³ *Saunders v. Samarreg*, 205 Pa. 632.

was signed.¹⁴ But an unsigned codicil is of no force.¹⁵ If signed at any place before the testamentary end, i. e., the appointment of executor, if any, it cannot be probated under the act *supra*.¹⁶

If the paper is signed twice and the signature opposite the attestation has been erased, it is a cancellation of the will.¹⁷ Where the will is executed and the addition appointing executors is placed there at a later date, it will be held to be an unexecuted codicil which does not affect the will.¹⁸ The presumption, however, is that it was written at the same time,¹⁹ and must be overcome by proof. Matter which follows a will written in a "journal cash book," which has no relation to the disposition, is not a part of it and does not affect the execution.²⁰ Where there was no caveat against the probate, it is immaterial that the appointment of an executor followed the signature.²¹ When a letter, which is testamentary, is signed with the full name, and a codicil with the initials on proof of hand writing, it was held sufficient.²²

Said Ch. J. Gibson: "Signing at the end of a will was required by the statute to prevent evasion of its provisions that followed the English statute of frauds, which the judges held to be satisfied wherever the testator's name in his own handwriting, was found in the introductory or any other part of the instrument."²³ This requirement of the statute was for the purpose of avoiding the dangers of having mere memoranda or incomplete directions taken for the expression of final intention.²⁴

20. Signature by mark.

It is obvious that where a person cannot write his name for any reason, he may execute his will by making his mark, which must be duly witnessed.²⁵ This mark must be made in whatever form with testatorial intent,²⁶ and if decedent starts to sign but stops and says: "I can't sign it now," this negatives the intent.²⁷ If by reason of physical weakness the testator cannot hold the pen alone, he may be assisted in carrying out his intention.²⁸ The name is ancillary to the mark but by no means inseparable from or indispensable to it. At the common law it is the marksman's touch, not the subscription of the name in connection with it, which gives life to the instrument.²⁹ As

¹⁴ Pepper's Est., 148 Pa. 5.

¹⁵ Smith's Est., 9 C. C. 333.

¹⁶ Wineland's Ap., 118 Pa. 37; Funston's Est., 24 C. C. 135; Frazier's Est., 8 C. C. 306. (But see Teed's Est., 225 Pa. 633.)

¹⁷ Evans' Ap., 58 Pa. 238.

¹⁸ Baird's Est., 4 D. R. 123; Monroe's Est., 8 Lack. L. N. 306.

¹⁹ Morgan's Est., 12 D. R. 341. (See Freas' Est., 10 D. R. 333.)

²⁰ Beaumont's Est., 216 Pa. 350.

²¹ Hartmyer's Est., 25 Lanc. L. R. 14.

²² Simcox's Est., 56 Pitts. L. J. 78.

²³ Hays v. Harden, 6 Pa. 409.

²⁴ Baker's Ap., 107 Pa. 381; Vernon v. Kirk, 30 Pa. 218.

²⁵ Lees' Est., 5 C. C. 396; Long v. Zook, 13 Pa. 400; Burford v. Burford, 29 Pa. 221.

²⁶ Greenough v. Greenough, 11 Pa. 497.

²⁷ Plate's Est., 148 Pa. 55.

²⁸ Main v. Ryder, 84 Pa. 217.

²⁹ Gibson, C. J., in Long v. Zook, 13 Pa. 400.

to a blind person, who makes a will, it has been held that if there be no charge of fraud, the will need not be read in the presence of the attesting witnesses.³⁰ An express request to assist a palsied man to mark the signature need not be shown.³¹ Every presumption will be in favor of the proper signature.³² The California statute requires the signing of the will in the presence of subscribing witnesses, similar to the New York statute. The making of a mark is a valid signature under that statute.³³

21. Signature by another at testator's request.

If the testator has failed to sign his name himself, the fact that he was "prevented by the extremity of his last sickness" must be shown by two witnesses.¹ The request to another to sign it for him in his extremity is of equal necessity and must be shown;² and it must be signed in consequence of such request or it cannot be probated as his will.³ But where the will is completed, although written with a lead pencil, read over to testator and approved by him as his will, in the presence of witnesses, it may be probated without his signature, if he became unconscious at that time and unable to sign or request anyone to sign for him.⁴ If the testator lapses into unconsciousness before signing it cannot be said that it was signed in his presence, since his mind, which is the man according to Cicero, was withdrawn from its relations to the world.⁵ It is therefore necessary to this signing that he be conscious at the time that the act is done by his directions.⁶ This form has been held sufficient: Pearl Smith for Lizzie Franey, at her request,⁷ though doubtless it would be better form thus: Lizzie Franey by Pearl Smith, at her request or by her direction.⁸

22. Will in extremis, not signed.

Under the statute of 32d, Henry 8th, which required a will to be in writing to pass lands, it was held that a nuncupative will only related to chattels, and not even as to these, if the will was not executed.⁹ But, on the contrary, where the *animo disponendi* and the *animo testandi* were both present, as well as the witnesses, and the will fully

³⁰ Longchamp v. Fish, 2 New R. 415 (Eng.).

³¹ Vandruff v. Rinehart, 29 Pa. 232; Cozzen's Will, 61 Pa. 196; P. & L. Dig., vol. 23, col. 39824.

³² Burford v. Burford, 29 Pa. 221.

³³ Flannery's will, 24 Pa. 502.

¹ Grabill v. Barr, 5 Pa. 441; Greenough v. Greenough, 11 Pa. 489; Barr v. Grabill, 13 Pa. 396; Snyder v. Bull, 17 Pa. 54; Blocher v. Hostetter, 2 Grant, 288; Diehl v. Rodgers, 169 Pa. 316.

² Butler's Est., 223 Pa. 252; Ruoff's Ap., 26 Pa. 219.

³ Stricker v. Groves, 5 Wharton, 386. (See P. & L. Dig., vol. 23, col. 39826.)

⁴ Smith v. Beales, 33 Supr. C. 570; Aurand v. Wilt, 9 Pa. 54; Wall v. Wall, 123 Pa. 545; Showers v. Showers, 27 Pa. 435; P. & L. Dig., vol. 23, col. 39831.

⁵ Dunlop v. Dunlop, 10 Watts, 153. C. J. Gibson.

⁶ Baldwin's Est., 17 Phila. 458.

⁷ Vernon v. Kirk, 30 Pa. 218.

⁸ Bilger's Est., 28 C. C. 513. (See Quigney's Est., 3 Northam. 362.)

⁹ Matthews v. Warner, 4 Vesey, Jr., 186.

written, but as not yet signed, it may be shown that the signing was prevented by sudden death or sickness, or that the party *in extremis* acknowledged it to be his last will and testament.¹⁰

Under the clause of section 6 of the act of 1833, *supra*, relating to a will *in extremis*, it is necessary that the testator should have been prevented by his mortal illness not only from signing but also from requesting anyone to sign for him.¹¹

23. Publication.

In Pennsylvania publication is not a requisite to the validity of a will.¹² It is a private act and deed; nor is it necessary that the testator should have acknowledged it as a will or his last will and testament, as though he would record it. It is sufficient if he acknowledged it as his act;¹³ or acknowledges his signature.¹⁴ Even where the will devises real estate to charitable uses, wherein two witnesses must subscribe, it is not necessary to make known to them the contents or tell them that it is his will.¹⁵ The law, in this respect, differs from the laws of some other states.

24. Execution of will in New Jersey.

Section 1 of the act of March 12, 1851, P. L. 218, New Jersey, provides two ways of executing and proving a will.

1. It shall be in writing and shall be signed by the testator, which signature shall be made by the testator;

“Or”

2. It shall be in writing and “the making thereof acknowledged by him, and such writing declared to be his last will, in presence of two witnesses present at the same time, who shall subscribe thereto, as witnesses, in the presence of the testator.” If there is no proof that the testator himself signed it, the acknowledgment in the second clause is sufficient evidence that he did.¹⁶ The request of the testator to the witnesses to become such in attestation need not be proved. His acquiescence is sufficient when they are called in.¹⁷

A will signed by the testator and subscribed by a sufficient number of witnesses may be established by testimony *aliunde*, that the formalities which are necessary have been observed.¹⁸ The attestation clause is *prima facie* evidence of the facts stated in it and the instrument will

¹⁰ Montefiore v. Montefiore, 2 Addams' Rep. 354. Powell's Swinburne, p. 2, section 25.

¹¹ Ruoff's Ap., 26 Pa. 219; Showers v. Showers, 27 Pa. 485; Aurand v. Wilt, 9 Pa. 54; Blocher v. Hostetter, 2 Grant, 288; Smith v. Beales, 33 Supr. C. 570.

¹² Kisecker's Est., 190 Pa. 476.

¹³ Loy v. Kennedy, 1 W. & S. 396.

¹⁴ Lees' Est., 5 C. C. 396; Eyster v. Young, 3 Yeates, 511.

¹⁵ Comb's Ap., 105 Pa. 155.

¹⁶ Stevens v. Van Cleve, 4 Wash. C. C. 269.

¹⁷ Whitenack v. Stryker, 1 Gr. Ch. R. 9; Combs v. Jolly, 2 Gr. Ch. R. 625; Mundy v. Mundy, 2 McCarter, 290-4.

¹⁸ Allaire v. Allaire, 8 Vroom, 312, affirmed, 10 Vroom, 113; Mundy v. Mundy, 2 McCarter, 290.

not be rejected because the witnesses fail to remember the mode of its execution.¹⁹

If the attestation clause is perfect and shows on its face that all the forms of the statute have been complied with, and the subscribing witnesses, when called, admit their signatures, but through defects of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements.²⁰ It is presumed that all the formalities were complied with unless there be affirmative evidence given to disprove the statements of the attesting clause. * * * The signatures of the subscribing witnesses as well as of the testator may be proved if they are all dead or in foreign parts.²¹ But under the above act in New Jersey, a will to be valid must be signed by the testator and two witnesses in his presence, and if there is no attesting clause, it cannot be proved by the signatures, but the witnesses must depose to all the facts which the attesting clause would contain, if it were there. If all the witnesses are dead, the will cannot be proved.

25. Execution of wills in New York.

In New York infants may bequeath personalty by will,—males at the age of 18, females at the age of 16; but realty can only be willed by a person aged 21. A nuncupative will can be made only by a mariner at sea or a soldier in actual service. A will must be in writing and signed at the end thereof by the testator in the presence of two attesting witnesses, or acknowledged to have been made to each of such witnesses and declared by him at the time of subscribing or acknowledging to be his last will and testament, and at least two witnesses shall so sign the attestation which is in the following form: "Signed, sealed, published and declared by the said testator as and for his last will and testament, in our presence; who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses."

26. Execution of will in Ohio.

One must be of full age, sound mind and memory and under no restraint to make a valid will in Ohio. A written will cannot be revoked by a nuncupative one. As to personalty a verbal will made in testator's last illness, may be probated within six months after death, if declared in the presence of two competent disinterested persons and reduced to writing within ten days from the utterance. A devisee or legatee in the will may not be a witness to prove it, unless he relinquishes his devise or legacy. The form of attestation for a codicil is the same as for an original will and is as follows, in either case:

"Signed and acknowledged by said ——— as his last will and testament, in our presence, and signed by us at his request, in his presence."

Hebe Greiner,
James H. Littell.

¹⁹ *Compton v. Mitton*, 7 Halstead, 70-5; *Boylan Admrs. v. Meeker*, 4 Dutcher, 274-294.

²⁰ *Allaire v. Allaire*, 8 Vroom, 312 (10 Vroom, 113), affirmed.

²¹ *Allaire v. Allaire*, 8 Vroom, 312.

27. Execution of will in West Virginia.

In West Virginia a minor aged 18 may will personalty, but to devise or dispose of realty the testator must be twenty-one. A will must be probated and recorded in the county of the testator's residence; in the county where real estate devised is situated; in the county where he died or in the county wherein is property devised or bequeathed. All wills must be in writing and signed by the testator or someone for him in his presence and by his direction in such manner that it is evident that the name was intended for a signature, in the presence of two competent witnesses who must sign in his presence and in the presence of each other, unless the will be wholly written by the testator himself.

28. Execution of will in Maryland.

By the Maryland code every executor or other person exhibiting a will shall be examined on oath whether or not he knows of any other will or codicil and in what manner the will or codicil came into his hands. (S. 340.) Only a soldier or sailor can make a nuncupative will as to his personal effects. An executor cannot act until of full age, but administration *durante minoritate* will be granted. The age of majority in Maryland for making a will, as to real estate is, males 21; females 18. Wills as to personalty may be made by males over 14 and females over 12, as at the common law. Wills must be in writing, signed by the testator or someone for him, in his presence and by his express direction, attested and subscribed by two or more credible persons, as witnesses, also in his presence. All wills otherwise made cannot be probated.

29. Execution of will in Delaware.

In Delaware to make a will the person must be 21 years old. A will must be signed by the testator or someone by his direction and attested by two witnesses in the same manner as in Maryland. Nuncupative will of personalty to the sum of \$200 may be made.

CHAPTER XXIX.

WILLS — PROBATE.

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| <ol style="list-style-type: none"> 1. Proof of a will. 2. Proof of lost will. 3. Probate of a will. 4. Testator's knowledge of contents. 5. Execution and circumstances. 6. Register may compel production of will. 7. Form of petition for citation. 8. Form of citation. 9. Register may compel attendance of witnesses. 10. Form of subpoena to witnesses. 11. Power to issue commissions to take depositions. 12. Formal proof before register. 13. Form of proof of signature of deceased witness. 14. Form of proof of unsigned will. 15. Form of commission to take depositions. 16. Form of interrogatories. 17. Report of commissioner. 18. Form of decree of probate. | <ol style="list-style-type: none"> 19. Competency and credibility of witnesses. 20. Proof of hand writing of witnesses. 21. Proof of testator's signature. 22. Proof when will is unsigned. 23. Proof when signed by mark. 24. Alterations, erasures and interlineations. 25. Will of married woman. 26. Conclusiveness of probate. 27. Probate within three years. 28. Will to speak from the death of testator. 29. Record of probated will. 30. Copies of foreign wills, probate of. 31. Filing certified copy of will made in another state. 32. Exemplification of will to another county. 33. Probate after letters of administration issued. |
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1. Proof of a will.

Strictly speaking the proof of the due execution of the will is not "the probate," for this is the certificate of the proof by the register (ordinary, in England) with a copy of the will on parchment, attached, made out under seal and delivered to the executor.¹ The proof of a will is made by producing the will before the register, as well as the subscribing witnesses, if living and convenient, whose oaths are taken that they saw the testator subscribe the will and heard him declare and publish it as his last will and testament, and asked them to subscribe the same as witnesses thereto. It was the practice in England for the executor to have the will solemnly propounded by calling the witnesses to its proof in the presence of the widow, where there was one, and the next of kin.² If there be but one attesting witness living, or obtainable, there must be the testimony of one other person to the same effect; and if there were no attesting witnesses, or if they are all absent and not obtainable, witnesses to the handwriting of the testator as well as of the attesting witnesses is admissible.³

¹ 4 Burn's Ec. L. 205. (Before the English Will act of January 1, 1838.)

² Godolphin, 65; 3 Bacon's Abr. 39.

³ Twaites v. Smith, 1 Peere Williams, 12; 2 Blackstone's Com. 501;

The will being proven, is filed and recorded by the register in his office, and the probate is then made up and issued to the executor. In case the executor is abroad or infirm and cannot take the oath in the office of the register, his oath may be taken by commission issued by the register for that purpose,⁴ who under our statute has power to issue commissions or letters rogatory.⁵ In England, it may be noted, when the will had to do with real estate alone, it was provable in Chancery alone; if real and personal, in the Ecclesiastical or Spiritual Court.⁶

"It was not always so," says Wentworth. But the reason why the Spiritual Court was given jurisdiction was on account of "the piety and integrity which is presumed to be in those of that function having charge of souls. Indeed they are, as it seems to me, executors of the New Testament, or last will and testament of Jesus Christ, whereby great legacies and gifts are given to men, and pastors to be dispensed and distributed: Of which distributors it is required as St. Paul saith, 'That they be found faithful.'" From this let not one jot nor tittle be subtracted. For when a man makes his will it is in contemplation of death, that inevitable event. It is due that it be clothed with solemnity. "Naked came I into the world and naked go I out of it," saith the Scripture. So he who strips himself of his earthly goods, standing face to face with death is in no trifling spirit.

One probate sufficeth for all the executors. It is their badge of authority; "for, it shall be taken *reddendo singula singulis*."⁷ Both probate and refusal to probate relate to the death of the decedent, and the only way to prove a right to claim property under the will is by its probate.⁸

2. Proof of lost will.

It was held in England that where a will was lost, it might still be proved by the evidence of two competent witnesses who have read it and remember the contents and can depose to the tenor thereof.⁹ Or where it was destroyed in testator's lifetime (not by himself)¹⁰ or after his death.¹¹ Following English precedent, it was early held in Pennsylvania that the contents of a will in existence when decedent died, but afterwards lost might be proved by parol, after having laid the proper grounds for secondary evidence, viz.: its existence and its destruction or its loss and inability to discover it after diligent search

Beaumont v. Perkins, 1 Phillimore's Ec. R. 78; experts on hand-writing admitted in this case as some evidence.

⁴ 4 Burns' Ec. L. 208.

⁵ Section 9, act of 1832. (See *infra*.)

⁶ 11 Viner's Abr. 57, 60, 117; Habergain v. Vincent, 2 Vesey, Jr. 230.

⁷ 4 Burns' Ec. L. 209; Else v. Osborn, 1 Peere Williams, 388.

⁸ Rex v. Inhabitants of Netherfeal, 4 Durnford & East, 258. The same is true of real estate. Coulter v. Shelmadine, 204 Pa. 120; Toner v. Taggart, 5 Binney, 490; Tozer v. Jackson, 164 Pa. 373; McCay v. Clayton, 119 Pa. 133.

⁹ Legare v. Ash, 1 Bay's Rep. 464.

¹⁰ Trevelyan v. Trevelyan, 1 Phillimore's Ec. R. 149.

¹¹ Foster v. Foster, 1 Addams, Rep. 462; 2 Eng. Ec. Rep. 182. In this case the oldest son tore up the will and codicil, but the pieces were gathered and put together and the will probated and sustained. The costs were put upon the spoliator.

where it would naturally be, if in existence.¹² Having proved it in the same manner as a lost deed or record and its contents it may then be probated, the register preserving the evidence for use in case of appeal.¹³

Not only the existence and loss of such will must be proved by two witnesses, as in the case of an existing will, but they must be able to establish every fact necessary to its validity and to the dispositions made by it.¹⁴ The proof must be clear and satisfactory,¹⁵ especially so when the witnesses are in part interested.¹⁶ So, one who can only remember that there was a will but not the contents or what its provisions were, is not a very astute witness to prove it.¹⁷ When a will was last seen in the possession of the testator the presumption arises that he himself destroyed it, *animo revocandi*, particularly when his methodical and careful business habits are shown.¹⁸ In such case it requires the strictest proof and adherence to the rules of practice.¹⁹ The practice is outlined by Mestrezat, J., in a recent case:²⁰

In order to justify a verdict in favor of an alleged will which is not produced, the jury must find on sufficient evidence, the due execution of it, its contents substantially as set forth in the copy annexed to the precept for the issue and that the instrument was unrevoked at the death of the testator. The contents thereof cannot be shown until after its execution has been proven by two witnesses, and they must identify the paper as a copy of the will which they witnessed. If one of the witnesses fails to remember the contents of the will and the year or the season of the year when it was witnessed his testimony is of weak force and insufficient.

The presumption when a will was last seen in possession of the testator, is that he himself revoked or destroyed it,²¹ but this is rebuttable by proper evidence.²² There is also a presumption against fraud.²³ A mere suspicion of destruction will not justify the awarding of an issue.²⁴ The acts and declarations of the parties alleged to have destroyed it are admissible in evidence.²⁵ The existence of a will cannot be proven by the declarations of the deceased alone.²⁶ Where a testator knew that his will could not be found, some time before his death and did not make another, the presumption is he revoked it.²⁷

¹² Havard v. Davis, 2 Binney, 406.

¹³ Myers' Est., 5 D. R. 127.

¹⁴ Buechle's Est., 5 D. R. 127; Kevan v. Agnew, 57 Pitts. 148.

¹⁵ Buechle's Est., 3 D. R. 16.

¹⁶ Deaves' Est., 140 Pa. 242.

¹⁷ Fallon's Est., 9 Del. Co. 529.

¹⁸ Fallon's Est., 214 Pa. 584.

¹⁹ Lappe's Est., 215 Pa. 424.

²⁰ Michell v. Low, 213 Pa. 526.

²¹ Jones v. Murphy, 8 W. & S. 275; Smith's Est., 2 C. C. 626.

²² Foster's Ap., 87 Pa. 67; Gardner v. Gardner, 177 Pa. 218; Jones v. Murphy, 8 W. & S. 275; Gardner's Est., 164 Pa. 420.

²³ Stephenson's Est., 6 C. C. 628.

²⁴ Stewart's Est., 149 Pa. 111.

²⁵ Youndt v. Youndt, 3 Grant, 140; Gardner's Est., *supra*; Gardner v. Gardner, *supra*.

²⁶ Clark v. Morton, 5 Rawle, 235.

²⁷ Deaves' Est., 140 Pa. 242.

If the evidence of destruction is conflicting it is a proper case for the jury and their verdict will stand.²⁸

3. Probate of a will.

Section 6 of the act of April 8, 1833, P. L. 249, provides:

"Every will * * * shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect."

In Pennsylvania they need not be subscribing witnesses,²⁹ except where a devise of real estate to charity is made under the eleventh section of the act of April 26, 1855, P. L. 328, when they must be.³⁰ In other cases, the will may be proved by proving the signature of the testator by two witnesses.³¹ If there be subscribing witnesses they need not have seen the testator sign or make his mark.³² It is sufficient that they signed in his presence and at his request.³³ But if they sign in his absence the will must be proved as though it had not been witnessed.³⁴ Although the attestation be not in the usual form, if the witnesses testify that they were present at the time and saw the testator sign and heard him declare and publish it as his last will and testament, the proof is complete.³⁵ Our statute is more liberally construed than the English statute, in favor of the verity of a will.³⁶ It is not invalidated by the fact that one witness was not present nor requested to sign at the time of its execution. It may still be proved *aliunde*.³⁷ A defect in the execution is remedied by a duly executed codicil.³⁸ In Pennsylvania, it would be regarded as an impertinence for a subscribing witness to a will to inquire as to its contents.³⁹ It is enough for him to know that the testator made it by signing it and that he witnessed it as the act and deed of the testator,⁴⁰ although from blindness or other cause the testator was unable to read.⁴¹

4. Testator's knowledge of contents.

In the probate of the will, which has nothing to do with the question of whether or not the testator meant it or understood it, it is immaterial whether the will was read to him or not.¹ The law implies that

²⁸ *Gfeller v. Lappe*, 208 Pa. 48. (See also 211 Pa. 462, where a later will was proven to have existed and that the former will was a forgery.)

²⁹ *Hight v. Wilson*, 1 Dallas, 94; *Carson's Ap.*, 59 Pa. 493.

³⁰ *Phillips' Est.*, 1 D. R. 311; *Ralston's Est.*, 1 Chester Co. 482; *Sweitzer's Est.*, 142 Pa. 541; *Wood's Est.*, 209 Pa. 16; *Irvine's Est.*, 206 Pa. 1; *Paxson's Est.*, 221 Pa. 98; *Kessler's Est.*, 221 Pa. 314.

³¹ *Frew v. Clarke*, 80 Pa. 170; *Mellert's Ap.*, 13 W. N. C. 222; *Dunn's Est.*, 3 D. R. 248.

³² *Mealey's Will*, 11 Phila. 161.

³³ *Leckey v. Cunningham*, 56 Pa. 370.

³⁴ *Kirby's Est.*, 9 Kulp, 345.

³⁵ *Burford v. Burford*, 29 Pa. 229.

³⁶ *Miller v. McNeill*, 35 Pa. 217.

³⁷ *Scattergood v. Kirk*, 192 Pa. 263.

³⁸ *Walton's Est.*, 194 Pa. 528.

³⁹ *Lewis v. Lewis*, 6 S. & R. 489. *Duncan, J.*

⁴⁰ *Lees' Est.*, 5 C. C. 396; *Combs' Ap.*, 105 Pa. 155; *Beswick's Est.*, 13 D. R. 711; *Lillibridge's Est.*, 221 Pa. 5; *Morgan's Est.*, 219 Pa. 355.

⁴¹ *Hand's Est.*, 4 C. C. 446.

¹ *Hess' Ap.*, 43 Pa. 73; *Baxter's Ap.*, 7 Phila. 66.

he himself knew its contents, from the due execution of it.² Upon an issue *devisavit vel non*, the burden of proving that decedent did not know the contents and was imposed upon is on the contestant.³ It matters not that the witnesses did not hear the will read to him, that it was not written by him nor in the language he spoke, being a German.⁴

While two witnesses are required to prove the due execution, fraud or substitution may be shown by one witness⁵ but it requires clear and convincing proof to set aside a will.⁶

5. Execution and circumstances.

In admitting a will to probate it is important to ascertain the fact that the will was that of the decedent and not some other person. He must be clearly connected with it.⁷ Hence the witnesses must be able to identify him.⁸ But a will was identified by the acts of the testator in relation thereto.⁹ An issue *d. v. n.* will not be granted upon the signature unless there is a substantial dispute concerning it.¹⁰ The clear, unshaken testimony of the subscribing witnesses will not be overcome by the opinions of other witnesses that the signature is not that of the testator;¹¹ and even though these opinion venders are dubbed "experts," who make that a paying profession.¹² The testimony of the scrivener and one of the subscribing witnesses is for the jury.¹³ Where one of the witnesses admits his signature, but gets mentally tangled in his statements, the probate will stand when the other evidence is sufficient.¹⁴ Upon an issue as to forgery the jury may consider, not only the testimony of the witnesses but also the external appearance of the will, its contents and all the related circumstances.¹⁵ The declarations of the decedent are not in themselves enough to overcome the testimony of the subscribing witnesses to the execution.¹⁶ But they are evidence and entitled to due weight.¹⁷ The condition of decedent where he executed the will

² *Vernon v. Kirk*, 30 Pa. 218; *Dickinson v. Dickinson*, 61 Pa. 401; *Douglass' Est.*, 162 Pa. 567.

³ *Rees v. Stille*, 38 Pa. 138; *Frew v. Clarke*, 80 Pa. 170; *Masseth's Est.*, 213 Pa. 136.

⁴ *Hoshauer v. Hoshauer*, 26 Pa. 404; *Mealey's Will*, 11 Phila. 161; *P. & L. Dig.*, vol. 23, col. 39842.

⁵ *Lewis v. Lewis*, 6 S. & R. 489; *Combs' Ap.*, 105 Pa. 155.

⁶ *Boehm v. Kress*, 179 Pa. 386; *Lowe's Estates*, 35 Pitts. L. J. 181.

⁷ *McAndrew's Est.*, 206 Pa. 366.

⁸ *Irvin v. Deschamps*, 11 W. N. C. 365.

⁹ *Tomlinson's Est.*, 133 Pa. 245.

¹⁰ *Berg's Est.*, 173 Pa. 647; *McCrary's Est.*, 27 C. C. 335; *Masson's Est.*, 198 Pa. 636.

¹¹ *Malunney's Est.*, 203 Pa. 21, notwithstanding the act of May 15, 1895, *P. L.* 69; *Douglass' Est.*, 162 Pa. 567; *Perrett v. Perrett*, 49 Pitts. L. J. 79.

¹² *Givin v. Green*, 10 Phila. 99; *Perrett v. Perrett*, *supra*.

¹³ *McGeary v. McGeary*, 3 Atl. 22.

¹⁴ *Rice's Est.*, 173 Pa. 298; *Simcox's Est.*, 1 D. R. 653.

¹⁵ *Sheets v. Whitaker*, 14 Phila. 11; *Sharpless' Est.*, 134 Pa. 250.

¹⁶ *Swope v. Donnelly*, 190 Pa. 417.

¹⁷ *Lappe v. Gfeller*, 211 Pa. 462.

by mark, and whether the will was his voluntary act, are for the jury.¹⁸ That the will was executed on Sunday is immaterial, the making of a will being a solemn and not a worldly employment.¹⁹ A will should not be set aside on the testimony of experts²⁰ in guessing at handwriting, alone. Where there is no valid will, it cannot be subsequently validated by decree in equity, or act of Assembly.²¹ The law when the will was executed is the law which governs it, and not what the law was when testator died.²²

6. Register may compel production of will.

Section 7 of the act of March 15, 1832, P. L. 135, provides:

"The register having jurisdiction as aforesaid, shall, at the instance of any person interested, issue a citation to any person having the possession or control of a testamentary writing, alleged to be the last will and testament of a decedent, requiring him to produce and deposit the same in his office for probate, and if such person shall conceal or withhold such writing, during the space of fifteen days, after being personally served with a citation, issued in the manner and form aforesaid, he shall be liable to an indictment as for a misdemeanor, or to an action for damages by the person aggrieved."

The remedy for disobedience is fixed in this section and must be followed.¹

7. Form of petition for citation to produce will.

To Orlando L. Nichols, Register of Wills of Lycoming County.

The petition of Samuel Reed respectfully represents that he is a son of Robert Reed, late of Lycoming township, said county, deceased, and that said decedent left a will, as your petitioner is informed and verily believes and that the same is in the possession of Michael Sanders, Esq., of said township, and he refuses to deliver the same, or to appear and make proof of the same as he is in duty bound.

Your petitioner therefore prays you to issue a citation to the said Michael Sanders, Esq., to appear on a day certain before you to make probate of the will of the said decedent, that letters thereon may be duly issued to the person therein named as executor.

And he will ever pray, etc.

Samuel Reed.

(Affidavit to the truth.)

Before issuing a citation, however, the register will take due proof of the day, hour and place of the death of the decedent. [See form under administrators.]

¹⁸ Robinson v. Robinson, 203 Pa. 400; Albright's Est., 17 York, 109.

¹⁹ Beitenman's Ap., 55 Pa. 183.

²⁰ Fuller's Est., 222 Pa. 182; Keil's Est., 215 Pa. 464. (See Schooley v. Crawford, 9 Lack. Jur. 295, 79.)

²¹ Alter's Ap., 67 Pa. 34; Camp v. Stark, 81 * Pa. 235.

²² Taylor v. Mitchell, 57 Pa. 209; Packer v. Packer, 179 Pa. 580; Bradford's Will, 1 Parsons, 153; Kurtz v. Saylor, 20 Pa. 205; Jack v. Shoenberger, 22 Pa. 416.

¹ Nichols' Est., 3 Supr. C. 484; Prentzell's Est., 11 Phila. 34; McDonald's Est., 14 Phila. 253.

8. Form of citation to produce a will.

The Commonwealth of Pennsylvania.

Lycoming County, ss.

To Michael Sanders, Esq., greeting:

Whereas, Orlando L. Nichols, Esq., register of the probate of wills and granting letters of administration, in and for the County of Lycoming, hath received information from Samuel Reed that Robert Reed, late of said county, Pennsylvania, lately died, having first made his last will and testament in writing, and thereof appointed ——— to be the executor. You and each of you are hereby cited to be and appear before me, Orlando L. Nichols, Esq., register for the probate of wills and granting letters of administration, in and for said county, at my office in the city of Williamsport, on ———, the ——— day of ———, A.D. 19 —, at 10 o'clock A.M. of said day, then and there to make probate of said will (if any exists) [and to take out letters testamentary thereon, according to law, or renounce your right and title to the said executorship,] that administration with the will of the said Robert Reed, deceased, annexed, may be committed to such person or persons as may be entitled thereto.

Given under the hand of the said Orlando L. Nichols, Esq., and the seal of the said office, at Williamsport, the ——— day of ———, A.D. 19 —.

[Seal.]

Orlando L. Nichols,
Register.

9. Register may compel attendance of witnesses.

Section 8 of the act of March 15, 1832, P. L. 135, provides:

"Whenever a testamentary writing shall be offered for probate, before any register having jurisdiction thereof, such register shall have power to issue a citation to any person whose name may be subscribed thereto as a witness, or who may be alleged to him to be otherwise capable of proving the due execution of such testamentary writing, such person being within the proper county, or within thirty miles of the office of such register, commanding him, under a penalty of three hundred dollars, to appear before him at the office of the register of the county, on a day certain, not less than five days from the service of such citation, and depose and testify what he may know concerning the execution of such writing; and if such person, being cited and summoned as aforesaid, shall refuse or neglect to appear as commanded, the register shall have power to issue an attachment against such witness to compel his appearance, or the party aggrieved may have an action against him to recover the said penalty, in the manner now allowable by law, in cases of subpoenas issued to witnesses by the Court of Common Pleas."

The above confers the only power a register has to compel attendance, and it is limited to such witnesses as can prove the document.²

10. Form of subpoena to witnesses.

Lycoming County, ss.

The Commonwealth of Pennsylvania, to ——— ———, greeting:
[Seal.] We command you, that, laying aside all business and ex-

² Burns' Will, 11 Phila. 35.

cuses whatsoever, you be and appear in your proper person before Orlando L. Nichols, register of wills, at his office, in the courthouse, city of Williamsport, in said county, on —, the — day of —, A.D. 19 —, at 10 o'clock in the forenoon, to testify all and singular those things which you shall know in a certain matter now pending in the matter of the proof of the alleged will of Robert Reed, late of our county, deceased. And hereof fail not, under a penalty of one hundred pounds.

Witness Orlando L. Nichols, register of wills, at Williamsport, the — day of —, in the year of our Lord one thousand nine hundred and —.

Orlando L. Nichols,
Register.

11. Power to issue commissions to take depositions.

Section 9 of the act of 1832, *supra*, provides:

"On the application of any person interested, every register shall have power to issue commissions to take the depositions of witnesses in other counties or states, or foreign countries, in all cases within his jurisdiction, upon interrogatories filed in his office."

Such commission must be under seal, though in one case where it was executed without the seal, the certified copy under seal was held to authenticate.³ As to commissions abroad and letters rogatory, see Vol. I, "Depositions."

12. Formal proof before register.

When a paper is produced before the register alleged to be a will, if no objections are made or *caveat*⁴ is filed, and the subscribing witnesses are produced, the register will take proof of the day, hour and place of the death of the testator. He will then take the oath or affirmation of the subscribing witnesses in the following form:

Register's Office, Williamsport, Pa., June 5, 19 —.

Lycoming County, ss.

This day before me — — Esq., register of wills in and for the county aforesaid, personally came, Stephen Smith and Lucy Sallade, the subscribing witnesses to the above and foregoing last will and testament of John Sallade, late of — said county, and State of Pennsylvania, deceased, who being by me duly sworn according to law, do say that they were present and saw the testator John Sallade sign his name to the foregoing instrument of writing and heard him there and then declare and publish the same as his last will and testament, and that at the time of so doing he was of sound mind, memory and understanding, to the best of their knowledge and belief and that they did sign their names as subscribing witnesses in the presence of each other and in the presence and at the request of the testator.

Sworn to, etc.

Stephen Smith,
Lucy Sallade.

³ Loy v. Kennedy, 1 W. & S. 396.

⁴ *Caveat* — that he take heed — derived from Chancery — where it is used for any form of caution or warning.

If the testator's name was signed by another, the proof will be varied to show that he was at the time incapable of signing it himself and requested another to sign the same for him, stating the circumstances.

13. Form of proof of signature of deceased witness.

If one or both of the subscribing witnesses be dead and the signatures must be proved, the following form has been used:

Clinton County, ss.

This day, ———, 19 —, before me Thomas Shearer, Esq., register of wills, in and for the county aforesaid, came John Brady of the township of Lamar, said county, who being duly sworn according to law, says that he was well acquainted with Christian Barner, late a resident of said county, one of the subscribing witnesses to the last will and testament of Jonathan Shafer, late of said county, deceased; that he is familiar with the handwriting of said Christian Barner, having frequently seen him write his name [and such other facts as show his opportunity to know the handwriting of deceased witness]; that the said Christian Barner is now dead; that he has carefully examined the said signature as witness to the will of said Jonathan Shafer, dated ——— day of ———, A.D. 19 —, and verily believes and says that it is in the handwriting of said Christian Barner.

Sworn to, etc.

John Brady.

14. Form of proof of unsigned will in extremis.

This form was used and approved in *Smith v. Beale*, 33 Superior Court, 570:

“County of Adams, ss.

Before me the subscriber, register of wills in and for the county aforesaid, personally came Cyrus G. Beales, Boreas F. Reed and Jacob T. Myers, all of the borough of York Springs, Adams County, Penna., who, being severally sworn, do depose and say that they have been long and intimately acquainted with Thomas D. Reed, the above-named testator, of York Springs, Adams County; that on the morning of May 10, 1883, about 8 o'clock, Thomas D. Reed, being in the extremity of his last illness, requested Cyrus G. Beale to write his will in the presence of said Boreas F. Reed and Jacob T. Myers, as the witnesses thereto, whom he requested for that purpose; that said Cyrus G. Beales got paper and pencil and wrote down the foregoing as the will of said Thomas D. Reed, as he dictated it just as it is therein written; that after it was thus written it was read by Cyrus G. Beales to said Thomas D. Reed, and he was asked whether that was what he wanted, and he said yes; and while it was being prepared for signing by said Thomas D. Reed, he became unconscious and in a dying condition, wholly insensible, and died in less than half an hour; that he was prevented by the extremity of his last illness and dying condition from signing the same or giving directions that the same should be signed for him; that at the time of dictating his will as aforesaid, and afterwards when the same was read to him and he answered that that was right, it was what he wanted, the said Thomas D. Reed was of sound and disposing mind, memory and understanding, and knew all about the disposition of his property which he had

made; that when the will was ready he was not only incapable of signing the will but also of directing it to be done by another for him; that this will was made in his own dwelling house where he had resided for many years immediately preceding his death; that his death occurred yesterday morning, May 10, 1883, about 9 o'clock; that the dictation of the foregoing will and the reducing of it to writing and the reading of it to Thomas D. Reed and his answer that it was all right, it was what he wanted, was all in the presence of the undersigned Boreas F. Reed and Jacob T. Myers, as witnesses, and that said testator was then fully conscious of what he was doing, but suddenly became insensible and in a dying condition, and wholly incapable of signing it or directing it to be signed.⁵

Cyrus G. Beales,
Boreas F. Reed,
Jacob T. Myers.

Sworn and subscribed to the truth of the foregoing probate and affidavit before me this 11th day of May, A.D. 1883.

Jere Salybaugh, Register.

15. Form of commission to take depositions of absent or infirm witnesses.

It may so happen that the witnesses are far removed or so aged and infirm that they cannot attend at the office of the register. In such cases their depositions may be taken. Following is a form of commission for the purpose:

Commonwealth of Pennsylvania,

County of Wayne, ss.

To Forrest Nolan Magee, Esq., Commonwealth Building,
[Seal.] 1201 Chestnut street, Phila., Pa., greeting:

Know ye, that in confidence of your prudence and fidelity, we have appointed you a commissioner, and by these presents do authorize and empower you, the said Forrest Nolan Magee, to examine William E. Knowles and Jennie Wynne, both residing in the city of Philadelphia aforesaid, as witnesses, in a cause pending before the register of wills, in and for the said county of Wayne, in the matter of proving the last will and testament of Liscetta Mott, late a resident of the said city of Philadelphia, deceased, to which the said William E. Knowles and Jennie Wynne were the subscribing witnesses, on the part of the proponent, on oath upon the interrogatories annexed to this commission, and to take and certify the depositions of the said subscribing witnesses and return the same according to the directions hereto annexed.

In testimony whereof we have caused the seal of the register to be hereunto affixed, this — day of —, A.D. 19 —.

Register of Wills.

The original will must be attached to the commission for the purposes of identification and testimony.

⁵ Whoever prepared this "probate" had a comprehensive grasp of all the requisite elements. The attorney for the proponent was W. C. Sheely, Esq.

16. Form of interrogatories.

Interrogatories to be propounded to William E. Knowles and Jennie Wynne, as subscribing witnesses to be examined in support of the last will and testament of Liscetta Mott, late a resident of the city of Philadelphia, deceased:

First Interrogatory.—What is your name, age and occupation, and where do you reside?

Second Interrogatory.—Were you acquainted with Liscetta Mott, deceased? State how long and how intimately you were acquainted with her?

Third Interrogatory.—Look at the instrument in writing hereunto annexed, bearing date of the — day of —, A. D. 19—, purporting to be the last will and testament of Liscetta Mott, deceased, and say whether or not you were present at the time of the execution of the same? If, so, when and where? State particularly what took place at the time of the execution of the said instrument, who was present, what was done and said, and by whom done and said.

Fourth Interrogatory.—What was the condition of the said Liscetta Mott, regarding the soundness or unsoundness of her mind at the time the said instrument was executed?

Fifth Interrogatory.—What was Liscetta Mott's age on or about the — day of —, A. D. 19—?

Sixth Interrogatory.—Was any undue influence or restraint used by any person at the time of the execution of the said instrument?

Seventh Interrogatory.—Do you know of any other matter or thing relating to the execution of the said instrument of writing, or the competency of the said Liscetta Mott to execute the same? If so, state the same as fully and particularly as if you had been specifically questioned concerning it.

The foregoing interrogatories submitted and allowed.

Register of Wills.

Date — —, 19—.

17. Report of commissioner.

The commissioner will take the answers formally, under oath, to each interrogatory, saying: In answer to the first interrogatory deponent says: and so on, to the end.⁶

His certificate to be returned with his commission and the will attached is as follows:

To — —, Esq., Register of Wills of the County of Wayne, State of Pennsylvania.

In the matter of the proof of the last will and testament of Liscetta Mott, deceased.

Depositions of William E. Knowles and Jennie Wynne, subscribing witnesses to said will, and examined in support of the same.

Taken and reduced to writing by and sworn to and subscribed before Forrest Nolan Magee, Esq., Commissioner, on the — day of

⁶ See Commissions, etc., vol. 1, Johnson.

— A. D. 19—, in reply to the interrogatories appended to said will and commission.

Forrest Nolan Magee,
Commissioner.

No. 1201, Chestnut St.,
Philadelphia, Pa.

Date — —, 19—.

[The depositions follow.]

18. Form of decree of probate.

Following is the form of decree of probate:

And now, to-wit, — day of — A. D. 19—, having considered the testimony offered in this case and filed the same of record, I do adjudge the foregoing writing to be duly proved as the last will and testament of said Liscetta Mott, now deceased, and as such I do enter the same of record according to law.

— —,
Register.

19. Competency and credibility of witnesses.

Before proceeding further with the steps of practice, it is in order to consider matters concerning the proof of a will; and first of the witnesses. Since the act of May 23, 1887, P. L. 158, as well as before it, under the act of April 15, 1869, P. L. 30, a beneficiary who is also named as executor, is competent to prove the will.⁷ If a witness stultifies himself so that his credibility is destroyed the will may be proved by proving the handwriting of the testator.⁸ The proof by two witnesses to the execution of the will has been modified some. The rule is that where there are two witnesses each must testify to all the facts requisite to make complete proof that the will was executed.⁹ If there be but one witness and circumstances completely corroborative and equivalent to another witness, the will is so proved.¹⁰ The circumstances as well as the deposition must be comprehensive of all the facts necessary¹¹ and must refer to the disposition itself.¹² But they must conjoin with respect to the same writing.¹³ Alterations after execution must be proved to have been made and published, by two witnesses.¹⁴ If there be more than two subscribing witnesses, it is unnecessary to produce them all, two being sufficient

⁷ Patterson v. Shrader, 12 W. N. C. 429; Bowen v. Goranplo, 73 Pa. 357; Frew v. Clarke, 80 Pa. 170. (See P. & L. Dig., vol. 23, col. 39860, for cases on competency.)

⁸ Kirby's Est., 9 Kulp, 345.

⁹ Hock v. Hock, 6 S. & R. 47; Derr v. Greenawalt, 76 Pa. 239; Simrell's Est., 154 Pa. 604; Fallon's Est., 9 Del. Co. 529; P. & L. Dig., vol. 23, col. 39863.

¹⁰ Boudinot v. Bradford, 2 Yeates, 170; Eyser v. Young, 3 Yeates, 511; Jones v. Murphy, 8 W. & S. 275; Carson's Ap., 59 Pa. 493; Rogers' Est., 57 Pitts. L. J. 29.

¹¹ Derr v. Greenawalt, 76 Pa. 239; Evans' Will, 1 Lack. Jur. 13.

¹² Fallon's Est., 9 Del. Co. 529.

¹³ Reynolds v. Reynolds, 16 S. & R. 82; Plate's Est., 9 C. C. 644; Rice's Est., 173 Pa. 298.

¹⁴ Simrell's Est., 154 Pa. 604; Charles v. Huber, 78 Pa. 448; P. & L. Dig., vol. 23, col. 39866.

in Pennsylvania¹⁵ and a majority of the states, although some still follow the common law rule as to real estate, requiring three witnesses in such case.

20. Proof of handwriting of witnesses.

A will in Pennsylvania shall not fail because the subscribing witnesses are dead, which is not an unusual occurrence. At the common law an ancient document after the lapse of thirty years from its making proves itself because the parties will be presumed to be dead.¹⁶ So the fact being established that the witnesses are dead, proof may be offered of their hand writing.¹⁷ The same rule is applied where a witness is beyond the jurisdiction and the grasp of process;¹⁸ also where, after due and diligent inquiry his whereabouts remain unknown;¹⁹ or being known, he refuses to testify.²⁰ Thus proof of the signature of the witness proves everything that the witness could have proved as to the formal execution of the will.²¹

21. Proof of testator's signature.

A will may be proved in Pennsylvania without the subscribing witnesses, if for any reason they fail to prove it.²² It may be proved by other witnesses who were present at the execution, or who are familiar with the testator's hand writing,²³ although the body of the will be not in his hand writing.²⁴

22. Proof when will is unsigned.

If the will is not signed by the testator nor by any one for him by his direction, two witnesses must depose not only that the decedent was unable to sign himself, but by reason of his extremity he was prevented from directing any one to sign for him.²⁵

23. Proof when signed by mark.

To prove a signature by mark it is essential that the witness should have been present and seen testator make his mark;²⁶ or if he has

¹⁵ Fox v. Evans, 3 Yeates, 506; Rees v. Stille, 38 Pa. 138. Manifestly in this work only the leading cases can be cited, for the citation of all the reported cases makes a volume of nearly 900 pages — vol. 23, P. & L. Dig. of Dec. and vols. 2 and 4, C. R. A., which see.

¹⁶ Shaller v. Brand, 6 Binney, 435.

¹⁷ Hays v. Harden, 6 Pa. 409; Barker v. McFerran, 26 Pa. 211; Sheets v. Whitaker, 14 Phila. 11; P. & L. Dig., vol. 23, col. 39873.

¹⁸ Engles v. Bruington, 4 Yeates, 345.

¹⁹ Givin v. Green, 10 Phila. 99.

²⁰ Sheets v. Whitaker, 14 Phila. 11.

²¹ Whiteside's Est., 4 C. C. 216; Barker v. McFerran, 26 Pa. 211; Kirk v. Carr, 54 Pa. 285.

²² Hight v. Wilson, 1 Dallas, 94.

²³ Winpenny's Ap., 8 W. N. C. 415; Irvin v. Deschamps, 11 W. N. C. 365; Miller v. Carothers, 6 S. & R. 215.

²⁴ Frew v. Clarke, 80 Pa. 170.

²⁵ Cavett's Ap., 8 W. & S. 21; Grabill v. Barr, 5 Pa. 441; Asay v. Hoover, 5 Pa. 21; Kirk v. Carr, 54 Pa. 285; Smith v. Beales, 33 Supr. C. 570. (See form, *supra*, par. 14.)

²⁶ Shinkle v. Crock, 17 Pa. 159.

not seen him make it, to be able to testify that the testator acknowledged making it, to witness.²⁷

24. Alterations, erasures and interlineations.

There is nothing more natural than the matter now in consideration. Therefore the presumption is that alterations, by erasure or interlineation, were made before execution,²⁸ and proof of a will by proof of the handwriting of a witness effects proof of the will as altered.²⁹ This rule, however, does not obtain where the alterations were made some time after, by the testator himself or some other person.³⁰ Alterations by codicils do not come within the rule above stated.³¹ If the alterations are made by a third person, and by authority of the testator, the facts must be proved by two witnesses.³² If the alterations are made by the testator, in the presence of the subscribing witnesses, it is not a revocation³³ and the will so altered may be proved.³⁴

25. Will of married woman.

The act of June 3, 1887, P. L. 332 (section 5), which enabled a married woman to make a will of her separate estate the same as if she were *feme sole*, was held to be constitutional.¹ It placed her exactly on the same footing as a man and not any more favorably.² A married woman, although incompetent to make a valid will in the state of her domicil, may make a valid will as to real estate in Pennsylvania, if made agreeably to our laws.³

A habitual drunkard not being civilly dead, may make a will which will be *prima facie* valid.⁴

26. Conclusiveness of probate.

Section 7 of the act of April 22, 1856, P. L. 532, as amended by the act of June 25, 1895, P. L. 305, provided that the probate of a will shall be conclusive as to real estate, unless within three years it is controverted by *caveat* and action at law. This has been held to apply to all persons, whether infants, *femes covert* or persons *non compos mentis*.⁵ And it is equally so as to personalty, whether a *caveat* is pending or not.⁶ The register, acting as a judicial officer

²⁷ Dunn's Est., 3 D. R. 248; Carson's Ap., 59 Pa. 493.

²⁸ Wikoff's Ap., 15 Pa. 281.

²⁹ Charles v. Huber, 78 Pa. 448; Shaver v. McCarthy, 110 Pa. 339. *Contra*, Oberdorf's Est., 2 Lack. L. N. 43.

³⁰ Whitehill's Will, 1 Lanc. Bar, No. 33; Glassen's Est., 16 Phila. 219; Fuguet's Will, 11 Phila. 75; Smith's Est., 2 C. C. 626.

³¹ Morrow's Est., No. 1, 204 Pa. 479; Linnard's Ap., 93 Pa. 313.

³² Derr v. Greenawalt, 76 Pa. 239; Simrell's Est., 154 Pa. 604.

³³ Dixon's Ap., 55 Pa. 424.

³⁴ Ramsey's Est., 2 D. R. 425.

¹ Grubb's Est., 174 Pa. 187; Audenried's Est., 4 C. C. 128.

² Knox's Est., 131 Pa. 220; Berg's Est., 173 Pa. 647.

³ Martin's Est., 1 D. R. 167.

⁴ Leckey v. Cunningham, 56 Pa. 370.

⁵ Cochran v. Young, 104 Pa. 333; Broe v. Boyle, 108 Pa. 76; McCay v. Clayton, 119 Pa. 133; Wall v. Wall, 123 Pa. 545; Smith v. Beales, 33 Supr. C. 570; Stobert v. Smith, 189 Pa. 240.

⁶ Nichol's Est., 174 Pa. 405.

in these premises, his decree cannot be collaterally attacked.⁷ After the time for appeal has passed, the production of a later will cannot affect the probate of the first⁸ and the existence of the later will cannot be inquired of collaterally.⁹ It is conclusive as to the appointment of an executor.¹⁰ The register's judicial power ends with the probate and he cannot revoke the letters when once granted.¹¹ The limitation of three years is computed from the date of the decree and not the refusal to open it.¹² After the limitation has run, the title of the devisee cannot be challenged on the ground that the will was made by one under age.¹³ An appeal stops the running of the limitation.¹⁴ It has been said that the old distinction between probate in common form and in solemn form does not exist in Pennsylvania,¹⁵ and therefore notice of the probate is not requisite.¹⁶ On any question within the register's jurisdiction on the probate, the decree cannot be attacked collaterally.¹⁷ The fraud for which it may be attacked is not fraud in obtaining the will, but in procuring the decree.¹⁸ If a codicil be probated the day after the will is probated it will be considered as a part of the will.¹⁹ After three years the probate is conclusive against all the world.²⁰ The "caveat" means the warning to the register that the probate is contested, and "action at law," does not mean ejectment, but an appeal to the Common Pleas from the Orphans' Court.²¹ The proceeding may be by appeal without *caveat*.²² A decree by the register against the probate of an alleged will is equally conclusive.²³ When there is an appeal to the Supreme Court, the final judgment of the highest court ends the controversy.²⁴ The refusal to probate because of want of proper proof is not conclusive when proper proof is offered to the register.²⁵ If a general verdict and judgment are reached on the averment of undue influence they cannot be attacked collaterally by attempting to show a later will.²⁶ The decree of probate is conclusive, if unappealed from, although defective on its face and cannot be inquired of col-

⁷ Loy v. Kennedy, 1 W. & S. 396; Holliday v. Ward, 19 Pa. 485; Freas' Est., 10 D. R. 333; Chew's Est., 2 Parsons, 153, except for want of jurisdiction, Shoenberger's Est., 139 Pa. 132.

⁸ Cochran v. Young, 104 Pa. 333; Shepard's Est., 170 Pa. 323.

⁹ Irwin v. Hanthorn, 1 Supr. C. 149.

¹⁰ Miller's Est., 216 Pa. 247.

¹¹ Hoopes' Est., 185 Pa. 167; Mathews v. Biddell, 8 Supr. C. 112; Beaty's Est., 193 Pa. 304; Miller's Est., 159 Pa. 562.

¹² Miller's Est., 159 Pa. 562; Hoopes' Est., 185 Pa. 167.

¹³ Stout v. Young, 217 Pa. 427.

¹⁴ Lappe's Est., 52 Pitts. L. J. 157.

¹⁵ Keisler's Est., 12 D. R. 232; Well's Est., 7 C. C. 354.

¹⁶ Whitaker's Est., 14 Phila. 275.

¹⁷ Wettach v. Horn, 201 Pa. 201.

¹⁸ Wells' Est., 7 C. C. 354.

¹⁹ Bracken's Est., 138 Pa. 104.

²⁰ Wilson v. Gaston, 92 Pa. 207; Young v. Fager, 200 Pa. 329; Warfield v. Fox, 53 Pa. 382; Folmar's Ap., 68 Pa. 482.

²¹ Simrell's Est., 2 Lack. Jur. 405; McCort's Ap., 98 Pa. 33.

²² Marshall's Will, 41 Pitts. L. J. 241.

²³ Lant's Ap., 95 Pa. 279; McCay v. Clayton, 119 Pa. 133.

²⁴ Shermer's Ap., 44 Pa. 396.

²⁵ Dubreuil's Will, 8 Phila. 596.

²⁶ Rudy v. Ulrich, 69 Pa. 177.

laterally;²⁷ and on appeal it is *prima facie* evidence.²⁸ Notwithstanding the probate of a will its effect is for the court and in construing it matters *dehors* may be considered in aid of the application of it;²⁹ as in cases of gifts to charities.³⁰ The exemplification of a probated will by the register is evidence of the will and it need not be produced in an action of ejectment.³¹

27. Probate within three years.

The act of April 1, 1909, P. L. 79, provides:

"That where the last will of any decedent shall not have been offered for probate within three years from the date of the death of the testator, the same shall be void and of no effect against a *bona fide* conveyance or mortgage of the real or personal estate of said decedent, duly recorded before the date of the offering of said will for probate: *Provided*, That this act shall not take effect as to wills which would be sooner affected, until the expiration of one year from the date of its passage."

28. Will to speak from the death of testator.

Section 1 of the act of June 4, 1879, P. L. 88, supplementary to the act of 1833, provides:

"That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

29. Record of probated will.

Section 17 of the act of March 15, 1832, P. L. 135, provides:

"All original wills, after probate, and the copies of all original wills produced under the provisions of this act, shall be recorded and filed by the register of the respective county, and shall remain in his office, except when required to be had before some higher tribunal by certiorari or otherwise, and if removed for such cause they shall be returned in due course to the office where they belong, and the copies of all such and of the probates thereof, under the public seals of the courts or offices where the same may have been or shall be so taken or granted respectively, except copies of probates of such wills and testaments as shall appear to be annulled, disproved or revoked, shall be adjudged and are hereby enacted to be matter of record, and good evidence to prove the gift or devise thereby made."

The act of February 27, 1872, P. L. 173, provided that wills in other than the English language, shall be translated and recorded in Berks County, and a copy of the will in English be annexed to letters testamentary. This provision was adopted because, at that time, many

²⁷ Holliday v. Ward, 19 Pa. 485; Thompson v. Thompson, 9 Pa. 234.

²⁸ Davies v. Morris, 17 Pa. 205. (See P. & L. Dig., vol. 23, col. 40217; Amberson's Est., 204 Pa. 397.

²⁹ Hegarty's Ap., 75 Pa. 503; Craft's Est., 164 Pa. 520; Owens v. Haines, 199 Pa. 137.

³⁰ Phillips' Est., 1 D. R. 311; Evans' Est., 12 D. R. 694; Hupfield's Est., 5 Phila. 219.

³¹ Kenyon v. Stewart, 44 Pa. 179; Logan v. Watt, 5 S. & R. 212.

citizens were literate principally in the German language, in which they wrote as well as conversed.

The act of the register in admitting a will to probate is judicial, and cannot be controverted in a collateral proceeding.³² But if on the face of the record the register had no jurisdiction, no lapse of time will give his act validity.³³ A register of another county cannot set aside the probate on the ground that testator was nonresident.³⁴ A formal decree of probate is not essential, the issuing of letters testamentary and the minute thereof being sufficient evidence that the will was probated.³⁵ But no register who comprehends his duty now, omits making record of the probate.

30. Copies of foreign wills, duly authenticated, may be probated.

Section 12 of the act of March 15, 1832, P. L. 135, provides:

"Copies of wills and testaments proved in any other state or country, according to the laws thereof, and duly authenticated, may be offered for probate, before any register having jurisdiction, and proceedings thereon may be had with the same effect, so far as the granting of letters testamentary, or of administration with the will annexed, as upon the originals, and if the executor or other person producing any such copy shall produce also therewith a copy of the record of the proceedings for the probate of the original thereof, and of the letters testamentary, or other authority to administer, issued thereon, attested by the person having power to receive the probate of such original, in the place where it was proved, with the seal of office, if there be one annexed, together with the certificate of the chief judge or presiding magistrate of the state, country, county or district where such original was proved, that the same appears to have been duly proved, and to be of force, and that the attestation is in due form, such copies and proceedings shall be deemed sufficient proof, unless the contrary be shown, for the granting of letters testamentary, or of administration with the will annexed, as the case may require, without the production or examination of the witnesses attesting such will."

If no contest is begun within three years the probate of a foreign will is conclusive as to real estate, under the act of 1895, *supra*.¹ Whilst the course ordinarily is to probate the will in the domicil of the testator, according to the laws of that domicil, a will made abroad and not so probated may be probated originally in Pennsylvania, if the bulk of the estate is in this state and especially so in respect to realty,² and although the personalty was administered upon in another state.³ So if a will be made abroad (France) not accord-

³² Holliday v. Ward, 19 Pa. 485; Lovett's Exr. v. Mathews, 24 Pa. 330; McCort's Est., 12 Lanc. Bar, 127; Wilson v. Gaston, 92 Pa. 207; McCay v. Clayton, 119 Pa. 133.

³³ Wall v. Wall, 123 Pa. 545.

³⁴ Shoenberger's Est., 27 W. N. C. 129.

³⁵ Lovett v. Mathews, 24 Pa. 330.

¹ Opp v. Chess, 204 Pa. 401.

² Brown's Est., 2 D. R. 730.

³ Butler's Will, 37 Pitts. L. J. 122.

ing to the laws of Pennsylvania, but a codicil appears which is, the probate of the will alone will be revoked and the will and codicil probated together as one will.⁴ The will of a resident of Pennsylvania made in Ireland and probated there, may be probated here by a copy proved by the subscribing witnesses in the county of his domicile here.⁵ As to personalty, in order to sustain the grant of letters on a will made in another state, and probated here, it is held that the will must be executed according to the law of the domicile.⁶ The court will not collaterally inquire into the probate of a will in another state,⁷ but give the record full faith and credit.⁸ The judges of the Court of Common Pleas have no authority under the act of June 17, 1839, P. L. 678, to revise the judicial act of the register in probating a will made in Paris, upon the evidence by commission, with a view to correct alleged errors in the translation and retranslation.⁹ In adjudicating upon a foreign will the register is not required to enter a formal decree. His admission of it to the records creates a presumption that he passed upon it judicially.¹⁰ But to create this presumption he must make a record of some kind, his endorsement upon the paper itself being insufficient to give notice to any one besides the person holding it.¹¹ As personal property has no situs but is movable,¹² ancillary letters to those granted in another state may be taken out in the county where the principal part of the goods and estate of the decedent shall be, even though they consist of securities brought here by the executor.¹³

31. Filing of certified copy of will made in another state — Effect.

Section 1 of the act of May 20, 1891, P. L. 98, repealing the acts of May 22, 1878, P. L. 98 and May 28, 1885, P. L. 24, provides:

"All deeds and conveyances of lands within this commonwealth heretofore made and executed, and duly recorded in the county where the lands therein conveyed lie, under the authority of any last will and testament, by the executor or executors thereof, or trustee or trustees named in said will, and having power therein to convey real estate, the said will having been duly proved and letters testamentary granted as prescribed by the laws of the state of which the testator was a citizen at the time of his death, shall, upon the recording of a copy of said last will, duly certified as prescribed by the acts of congress,¹⁴ in the office of the register of wills in the

⁴ Pepper's Est., 148 Pa. 5. English cases followed, and Hood's Est., 21 Pa. 106, distinguished.

⁵ McDonald's Est., 130 Pa. 480; McKeown's Est., 10 D. R. 332; Roberts' Est., 17 D. R. 453.

⁶ Flannery's Will, 24 Pa. 502; Pretto's Will, 4 Phila. 380.

⁷ Lovett v. Mathews, 24 Pa. 330.

⁸ Hoysradt v. Tionesta Gas Co., 194 Pa. 251; P. & L. Dig., vol. 23, col. 40198; Rhome v. Morris, 31 Supr. C. 254,

⁹ Coleman's Ap., 163 Pa. 334.

¹⁰ Opp v. Chess, 204 Pa. 401; Holliday v. Ward, 19 Pa. 485. Black, C. J.

¹¹ Guthrie v. Kerr, 85 Pa. 303.

¹² Stokely's Est., 19 Pa. 482.

¹³ Viosca's Est., 197 Pa. 280.

¹⁴ Act of 1790, vol. 1. Johnson, p. 447, par. 17.

county where the lands conveyed lie, be held to have the same force and effect to pass and convey the estate that was in the testator at the time of his decease, and intended to be conveyed by the deed or conveyance as if such will had been duly proved and letters testamentary thereon granted within this commonwealth: *Provided*, That all such deeds or conveyances shall be in such form and drawn in such manner as to convey the estate intended to be conveyed, either by the laws of this commonwealth, or by the laws of the state of the testator's domicil, and shall have been duly acknowledged as prescribed by existing laws of this commonwealth: *And provided*, That nothing herein contained shall affect the rights of the parties to any suit now pending."

32. Exemplification of will to another county.

Section 1 of the act of April 23, 1889, P. L. 48, provides:

"In any case in which a last will and testament shall have been duly proved before the register of wills for any county of this commonwealth, and shall relate to real estate in any county thereof, the probate of which said will has become conclusive respecting real estate, either by lapse of time, or by judgment of a proper court having jurisdiction, it shall be lawful to take from the office of such register, an exemplification of said will and of the probate thereof, duly certified by such register, under his seal of office, to be a full and perfect copy of the same, and to file the said exemplification in the office of the register of wills of any county in which any of the real estate owned by the testator may be, which said register shall forthwith record the said exemplification. And the record of such exemplification shall be, and is hereby declared to be, as valid and effectual in law as the original will after probate, or its duly certified copy, or its record, would be, for all purposes of vesting title, of evidence and of notice. [For forms of exemplifications of the record, see *supra*.]

33. Probate after letters of administration.

In case letters of administration have been granted, and a will is discovered the register may upon the petition of the administratrix who is named as executrix in the will, permit the surrender of the letters and take formal proof of the will and issue letters thereon.¹⁵ But where a will has been probated and letters *c. t. a.* have been granted, he has no power to revoke the probate, upon an allegation of a later will.¹⁶ Pending an issue *d. v. n.* the register cannot probate an earlier will.¹⁷ The remedy of parties is by appeal.¹⁸ If while letters of administration are in force a debtor of the decedent pays the administrator, his debt is discharged although a will is subsequently probated and letters *c. t. a.* are issued.¹⁹

¹⁵ Kern's Est., 212 Pa. 57; Agnew's Ap., 37 Pa. 467; Buechle's Est., 3 D. R. 16.

¹⁶ McArthur's Est., 26 Pitts. L. J. 57.

¹⁷ Hantz v. Hull, 2 Binney, 511.

¹⁸ Auberle's Est., 50 Pitts. L. J. 186; Lappe's Est., 52 Pitts. L. J. 157; Keisler's Est., 12 D. R. 232; Shaeffer v. Eichart, 10 C. C. 360.

¹⁹ Zeigler v. Storey, 220 Pa. 471.

CHAPTER XXX.

CODICILS.

1. Origin of codicils as trusts.
2. Codicils in England.
3. Form of a codicil.
4. Office of a codicil in Pennsylvania.
5. Republication of will by codicil.

1. Origin of codicils as trusts.

A codicil¹ was of Roman origin, infrequent before the reign of Augustus and first introduced by Lucius Lentullus, the author of trusts, while dying in Africa.² By his codicil he created the Emperor trustee, who was advised by the sages of the law, among them Trebatius, whose opinion was of the highest authority, that a codicil was most convenient, because when a man could not make a testament he could make a codicil, which required less solemnity. This was adopted by Labeo, a lawyer of great eminence, and thenceforth codicils were legal. But the codicil of the Romans was different from what it has become filtered through English law. It might precede a will; now it is an addendum or amendment of a will. Its office was to create a trust and the thing so left could be demanded by the *fidei-commissary*, as the trustee was termed. The heir could not be disinherited by a codicil, just the contrary of its present office. Justinian declared that "A man may make many codicils and they require no solemnity."³

2. Codicils in England.

In England a different use was created for a codicil which was defined:

"A just sentence of our will, concerning that which anyone would have to be performed after his death, without the appointing of an executor." By force of the last words it differs from a testament which cannot be without constituting an executor. It is made a part of the will and to be probated and construed with it, when it appears to have been made later in time than the will itself to which it is claimed to be codiciliary. When two codicils are found and it cannot be determined which was first and which last and the same thing is given to different persons they ought to divide."⁴

It was there held that codicils, however numerous are effectual, if not inconsistent with each other;⁵ and each codicil amounts to a republication of the will itself with the additional bequests.⁶ So it

¹ Codicillus — a diminutive codex or book.

² Justinian, Lib. 2, Titulus 25.

³ Sec. 3, Lib. 2, Tit. 25.

⁴ Wentworth on Ex., p. 59 n.

⁵ Willet v. Sandford, 1 Vesey, 187.

⁶ Beckford v. Parnecot, Cro. Eliz. 493; Arney v. Miller, 2 Atkyns, 599.

was held in an old case⁷ where a testator, when he made his will had a son named Robert and also a grandson so named. His son having died, he afterwards republished his will by codicil and it was held that the grandson took under the designation of son.

3. Form of a codicil.

Following is a form of a codicil:

Be it known unto all men by these presents, that whereas I, James D. Reed of the City of Williamsport, Lycoming County, Pa., have made and declared my last will and testament in writing, bearing date — — —, A. D. — — —, I, the said James D. Reed, by this present codicil do confirm and ratify my said last will and testament, and do give and bequeath to David Reed and Florence Reed of said city, etc. [giving the bequest]. And my will and intention are that this codicil be adjudged and executed as a part of my said last will and testament; and that all things herein contained and mentioned be faithfully and truly performed and as fully and amply in every respect, as if the same were so declared and set down in my said last will and testament.

In witness whereof, I, the said James D. Reed, have hereunto set my hand [and seal, where the law requires it] this — — day of — — A. D. 19—.

Witnesses, { — — —
— — —,

James D. Reed.

4. Office of codicil in Pennsylvania.

In Pennsylvania a codicil is an addition to or amendment of a will, whether written on the same sheet of paper or on different sheets, and all should be probated together as one instrument.⁸ If the will is being contested the codicil cannot be separately probated.⁹ If the will has been probated when the codicil is discovered, the practice as laid down by Hawkins, J., is to open the probate and then probate both together.¹⁰ If the will cannot be found to which it applies, it cannot be probated.¹¹ A later will may republish bequests in the first without appointing the same executors.¹² It is the office of the codicil to change or modify the provisions in a will, by whatever name it is called.¹³ If it is complete in itself, it is immaterial that the original will is destroyed.¹⁴ A supplemental writing not intended to take effect after the death of the maker is neither a will nor a codicil and cannot be probated as such.¹⁵

⁷ Strode v. Berager, 2 Levinz, 243.

⁸ Pepper's Est., 148 Pa. 5.

⁹ Pepper's Est., 148 Pa. 5.

¹⁰ Jacoby's Est., 45 Pitts. L. J. 17. (But see Bradford's Will, 1 Parsons, 153; Zug's Est., 57 Pitts. L. J. 176.)

¹¹ Hiller's Est., 9 Kulp, 64.

¹² Nelson's Est., 147 Pa. 160.

¹³ Cousinery's Est., 13 D. R. 224; Carter's Est., 2 D. R. 578; Auberle's Est., 50 Pitts. L. J. 186; Lowe's Estates, 35 Pitts. L. J. 181.

¹⁴ Smith's Est., 2 C. C. 626.

¹⁵ Bright's Est., 212 Pa. 363.

5. Republication of will by codicil.

All the judges agree that a codicil republishes and re-adopts the will, except in so far as it is altered and is not the making of a new will.¹⁶ It also re-affirms all previous codicils not revoked by it, and all that is retained, is declared as of the date of the last codicil.¹⁷ The making of a codicil to a will in which there was a conditional bequest, does not dispense with the condition unless it expressly does so.¹⁸ The will need not be present when the codicil is made in order to operate as a republication,¹⁹ and if there were any defects in the execution of the will, due execution of the codicil cures them;²⁰ as, also, a defect in a codicil may be remedied by due execution of a later one.²¹ Being a part of the will and "the end thereof," its proper execution relates back over the entire will.²² A will by statute speaks from the death of a testator but its status as an instrument dates from the execution of the last codicil.²³ The last codicil republishes not only the will but all the other codicils,²⁴ but it must be construed in harmony with the intentions of the testator.²⁵ The republication by a later codicil expressly affirming the former codicil does not republish the will except as amended by the codicils.²⁶ The act of July 12, 1897, P. L. 256, did not affect a will made prior to it, but amended by codicil after its passage.²⁷ There is a distinction between an intermediate will and an intermediate codicil. So the making of a codicil to a prior will revokes the intermediate will, and a testator may by apt words revoke not only an intermediate will but a codicil, by a codicil without physical annexation. His intention as expressed in the last codiciliary disposition controls.²⁸ A codicil may expressly revoke all provisions made in the will in favor of the heir,²⁹ but it will not be held to have revoked the gifts to the residuary legatees in the will unless it does so by express intention. The court will not imply it.³⁰ If a codicil be annexed to a revoked will it annuls the revocation.³¹ The revival of a former will by codicil is given due effect.³²

¹⁶ Harrison's Est. Hanna, P. J.; 10 D. R. 45; affirmed in 18 Supr. C. and 202 Pa. 331.

¹⁷ Dobbins' Est., No. 2, 221 Pa. 259.

¹⁸ Heller's Est., 16 D. R. 306.

¹⁹ Wikoff's Ap., 15 Pa. 281.

²⁰ Whitesides' Est., 4 C. C. 216.

²¹ Walton's Est., 194 Pa. 528.

²² Pepper's Est., 148 Pa. 5; Porter v. Turner, 3 S. & R. 108.

²³ De Haven's Est., 207 Pa. 147-152; Leonard's Est., 10 C. C. 437; Neff's Ap., 48 Pa. 501; Eastwick's Est., 13 Phila. 350; Coale v. Smith, 4 Pa. 376.

²⁴ Girard, Etc., Co. v. Ashburner, 18 Phila. 643.

²⁵ Snodgrass' Est., 24 Pitts. L. J. 37; Walls v. Walls, 182 Pa. 226.

²⁶ Lee's Est., 16 Supr. C. 627; 18 Supr. C. 513.

²⁷ Harrison's Est., 10 D. R. 45; 18 Supr. C. 588; 202 Pa. 331.

²⁸ Rice, P. J., in Lee's Est., 18 Supr. C. 513, affirming 16 Supr. C. 627.

²⁹ Walls v. Walls, 182 Pa. 226.

³⁰ Smith's Est., 25 Pitts. L. J. 100.

³¹ Lewis v. Lewis, 2 W. & S. 455.

³² Bradish v. McClellan, 100 Pa. 607.

CHAPTER XXXI.

NUNCUPATIVE WILLS.

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|---|--|
| 1. Nature of. | 4. Conditions of nuncupation. |
| 2. Manner of making will. | 5. Form of nuncupative will, written down. |
| 3. No testimony not reduced to writing to be received after six months. | 6. Form of probate. |
| | 7. Form of affidavit. |

1. Nuncupative will — Nature of.

A nuncupative will is a verbal one, "by word of mouth," in popular phrase, and relates wholly to the disposition of personalty. Our statute follows closely the statute of 29th Charles II, section 23, chapter 3, as to declaration in the presence of witnesses and time. By that statute three witnesses were required and the declarations must be reduced to writing within six days. Our statute authorizes proof by two or more witnesses and the words spoken must be reduced to writing within six days or it cannot be probated after six months. The term is derived from *nuncupo*—I declare.

2. Manner of making will.

It was provided by section 7 of the act of April 8, 1833, P. L. 249: "That personal estate may be bequeathed by a nuncupative will, under the following restrictions:

I. Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will, except where such person shall be surprised by sickness being from his own house, and shall die before returning thereto.

II. Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest did bid the persons present, or some of them to bear witness that such was his will, or to that effect; and in all cases the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will."

Section 8 provided that "any mariner being at sea or any soldier being in actual military service, may dispose of his movables, wages and personal estate as he might have done before the making of this act."

Section 17 also contains a proviso excluding a person whose domicil is out of this commonwealth.

This is so because personal estate must be distributed in accordance with the law of the domicil of decedent, and if a will is void by the domiciliary law, it is void here.¹ In this it differs from a will devising realty, which must be according to the law of the *situs* of the

¹ *Desesbets v. Berquier*, 1 Binney, 336.

realty.² The domicil is defined to be that place where a person has fixed his habitation without a present intention to remove from it. There must be both residence and an intention to make the place of residence a home. *Prima facie* only is residence domicil. To change the domicil there must be an actual removal with such intention.³ But although a will of personalty may be void under the law of the state where made, if the testator has removed to Pennsylvania and it complies with the law of his domicil at his death, it is valid.⁴

"Domicil of origin must be presumed to continue until another sole domicil has been acquired by actual residence, coupled with the intention of abandoning the domicil of origin. This change must be *animo et facto*, and the burden of proof is upon the party who asserts the change."⁵

3. No testimony not reduced to writing, to be received after six months.

Section 11 of the act of March 15, 1832, P. L. 137, provides:

"No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the pretended testamentary words, unless the said testimony, or the substance thereof were committed to writing within six days after the making of such will."

The manner of committing such will to writing requires something more than a letter announcing the person's death and what he said. It should also show that decedent requested the bystanders to bear witness to the fact that such was his will.⁶ All the requisites of the law must be complied with.⁷

4. Conditions of nuncupation.

Nuncupation is founded in necessity. The conditions which authorize a valid disposition of goods and personal effects without writing it are last illness and a situation which deprives the person making it, of an opportunity to make a written will.⁸ It must be made to appear that the nuncupation was made in the last sickness of the testator and that by reason of the near approach of death there was neither time nor opportunity for the testator to execute the will in writing.⁹ What circumstances constitute a condition in

² Flannery's Will, 24 Pa. 502; De Roux v. Girard's Ex., 112 Fed. R. 89.

³ Carey's Ap., 75 Pa. 201.

⁴ Beaumont's Est., 216 Pa. 350. The will in this case begins with the testator's lucky numbers and is doubtless the most unique one on record.

⁵ Sterrett, C. J., in Price v. Price, 156 Pa. 617, citing Hood's Est., 21 Pa. 106; Pfoutz v. Crawford, 36 Pa. 421; Reed's Ap., 71 Pa. 378; Hindman's Ap., 85 Pa. 466; Follweiler v. Lutz, 112 Pa. 107, *inter alia*.

⁶ Taylor's Ap., 47 Pa. 31.

⁷ Megary's Est., 25 Supr. C. 243.

⁸ Yarnall's will, 4 Rawle. 46; Boyer v. Frick, 4 W. & S. 357; Werkheiser v. Werkheiser, 6 W. & S. 184; Porter's Ap., 10 Pa. 254; Conaughton's Will, 1 D. R. 309; Haus v. Palmer, 21 Pa. 296; Conaughton's Will, 1 D. R. 309.

⁹ Mestrezat, J., in Mellor v. Smyth, 220 Pa. 169; Bippus' Est., 15 D. R. 469.

extremis may depend upon the mental as well as the physical state of the person.¹⁰ All the conditions must be present at the time, last illness, extremity, want of ability or opportunity to put it in writing and the mind and intent to nuncupate;¹¹ so is the *rogatio testium*, calling those who are present to witness that it is his will, an absolute requisite to a valid nuncupation, under the law, where the value of the things bequeathed exceeds \$100.¹² So, also, is the reduction of the declarations to writing, within six days after they were made by the decedent, when offered for probate after six months.

This cannot be done in a general and fragmentary way by writing a letter. It should be done in a formal and detailed manner.¹³ The two witnesses who must be present at the same time that the declarations were made, must each prove every essential.¹⁴ A married woman is competent to make such a will, and her husband is a competent witness.¹⁵ A soldier who is not in actual service cannot make such a will, except by complying with all the requisites of the law as above stated¹⁶ but if actually in the field, a letter written may constitute a will.¹⁷

5. Form of nuncupative will, written down.

The law prescribes no special form for writing a nuncupative will down after the death of the nuncupator *in extremis*. It is sufficient if a memorandum be made and signed by the witnesses. The law makes this much necessary where it is sought to probate it after six months from the nuncupation. Since memory sometimes fails in details, it may be best in every case to commit what was said to writing, whilst it is yet fresh in mind. The following form is a mere suggestion:

Phila., Pa., March 1, 1911.

We, James Gay and Alice Mauck, were both at the — hospital, on — street, Phila., this day [or, if earlier, state the date] just before the death of J. B. Garver of —, occurred, he having been stricken with mortal illness, a few hours previous, at his hotel where he customarily resided on Filbert street, said city, and removed therefrom to said hospital.

He, being mortally ill and unable in his extremity to execute a writing, did then and there call upon both of us to be witness to his will in these words, or to their effect, to-wit:

I want my gold watch to go to my brother James; my money in the Girard National bank to my mother, Mary Garver, who lives at Mountville, Lancaster County, Pa.; my trotting horse to my brother

¹⁰ Wiley's Est., 187 Pa. 82; Megary's Est., 25 Supr. C. 243; Meisenhelter's Will, 15 Phila. 651.

¹¹ Megary's Est., 25 Supr. C. 243; Porter's Ap., 10 Pa. 254; Wiley's Est., 187 Pa. 82; Rutts' Est., 200 Pa. 549; Mahan's Est., 52 Pitts. L. J. 5.

¹² Wiley's Est., 187 Pa. 82; Rutts' Est., 200 Pa. 549; Meisenhelter's Will, 15 Phila. 651; Yarnall's Will, 4 Rawle, 46.

¹³ Taylor's Ap., 47 Pa. 31.

¹⁴ Haus v. Palmer, 21 Pa. 296; Yarnall's Will, 4 Rawle, 46.

¹⁵ Mahan's Est., 52 Pitts. L. J. 5.

¹⁶ Smith's Will, 6 Phila. 104.

¹⁷ Linsenbiger v. Gourley, 56 Pa. 166.

Henry; my other personal property all to you, Alice Mauck. This is my will."

And he then fell into a sleep and died without regaining consciousness.

In witness whereof we have subscribed our names hereto this — day of — A. D. 1911.

James Gray,
Alice Mauck.

6. Form of probate of nuncupative will.

Nuncupative will of Alice Kleckner, late of New Berlin in the County of Union, deceased.

[Here follow the words declared.]

Henry Ault and Herman Berg, being severally duly sworn, declare and say, that the foregoing paper contains the testamentary words or the substance thereof, declared by Alice Kleckner therein named, on the — day of — A. D. 19—, and that at the time of her declaring the same, the said Alice Kleckner was of sound and well disposing mind and memory, to the best of their knowledge and belief and that she intended then and there to make disposition of her goods by nuncupative words; they further each say that the said testamentary words were uttered in the presence of each of them by said Alice Kleckner in her own habitation in said town of New Berlin, where she had resided for more than ten days [or, in case testator died away from home, at the house of — —, in —], in such extremity of her last illness as to preclude the making of a will in writing [in case of absence from home, the said — — having been surprised by sickness, being from her own house, and having died before she returned home] and that the said Alice Kleckner, at the time of pronouncing the said words, did bid these deponents, being then and there present, at the making of the said will, to bear witness that the said words were her will or words to that effect.

Sworn to, etc.

Henry Ault,
Herman Berg.

7. Form of affidavit of reduction to writing.

In order that the will may be probated after six months from the nuncupation, proof must be made that the words were reduced to writing within six days, which may be done as follows:

Union County, ss.

Henry Ault and Herman Berg being by me duly sworn say that Alice Kleckner, the testator in the nuncupative will named died at —, on the — day of — A. D. 19—, having on said day and within a short time before her death declared her will in the presence of both of us, and that we, the subscribers, did within six days thereafter, to wit, on the — day of — A. D. 19—, write down all the words which she then and there did declare in our presence as her will, of which she called us to bear witness, and the writing herewith produced is the same which we then and there made.

Sworn to, etc.

Henry Ault,
Herman Berg.

CHAPTER XXXII.

WILLS TO CHARITABLE OR RELIGIOUS USES.

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|---|--|
| 1. Restraints upon gifts to charitable and religious uses. | 7. Void gifts to charities, etc. |
| 2. Effect of death within a calendar month from making of will. | 8. Charitable, etc., gifts not to fail, when. |
| 3. Effect of new will or a codicil. | 9. Court to appoint a trustee. |
| 4. Attestation of will. | 10. <i>Cy pres</i> , as applied to wills. |
| 5. Competency of witnesses. | 11. Donees and trustees. |
| 6. Gifts to charities or religious uses. | 12. Clause in will avoiding effect of death within a calendar month. |

1. Restraint upon gifts to charitable and religious uses.

Section 11 of the act of April 26, 1855, provides:

No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law: *Provided*, That any disposition of property within said period, *bona fide* made for a fair valuable consideration, shall not be hereby avoided."

2. Effect of death within a calendar month.

The month meant by this statute is "a calendar month," according to the Gregorian calendar and not thirty days; so where the testator made his will on October 8 and died on November 8 it was not a full calendar month.¹ If it falls within the month the gift fails.² The act relates alone to the date and manner of execution.³ When the gift fails it falls into the undisposed of residue as to which testator died intestate.⁴ The allowance of a legacy to a religious use by the auditing judge, when testator died within one month may be excepted to after the audit and exception sustained.⁵ If the gift is held to be of a charitable or religious use, it is covered by this act although it be a college.⁶ It also applies to a gift under a power

¹ Gregg's Est., 213 Pa. 260. (See Wellman's Est., 9 D. R. 47.)

² McLean v. Wade, 41 Pa. 266; Miller's Est., 17 York, 165; Conway's Est., 10 D. R. 509; Luebbe's Est., 179 Pa. 447.

³ Carl's Ap., 106 Pa. 638.

⁴ Carlile's Est., 3 D. R. 153.

⁵ Kelly's Est., 9 D. R. 387.

⁶ Amole's Est., 32 Supr. C. 636.

of appointment under a will the maker of which died long before.⁷ A bequest for masses comes within the inhibition of the act.⁸ Merely precatory words which do not create an absolute use are not inimical to the law.⁹ If the will be made in Delaware, where there is no such inhibition the trust will be enforced in this state, as to interest on corporate bonds.¹⁰ It is immaterial if the date of the will follows the signature, since a will need not be dated at all in Pennsylvania.¹¹

3. Effect of new will or codicil.

The inhibition applies to a provision of a former will revoked by a later one within one calendar month, in which the same or a similar charitable bequest is made as in the former, and the property goes to the "residuary legatee, devisee, next of kin or heirs according to law."¹² Where the gift is invalid, it does not matter that it is virtually a republication of a former will.¹³ The failure of the latter gift does not keep the former alive.¹⁴ The testator has the power in his later will to preserve the virility of the former by declaring that if he should die within one month, the former will shall stand unrevoked and his later one be void.¹⁵ The fact that a codicil has been added to the will, not affecting the charitable bequests, will not invalidate them, if testator dies within one month.¹⁶ But if it deal with the same, by reducing or enlarging them, it comes within the prohibition of the statute¹⁷ unless it be merely incidental or a change of beneficiaries.¹⁸ A mere change of investment within the month will not affect the charitable gifts.¹⁹ A provision in the will that if the testator should die within one calendar month then the gift should go to the Archbishop of the diocese, naming him, absolutely, is a valid evasion of the inhibition of the law.^{19a} Charitable and religious associations, must, at least, bring themselves within the letter of the law, as they have no equities that will be enforced against next of kin.^{19b} Evidence of a promise by the legatee or devisee to devote the gift to charity would avoid it.^{19c}

⁷ Graff's Est., 16 D. R. 518.

⁸ Moran's Est., 24 Lancaster L. R. 70.

⁹ Dougherty's Est., 12 Phila. 70; Schultz's Ap., 80 Pa. 396.

¹⁰ Hildeburn's Est., 4 D. R. 40.

¹¹ Evans' Est., 12 D. R. 219.

¹² Lewis, C. J., in Price v. Maxwell, 28 Pa. 23.

¹³ Hoffner's Est., 161 Pa. 331.

¹⁴ Teacle's Est., 153 Pa. 219.

¹⁵ Hamilton's Est., 74 Pa. 69.

¹⁶ Carl's Ap., 106 Pa. 635; Reamer's Est., 53 Pitts. L. J. 135.

¹⁷ Luth. Cong's Ap., 113 Pa. 32; Poulson's Est., 11 Phila. 151.

¹⁸ Carl's Ap., 106 Pa. 635; Salt's Est., 8 D. R. 325; Reamer's Est., 53 Pitts. L. J. 135; Morrow's Est. (No. 2), 204 Pa. 484; Leisenring's Est., 5 D. R. 232; Sloan's Ap., 168 Pa. 422.

¹⁹ Manners v. Phila. Library Co., 93 Pa. 165.

^{19a} Flood v. Ryan, 220 Pa. 450.

^{19b} Gregg's Est., 213 Pa. 260.

^{19c} Kelly's Est., 17 D. R. 456. So also a form of appointment to evade the law. Graff's Est., 16 D. R. 518.

4. Attestation.

What constitutes attestation to such a will has been finally settled. It means subscribing witnesses;²⁰ and whilst they need not necessarily see the testator sign, or know what the will contains, they must be advised by the testator or someone for him, that he wishes them to subscribe as witnesses to his will and acknowledges his own signature thereto.²¹ Proof of the handwriting of the testator will not answer.²² It was once said that they need not be subscribing witnesses,²³ and thus the once Chief Justice of Pennsylvania, who had declared many wills invalid, had his own declared so for failure to observe this formality.²⁴ An attesting witness must be present and subscribe because he knows it is a will and that the testator signed whether before or in his presence and that he shall so prove it in law.²⁵ The purpose is to protect the testator and the lawful heirs from the importunities of societies and the impositions of various religious cults and fanatics, greedy for the gold he has earned and saved, probably with the help of those he would deprive of theirs by natural ties,²⁶ forgetting that he who remembereth not his own blood "is worse than a heathen."

5. Competency of witnesses.

The provision that the will shall be attested by "two credible and at the time, disinterested witnesses" is rigorously enforced. Whilst an executor as such is not disqualified,²⁷ nor a legatee under a former will, nor an employee in the institution made a beneficiary,²⁸ nor a mere contributor to it;²⁹ a trustee or an officer of the beneficiary is not "disinterested" and the law disqualifies him, because his interest is real and not sentimental.³⁰ The interest which disqualifies must be present and vested, not uncertain, remote and contingent.³¹ When the witnesses are thus incompetent all the gifts, for religious and charitable uses, fail and go into the residuum for the residuary legatee if there be one.³²

6. Gifts to charities or religious uses.

When gifts by will to charities are so vague and indefinite that they cannot be carried into effect they will be declared void.¹ If the

²⁰ Paxson's Est., 221 Pa. 98; Kessler's Est., 221 Pa. 314.

²¹ Kessler's Will, *supra*.

²² Phillips' Est., 1 D. R. 311; Wood's Est., 209 Pa. 16; P. & L. Dig., vol. 23, col. 39911.

²³ Hupfeld's Est., 5 Phila. 219; Taylor's Est., 16 Phila. 274.

²⁴ Paxson's Est., 221 Pa. 98.

²⁵ Irvine's Est., 206 Pa. 1.

²⁶ Beswick's Est., 13 D. R. 711.

²⁷ Jordan's Est., 161 Pa. 393; Kessler's Est., 221 Pa. 314.

²⁸ Combs' Ap., 105 Pa. 155.

²⁹ Evans' Est., 12 D. R. 694.

³⁰ Kessler's Est., 221 Pa. 314; Fetterhoff's Est., 228 Pa. 535, followed in Stinson's Est.

³¹ Jeane's Est., 228 Pa. 537; Historical Soc. v. Kelker, 226 Pa. 16.

³² Ripley v. Waterworth, 7 Vesey, Jr., 452.

¹ Clark's Est., 52 Pitts. L. J. 112.

intention of the testator can be reasonably made out, it will be given effect in determining which of the contestants for the charity shall have the distribution.² Where the testator mentioned an institution but misnamed it the court may determine what institution he intended to be the beneficiary.³ Where power is given the executors to expend a sum for charity, they cannot lavish it upon individuals, but must seek aggregates and let them filter it through the sieve of segregation, if anything be left.⁴ The institutions must at least be charitable.⁵ A denomination in general will be held to be intended rather than a local branch of the church militant.⁶ If the designation of the war-ringing brethren be in *breve*, the court may extend the title to those intended so that the religious use may not fail.⁷ A gift to a library *in futuro* will be executed and the fund not awarded to those already established.⁸ A trust will not be allowed to perish when a minister's home fails to draw the aged clergymen away from their wives, as required by the managers, rather than because they must throw away their tobacco when they enter it.⁹ A society which becomes a candidate for the benefaction in a will must answer the description of the testator in every particular.¹⁰ If the charitable bequest is general, excluding only those which are directed, conducted and administered by ecclesiastics, the will must be given effect by limiting only to that class.¹¹ A gift to his "pastor," for masses for the repose of his soul, means of the whole sum and the executors cannot dole it out at a dollar per mass.¹² Where the object of a bequest is certain and definite it will not fail merely because the building is located over the urban line.¹³

A charitable bequest is not invalid because the new church university, donee, does not conform to dogmas of any common church standards of religion or morality, and permits a species of concubinage intermediate, nor because the university happens to be located in a slightly different place than that designated in the will. The fact that donee is a schismatic body not connected with a general convention is not material to the question of testator's intention.¹⁴

² Board, Etc., v. Society, Etc., 9 Phila. 279; Schleicher's Est., 201 Pa. 612; St. Paul's, Etc., Church v. Gray, 198 Pa. 321; Daly's Est., 208 Pa. 58; Dulles' Est., 218 Pa. 162.

³ Pepper's Est., 1 D. R. 148; 154 Pa. 331.

⁴ Padelford's Est., 9 D. R. 174. This illustrates the tendency of the times to overlook the individual until he comes to the morgue. "He came to his own and his own knew him not."

⁵ Schleicher's Est., 201 Pa. 612.

⁶ Rouser's Est., 8 Supr. C. 188.

⁷ Kimmel v. Wagner, 1 Walker, 191. "Foxes have holes and birds of the air have nests, but the Son of Man hath not where to lay his head." St. Luke, Ch. 9, v. 58.

⁸ Pepper's Est., 154 Pa. 331.

⁹ Hamilton v. J. C. Mercer Home, 228 Pa. 410.

¹⁰ Grandom's Est., 6 W. & S. 537.

¹¹ Blenon's Est., Brightly, 338.

¹² Seibert's Ap., 18 W. N. C. 276. The priest in this case refused the masses until the whole sum was paid him, meanwhile quitting the pastorate.

¹³ Avery v. Home for Orphans of Odd Fellows of Pennsylvania, 228 Pa. 58.

¹⁴ Kramph's Est., 228 Pa. 455, reversing 25 Lanc. L. R. 289, which see

The court will not seek to evade the effect of the act when a charitable gift fails under its provisions.¹⁵ The failure of power to keep up a charity confers upon the court power to order its sale and disposition.¹⁶

7. Void gifts to charities, etc.

The disposition of property, when the gifts are void, as by the act, *supra*, does not create a new order of distribution.¹⁷ It passes, if pecuniary or specific to the residuary legatee, but if the legacy is itself the whole or part of the residue of the testator's estate, then it passes to the next of kin.¹⁸ A testator having created spendthrift trusts for his children, with remainder to charity, on failure of the charity, they take absolute vested estates in remainder after the termination of the trust, which they can convey.¹⁹ A trust for charity having been declared valid by the highest court of the land,²⁰ it cannot be again questioned, because the trustees may err in the construction of their duties and powers.²¹

8. Charitable, etc., gifts not to fail, when.

Section 10 of the act of April 26, 1855, P. L. 328, provides:

"That no disposition of property hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain or ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity or in excess of the annual value hereinbefore limited,²² but it shall be the duty of any Orphans' Court, or court having equity jurisdiction in the proper county to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity; for which purpose the proceeding shall be instituted by leave of the attorney general of the commonwealth on the relation of any institution, association or individual, desirous of carrying such disposition into effect, and willing to become responsible for the costs thereof, subject to an appeal as in other cases in said courts respectively, and to be reviewed, reversed, affirmed or modified by the Supreme Court of this state; but if the objects of the trust

for a complete review by Smith, P. J., of the New Church Swedenborgian and its doctrines as to the relations of the sexes, concubinage, and of the Church to the law of the land.

¹⁵ Bower's Est., 1 Berks County, 233.

¹⁶ Weber's Est., 25 Montg. 113.

¹⁷ Gray's Est., 147 Pa. 67.

¹⁸ Penrose, J., in Alter's Est., 4 C. C. 558; Lynch v. Lynch, 132 Pa. 422. It does not go to the remainderman. Worth's Est., 39 Supr. C. 565. On the proposition that it goes to the general residuary legatee, see Gray's Est., 147 Pa. 67; Wood's Est., 209 Pa. 16.

¹⁹ Moore v. Deyo, 212 Pa. 102. (See also Craige's Est., 14 D. R. 766; Carlile's Est., 3 D. R. 153 and Conley's Est., 197 Pa. 291, for particular cases of distribution.)

²⁰ Vidal v. Girard, 2 Howard (U. S.), 127.

²¹ Girard's Ap., 4 Penny. 347; Phila. v. Girard, 45 Pa. 9; Phila. v. Fox, 64 Pa. 169.

²² \$5,000 — section 8.

be not ascertainable, or have ceased to exist, or such disposition be in excess of the annual value permitted by law, or in perpetuity, such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the legislature of this commonwealth, in manner as nearly in conformity with the intent of the donor or testator, and the rules of law against perpetuities, as practicable, or otherwise to accrue to the public treasury for the public use."

The act of July 7, 1885, P. L. 259, provides:

"That in the disposition of property by will made or to be made for any religious, charitable, literary, educational or scientific use or purpose, if the same shall be void for uncertainty, or the object of the trust be not ascertainable, or has ceased to exist, or be an unlawful perpetuity, such property shall go to the heirs at law and next of kin, of the decedent as in the case of persons who have died or may die intestate."

Under the foregoing act it has been held that where provisions in the will fail at the death of the testator the estate vests in the heirs and next of kin, but the law does not affect an estate which has become vested.²³

9. Court to appoint a trustee.

The act of May 9, 1889, P. L. 173, provides:

"That no disposition of property heretofore or hereafter made for any religious or charitable use, shall fail for want of a trustee or by reason of the objects ceasing or depending upon the discretion of the last trustee, or being given in perpetuity, or in excess of the annual value limited by law; but it shall be the duty of any court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity, subject to an appeal as in other cases in said courts respectively, and to be reviewed, reversed, affirmed or modified in the Supreme Court of this state. * * *

10. Cy pres, as applied to wills.

The doctrine of *cy pres* is that when a trust or gift is valid it shall not fail because it cannot be carried out exactly in the manner indicated by the donor, but it shall be given effect as near as can be, with his directions.¹ The term means "as near as." Under this power the courts having equitable jurisdiction, upon the failure of the objects of a gift, will award the fund, as near as possible to comply with the intent of the donor.² If a restriction upon the use is unreasonable, impracticable and inconsistent with its general pur-

²³ Harmon v. Rumberger, 18 D. R. 486.

¹ Phila. v. Girard Heirs, 45 Pa. 9.

² Flaherty's Est., 2 Parsons, 186; Manners v. Phila. Library Co., 93 Pa. 165; Lower Dublin Academy's Pet., 8 W. N. C. 564; Comth. v. Pauline Home, 141 Pa. 537; Trim's Est., 168 Pa. 395; Cowan's Est., 4 D. R. 435; Daly's Est., 208 Pa. 58; Tenth Presb'y Church, 8 D. R. 323; Houston's Est., 12 D. R. 121; De Silver's Est., 14 D. R. 785, 211 Pa. 459.

poses the court will permit its execution without such restraint,³ unless the will contains a revocation for non-observance.⁴ This doctrine has been extended so that where one directed his body to be interred in a lot in a cemetery which he had intended to buy, his executors will be authorized to carry out his will and buy it.⁵

A diversion of the fund from the uses and purposes prescribed by the donor is not allowable. No matter to what use converted, the trust inheres and will be enforced,⁶ but only at the instance of those who are interested therein.⁷ The use may be changed by concurrence of donor and donee.⁸ Under this power the court has authorized a change from marble to bronze in construction.⁹ It was also held that the act of May 23, 1895, P. L. 114, is a resumption of *cy pres* powers.¹⁰ In order to institute proceedings to apply *cy pres* leave must first be obtained from the attorney general.¹¹ This may be done by preparing the petition or bill and submitting it to him for endorsement of his leave, or by filing an independent document containing his leave.

II. Donees and trustees.

A gift is not too indefinite when it gives a church power to distribute it.¹² "Benevolent" is synonymous with charitable.¹³ A gift to a pastor to say masses, etc., in his professional character is for a religious use;¹⁴ a gift for a home for industrious women and girls while out of work is a charitable use.¹⁵ A gift for burial grounds is a charitable use.¹⁶ If the donee was aware of a secret trust, he is affected by the limitation of the act of 1855.¹⁷ An unincorporated society is capable of being donee.¹⁸ A devise to a parochial school of a Catholic church properly goes to the church as donee.¹⁹ Where the donor authorizes his executors to divide the gift among charitable institutions the surviving executor may do so;²⁰ but an administrator

³ Philadelphia's Petn., 2 Brewster, 462.

⁴ Seitz v. Seitz, 1 Mona. 626.

⁵ Benison's Est., 9 Phila. 355.

⁶ Thomas v. Ellmaker, 1 Parsons, 98; Stallman's Ap., 38 Pa. 200; Mayer v. Society, Etc., 2 Brewster, 385; Schnorr's Ap., 67 Pa. 138; Potts v. Phila. Assn., Etc., 8 Phila. 326; Bethlehem Boro' v. Perseverance Fire Co., 81 Pa. 445; Humane Fire Co.'s Ap., 88 Pa. 389; Christ Church v. Church, Etc., 14 Phila. 61.

⁷ Hoffman v. Hartman, 7 Lanc. L. R. 137.

⁸ Pott v. Pottsville School Directors, 42 Pa. 132.

⁹ Smith's Est., 18 D. R. 1024.

¹⁰ Hamilton v. Mercer Home, 228 Pa. 411. The tobacco case of the superannuated ministers.

¹¹ Cromwell's Est., 18 D. R. 157.

¹² Casey's Est., 12 D. R. 15; Young v. St. Mark's, Etc., 200 Pa. 332.

¹³ Murphy's Est., 184 Pa. 310.

¹⁴ O'Donnell's Est., 209 Pa. 63; Gallen's Est., 15 Phila. 615.

¹⁵ Daly's Est., 208 Pa. 58; Seagrave's Ap., 125 Pa. 362.

¹⁶ Miller's Est., 17 York, 165; Brabson's Est., 16 D. R. 669.

¹⁷ Conway's Est., 10 D. R. 509.

¹⁸ Jacoby's Est., 51 Pitts. L. J. 77.

¹⁹ Corr's Est., 12 D. R. 788.

²⁰ Murphy's Est., 184 Pa. 310.

d. b. n. c. t. a. derives no such power from his appointment.²¹ The court has power to appoint a trustee to carry out the intent of the testator.²²

12. Clause in will, avoiding effect of death within a calendar month.

"6th. All the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath unto St. Teresa's Church, Broad and Catherine streets, and St. Joseph's House for Homeless Industrious Boys on Pine street, share and share alike: *Provided, however,* in case of my death within thirty days [the act says calendar month] from the date hereof, I give, devise and bequeath all my said residuary estate unto Most Reverend P. J. Ryan, Archbishop of Philadelphia, absolutely." By this clause Patrick Jeffers cut out his only sister Ann Flood, from inheritance. Jeffers had never been met by his devisee nor was there any evidence of collusion. The characterization of the devisee as "Archbishop" alone seemed to indicate a religious use in the alternative of the clause. The majority of the court in *Flood v. Ryan*, 220 Pa. 450, distinguished between legal and moral duty and sustained the will on the ground that Ryan took it absolutely as an individual and there was no legal restraint upon him to carry out the first alternative upon the failure of which his right to take was predicated. The devisee himself testified that, *in foro conscientiae*, he held it upon a trust for a charitable use. He said: "He has left me this money whatever it is, for some good purpose and because I am a bishop."

The only Pennsylvania authority cited to sustain its position is *Hodnett's Est.*, 154 Pa. 485, which was based upon *Schultz's Ap.* 80 Pa. 396, and English authorities which favor the Bishops, etc., of the Established Church, where church and state are not severed as here.

Mestrezat, J., in his dissenting opinion relies upon *Corr's Est.*, 202 Pa. 391; *O'Donnell's Est.* 209 Pa. 63, and cites Chief Justice Lewis in *Price v. Maxwell*, 28 Pa. 23-33, to show that the old English law which favored secret religious trusts to evade the statutes of Mortmain, was wiped out by the act of 1855, *supra*, and in England itself by statute 9th George 2nd ch. 36.

²¹ *Children's Hospital's Ap.*, 10 W. N. C. 313.

²² *De Silver's Est.*, 211 Pa. 459; *Steven's Est.*, 200 Pa. 318; *P. & L. Dig.*, 1 C. R. A., col. 869.

CHAPTER XXXIII.

DOMICIL, REVOCATION AND REPUBLICATION.

1. Domicil defined.
2. Domicil in a will.
3. Domicil as respects personalty.
4. Domicil as to devise of land.
5. Revocation by will or codicil.
6. Revocation of will in England.
7. Revocation of wills under the statute.
8. Will as to personal estate — revocation.
9. Revocation by cancellation and destroying.
10. Revocation by revival of earlier will.
11. Revocation by alienation, etc.
12. Effect of marriage on will of single woman.
13. Effect of marriage and birth of children on will.
14. After-born child — kind of provision required.
15. How far the will is revoked.
16. Revocation by implication.
17. Declarations of testator.
18. Republication of will.

I. Domicil defined.

We are told by an eminent writer that "we are indebted to the Civil Law for both the term 'domicil' and the legal idea which it represents."¹ After learnedly reviewing the various definitions of and evasions to define domicil, both in American and in foreign jurisprudence, he modestly ventures a definition which is comprehensive, to-wit: "Domicil expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home."² As to "residence" which is sometimes confounded with domicil, he says: "It commonly imports something less fixed and stable than, and to that extent different from domicil; and a distinction is taken between the actual and legal residence, the latter being generally deemed equivalent to domicil."³ So legal residence as required by statute, is equivalent to domicil.⁴ A sojourner for a time has a residence where he abides but that is not his home — his domicil. Thus he conveyed the idea of permanency in the word home, the forceful synonym for the Latin word from which domicil is derived. Habitation is another synonym for home — "the place of his last habitation" means his last home or domicil. "The domicil of origin" is the place of one's birth, that of his father if in wedlock; that of his mother when born out of wedlock.⁵

¹ The Law of Domicil by Hon. M. W. Jacobs, Dauphin County (Pa.) Bar, 1887.

² The Law of Domicil, p. 120, section 72.

³ The Law of Domicil, p. 121, section 73.

⁴ Taylor v. Reading, 4 Brewster, 439; Chase v. Miller, 41 Pa. 403; Fry's Election Case, 71 Pa. 302; Reed's Ap., 71 Pa. 378.

⁵ When masculine pronouns like he, him, his are used in law they em-

To change the domicile a new domicile must be required with the idea of abandoning the old and making a new home, excluding the idea of returning to the first indefinitely.⁶

2. Domicil in a will.

The description which a person puts in his will as to his domicile is *prima facie* his home.⁷ But it is not conclusive. So if he make a will beyond the state of his domicile and describes it therein, it must be probated according to the laws of that state, or, on appeal the probate will be set aside and declared of no effect. If the law of that state requires three witnesses,⁸ it requires the testimony of three to probate it.⁹

The definition of domicile by Gordon, J., in Carey's appeal, quoted from Bouvier's Law Dictionary, seems to have been followed down through the years. "The domicile of a person is that place in which he has fixed his habitation without any present intention of removing therefrom. Two things must concur to constitute domicile—first, residence; secondly, the intention of making the place of residence the home of the party."¹⁰

3. Domicil as respects personalty.

A will to pass personalty must be executed in accordance with the laws of his domicile at the time of his death.¹¹ When the law of the place where the will is made requires subscribing witnesses, but the maker of the will subsequently removes to Pennsylvania where subscribing witnesses are not essential, if the will is made in accordance with our laws it is valid and may be probated here.¹² But if a person domiciled out of the state dies within it, in order to probate it, as to personal estate, it must have been executed according to the laws of his domicile.¹³ It is governed by the law of his domicile as to form and construction¹⁴ as well as validity.¹⁵ This applies to a bequest of personalty to a corporation of this state by a resident of another state.¹⁶ Where but a short time previous to his death the testator was domiciled in another state the burden of proving domicile in this

brace the feminine as a rule. *Owens v. Haines*, 199 Pa. 137; *Eshelman v. Hoke*, 2 Yeates, 509; *Yeates, J.*, in *Dinah Duncan's Est.*, 3 Sm. L. 164.

⁶ See *Jacobs on Domicil* for full discussion, p. 259.

⁷ *Carey's Ap.*, 75 Pa. 201.

⁸ Rhode Island, when *Carey's Ap.* was decided; now by act of 1896, section 13, ch. 203; made two. The only states which now require three witnesses are Connecticut, Georgia, District of Columbia, Maine, Massachusetts, New Hampshire, South Carolina, Vermont.

⁹ *Carey's Ap.*, *supra*.

¹⁰ *Hindman's Ap.*, 85 Pa. 468; *Price v. Price*, 156 Pa. 617; *Jones' Est.*, 211 Pa. 364; *Dalrymple's Est.*, 215 Pa. 367; *Reed v. Reed*, 30 Supr. C. 229.

¹¹ *Desesbats v. Berquier*, 1 Binney, 336; *Carey's Ap.*, 75 Pa. 201; *Thomson's Est.*, 13 Phila. 376.

¹² *Beaumont's Est.*, 216 Pa. 350.

¹³ *Flannery's Will*, 24 Pa. 502; *Pretto's Will*, 4 Phila. 380.

¹⁴ *Freeman's Ap.*, 68 Pa. 151.

¹⁵ *De Renne's Est.*, 15 Phila. 566.

¹⁶ *Hildeburn's Est.*, 4 D. R. 40.

state is upon the executor.¹⁷ A power of appointment in a will which authorizes the donee to make a will in accordance with the law of the donee's domicile enables the donee of the power to make the will in another domicile than the one where she lived when the power was given.¹⁸

4. Domicil as to devise of land.

The rule of law is different where the will devises land; for the validity of such a will is not determined by the law of the domicile but the law of the *situs*.¹⁹ It is a muniment of title.²⁰ So, no matter where a will is made or what the law of domicile may be as to the execution of wills, if it conforms to the law of Pennsylvania in its requisites it is entitled to probate here, if it relates to land or real estate in Pennsylvania.²¹ A will may be probated in as many places as the testator held property.²² The register will not inquire whether there are any lands in Pennsylvania. That is a matter for the courts to determine as to what the will operates upon.²³ A will made in England by a citizen of that country which directs the conversion of real estate into personalty must be construed according to the laws of England.²⁴

5. Revocation by will or codicil.

Having stated the effect of domicile upon wills, it remains to consider how a will may be revoked by a later will or a codicil. If two wills be made on the same day and it cannot be determined which was last made they will be considered one a codicil of the other.¹ A clause of revocation in a later will revokes a former one, of course,² without formal cancellation.³ It does so necessarily, because later in time;⁴ and so of a codicil which makes a complete disposition of all testator's property.⁵ But a paper with a revocation which is found not a true will has no effect on a former will.⁶ A contingent will only revokes the former when the contingency happens.⁷

Before a later will can be offered in evidence against a former one, it must be proved by two witnesses.⁸ An addition of unsigned script at the end of a will has no effect upon it.⁹

¹⁷ Price v. Price, 156 Pa. 617.

¹⁸ Aubert's Ap., 109 Pa. 447.

¹⁹ Kessler v. Kessler, 3 C. C. 522; Martin's Est., 1 D. R. 167.

²⁰ Pepper's Est., 148 Pa. 5.

²¹ Thomason's Est., 13 Phila. 376; Pepper's Est., *supra*.

²² McKeown's Est., 10 D. R. 332; Lewis' Est., 10 C. C. 331.

²³ Flannery's Will, 24 Pa. 502.

²⁴ Moore's Est., 15 D. R. 39.

¹ Cousinery's Est., 13 D. R. 224.

² Price v. Maxwell, 28 Pa. 23.

³ Boudinot v. Bradford, 2 Dallas, 266.

⁴ Burden's Est., 11 Phila. 130; Teacle's Est., 153 Pa. 219.

⁵ Smith's Est., 2 C. C. 626; Evans' Ap., 58 Pa. 238.

⁶ Rudy v. Ulrich, 69 Pa. 177; Lutz's Est., 9 C. C. 294.

⁷ Hamilton's Est., 74 Pa. 69; Marshall's Est., 17 Phila. 440.

⁸ McKenna v. McMichael, 189 Pa. 440; Jones v. Murphy, 8 W. & S. 275. (But see Pare's Est., 15 D. R. 553.)

⁹ Heise v. Heise, 31 Pa. 246; Wikoff's Ap., 15 Pa. 281; Saunders v. Samarreg, 205 Pa. 632.

6. Revocation of will in England.

"A will, therefore, having two parts, viz.: inception, which is the making, and consummation, which is the death of the testator or maker of the will, there is power in him at any time before death to revoke or alter his will at his pleasure.¹⁰ Statute 29, Chas. 2, C. 3, section 6 provided that devises should remain unless revoked by a codicil or other will, or by writing signed by the devisor in the presence of three or more witnesses declaring the same. The court split upon an ejectment, on the question whether King Edward by writing but not signing a revocation of a devise to his daughter Diana, witnessed and written on the same sheet was saved by his original signature.¹¹ There is no revocation, unless in writing, burning or cancelling by the testator, or by his consent.¹² Under 14th Eliz., however, a will might be revoked by parol,¹³ which remained the rule in Pennsylvania until the act of 1833. A cancellation of a will will be very critically examined, before giving it operation as a revival of a prior will.¹⁴ Cancelling with lead pencil was held not a revocation, but only noting for future deliberation.¹⁵ The revocations implied by operation of law arise from acts which import an intention to revoke; thus any the least alteration or new modeling of the estate. If there are a number of codicils remodeling the will they constitute a republication.¹⁶ The birth of issue alone is sufficient as to the realty.¹⁷

A feoffment of the land is a revocation of the devise of it;¹⁸ and so a bargain and sale and recovery of the land.¹⁹ But a conveyance for years only does not revoke the devise,²⁰ except *pro tanto*.

7. Revocation of wills under the statute.

Section 13 of the act of April 8, 1833, P. L. 250, provides:

"No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same executed, and proved in the same manner as hereinbefore provided, or by burning, cancelling, or obliterating or destroying the same by the testator himself, or by someone in his presence and by his express direction."

8. Will as to personal estate — Revocation.

Section 14 of the same act provides:

"That no will in writing concerning any personal estate shall be

¹⁰ Wentworth on Ex. 45.

¹¹ 3 Leving, p. 86; Hilton v. King.

¹² Wing., Abr. Frauds, 17, 18.

¹³ Brooke v. Ward, 3 Dyer, 310b. The custom of Kent, gavel kind, is here referred to; "the father to the bough, the son to the plough."

¹⁴ Burns v. Burns, 4 S. & R. 295.

¹⁵ Parkin v. Bainbridge, 3 Phillimore, 321.

¹⁶ Guest v. Willasey, 10 Modern, 223.

¹⁷ Tomlinson v. Tomlinson, 1 Ashmead, 224; Doe v. Lancashire, 5 Term. R. 49.

¹⁸ Putbury v. Trevilian, Dyer, 143b, pl. 56; Cotton v. Cotton, 2 Vern. 209.

¹⁹ Dister v. Dister, 3 Levinz, 108; Pemberton, Ch. J., *et tout le court*.

²⁰ Barber v. Took, Ca. in Chancery, 193, part 1.

repealed, nor shall any bequest or direction therein be altered, otherwise than is hereinbefore provided in the case of real estate, except by a nuncupative will, made under the circumstances aforesaid, and also committed to writing in the lifetime of the testator, and after the writing thereof read to or by him, and allowed by him, and proved to be so done by two or more witnesses."

The statute having fixed the manner of revocation, it cannot be done otherwise. Writing "obsolete" on the margin is not a cancellation of the will.²¹

9. Revocation by cancellation and destroying.

If the maker draws a line through the word "will" and writes below "cancelled" without signing it, his intention to cancel is manifest and will be held effective.²² A cancellation by lead pencil is sufficient.²³ The will itself should show evidence of design to cancel or destroy.²⁴ An interlineation which is evidently an amendment is not a cancellation.²⁵ A will may be cancelled by destroying or tearing off the signature.²⁶ Although one legatee was not dead when the testator wrote over three clauses giving legacies "cancelled by death" and erased their names, it was a revocation as to all.^{26a} Where the testator tore off his signature and mutilated portions of the will but made a codicil to the will, both were construed together.^{26b}

10. Revocation by revival of earlier will.

If a testator republishes an earlier will it is a revocation of a later one,²⁷ and this he may do by a codicil,²⁸ but not by parol.²⁹

11. Revocation by alienation, etc.

When the testator alienates the land devised it is a revocation of the devise,³⁰ *pro tanto*.³¹ The dispositions unaffected still remain.³² A mortgage only affects the devise to the extent of the incumbrance.³³ It is the intention which largely controls.³⁴ But a sale of the land causes the devise to fall.³⁵

²¹ Lewis v. Lewis, 2 W. & S. 455.

²² Evans' Ap., 58 Pa. 238.

²³ Tomlinson's Est., 133 Pa. 245.

²⁴ Shipler's Ap., 3 Penny. 272; Cook's Will, 5 Clark, 1; Fuguet's Will, 11 Phila. 75.

²⁵ Dixon's Ap., 55 Pa. 424.

²⁶ Baptist Church v. Robbarts, 2 Pa. 110.

^{26a} Cummins' Est., 37 Supr. C. 580.

^{26b} Pomeroy's Will, 1 Berks Co. 331.

²⁷ Havard v. Davis, 2 Binney, 406.

²⁸ Neff's Ap., 48 Pa. 501; Bradish v. McClellan, 100 Pa. 607.

²⁹ Wilson's Will, 12 D. R. 649; Rankin's Est., 4 W. N. C. 203.

³⁰ Sherratt v. Burd, 1 Wharton, 246; Jones v. Hartley, 2 Wharton, 103.

³¹ Brown's Est., 1 Am. L. R. 125.

³² Balliet's Ap., 14 Pa. 451; Clapworth's Est., 45 Pitts. L. J. 387; Zimmerman v. Zimmerman, 23 Pa. 375.

³³ McTaggart v. Thompson, 14 Pa. 149.

³⁴ Aubert's Ap., 109 Pa. 447; Young v. Fager, 200 Pa. 329.

³⁵ Horning's Est., 43 Pitts. L. J. 227.

12. Effect of marriage on will of single woman.

Section 16 of the act of 1833, *supra*, provides:

"That a will executed by a single woman shall be deemed revoked by her subsequent marriage, and shall not be revived by the death of her husband."

13. Effect of marriage and birth of children on will.

Section 15 of the act of 1833, *supra*, provides:

"That when any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die leaving a widow, or either a widow, or child, or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child, or children after born, shall be deemed and construed to die intestate, and such widow, child or children shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will."

14. Afterborn child — Kind of provision required.

Section 15 of the act of April 8, 1833, P. L. 249, does not require that the testator shall either fully or adequately provide for an unborn child. His will is only revoked where it fails to disclose that he had the child in mind and intended it to apply to such child. This must be determined by the will itself. The testimony of witnesses, therefore, by parol, to show what intention the testator had when he made his will, is inadmissible and against all precedent.¹ "It may be true that if it clearly appears by the terms of the will that an after-born child was within the special intention of the testator, if there was any provision, no matter how inadequate, the words of the statute would be satisfied. Where, however, an immediate provision is made for children by name, who are living at the date of the will, and the interest which the after-born child takes is a reversion and by general words and not by special description as an after-born child, it would be a very strained construction to hold such a child to be provided for."² Commenting upon this, Chief Justice Mitchell said:³ "It was held that an after-born child was not provided for. It is quite clear that the child was not within the intention of the testator, being a stronger case in that respect than *Walker v. Hall*,⁴ for which that explanation has been suggested. The children that he mentioned as such were those *in esse*, by a previous wife, and if the after-born child took at all he took under the remainder to the testator's heirs at law, and therefore under the statute and not by any intended provision for him in the will."⁵ So the question is one of intent and not the amount or quality of the

¹ Sharswood, J., in *Willard's Est.*, 68 Pa. 327, citing *Iddings v. Iddings*, 7 S. & R. 111; *Asay v. Hoover*, 5 Pa. 21; *Kelley v. Kelley*, 25 Pa. 460; *Wallize v. Wallize*, 55 Pa. 242; *Best v. Hammond*, 55 Pa. 409; *Aspden's Est.*, 2 Wallace, Jr., 438.

² Sharswood, J., in *Willard's Est.*, *supra*.

³ *Newlin's Est.*, 209 Pa. 456.

⁴ 34 Pa. 483.

⁵ *Kinney v. Glasgow*, 53 Pa. 141.

provision, if it be an actual one and the child *in ventre sa mere* was in the disposing mind, of the testator. It was early held that the subsequent marriage and birth of a posthumous child did not absolutely revoke a will but only *pro tanto*, viz.: so far as regards the widow and child, but not the appointment of executors, nor as to the power to sell for the payment of debts.⁶ "The statute is founded on the same presumption that the unborn child was not in contemplation of the testator when he made his will, and that if it had been, he would have changed the provisions."⁷

15. How far the will is revoked.

By the birth of a child, unprovided for, or not embraced in the testamentary disposition, the will is not revoked as to the widow, who may elect to take under it or against it;⁸ but it is revoked *pro tanto*, as to the child.⁹ Section 15, *supra*, is not repealed by the act of June 4, 1879, P. L. 88, making every will speak from the death of the testator.¹⁰ This section applies equally to both sexes, and affects the will of a woman who dies without having made any provision for a child born subsequently. When the law uses the masculine pronouns he, his, him, they generally include the feminine gender.¹¹ The birth of a child revokes the will *pro tanto*, only;¹² and it is not for the register to pass upon the effect which subsequent events have upon the will.¹³

The act applies only to "after-born" children.¹⁴ A man's will is not entirely revoked by his subsequent marriage,¹⁵ but a woman's is.¹⁶ However, where he has no children when he makes his will and subsequently children are born to him, it may be revoked entirely, under the circumstances.¹⁷

16. Revocation by implication.

By a conveyance in his lifetime of the thing devised or bequeathed, the testator impliedly revokes his will so far as the thing conveyed is concerned, by making it impossible to give it effect at his death.¹⁸ This doctrine was extended to other circumstances than conveyance,¹⁹

⁶ Coates v. Hughes, 3 Binney, 498.

⁷ Newlin's Est., 209 Pa. 456. There is much in these cases argumentative and mere *obiter dictum*. (See Bowman v. Hoke, 30 Supr. C. 633, following Newlin's Est.; Trimble's Est., 10 Del. Co. 89; Holmes' Est., 15 D. R. 774.)

⁸ Fidelity, Etc., Co.'s Ap., 121 Pa. 1.

⁹ Walker v. Hall, 34 Pa. 483; Cowan's Ap., 74 Pa. 329; P. & L. Dig., vol. 23, col. 40149.

¹⁰ Armstrong's Est., 2 C. C. 166; Robeno v. Marlatt, 136 Pa. 35.

¹¹ Owens v. Haines, 199 Pa. 137; Young's Ap., 39 Pa. 115; Randall v. Dunlap, 218 Pa. 210.

¹² Miller's Est., 159 Pa. 573; Craft's Est., 164 Pa. 520.

¹³ Arthur's Est., 28 Pitts. L. J. 248.

¹⁴ Dailey's Est., 9 Kulp, 53; McCulloch's Ap., 113 Pa. 247.

¹⁵ Perry's Est., 4 C. C. 107.

¹⁶ Kurtz v. Saylor, 20 Pa. 205; Lant's Ap., 95 Pa. 279; Fransen's Will, 26 Pa. 202; Neill's Est., 222 Pa. 142.

¹⁷ Squire's Est., 11 Pa. 110; Wilson v. Ott, 160 Pa. 433.

¹⁸ Cooper's Est., 4 Pa. 88; Balliet's Ap., 14 Pa. 451.

¹⁹ Marshall v. Marshall, 11 Pa. 430; Young's Ap., 39 Pa. 115.

but has been discouraged more recently, where it was held that divorce is of itself not a revocation of a legacy to a wife, although she died two years before her late husband.²⁰ So, it appears, the doctrine of implication is a dangerous and elastic one, and it gives ground for pause,²¹ so that it will only be placed on statutory ground.²² Where a will was lost and the testator knew the fact for months prior to his death and made no effort to renew it, revocation will be presumed.²³

17. Declarations of testator.

The law does not permit a testator to revoke his will by parol,²⁴ although he declares his purpose to do so.²⁵ He must put it into effect by some substantive act showing the *animus revocandi* done.²⁶

18. Republication of will.

Republication by codicil has been considered in its order, *supra*. Where a will is republished it will be construed with reference to the property testator had and the beneficiaries therein, as of the date of republication,²⁷ whether by codicil or otherwise.²⁸ But, if by codicil, all previous codicils, not revoked by it, are retained as of such date of republication.²⁹ The republication binds an appointee, born after the date of the will.³⁰ Whether a will may be republished by parol once vexed the scholars and holographists. Some said yea³¹ and some said nay.³² The latter appear to have the better of the argument. But there is no question that the revocation of a later will revives and republishes an earlier will which the testator has preserved, unless it be shown by competent evidence and circumstances that he did not intend to die testate.³³ A will that was contingent may be republished so as to make it absolute.³⁴ A will being complete except the names of the executors, the insertion of such names at a later date is not a re-execution and republication as of that date, it seems.³⁵ A republication of a will requires the same proof as an original will³⁶ and two witnesses are necessary.³⁷

²⁰ Jones' Est., 211 Pa. 364. Mitchell J., dissenting, which *n. b.*

²¹ Wogan v. Small, 11 S. & R. 141.

²² Forsythe's Est., 47 Pitts. L. J. 73; Padelford's Est., 190 Pa. 35.

²³ Deaves' Est., 140 Pa. 242.

²⁴ Clark v. Morrison, 25 Pa. 453; section 13, act of 1833, *supra*.

²⁵ Clingan v. Mitcheltree, 31 Pa. 25.

²⁶ Fox v. Fox, 88 Pa. 19.

²⁷ Gilmer's Est., 154 Pa. 523.

²⁸ Alsop's Ap., 9 Pa. 374.

²⁹ Dobbins' Est. (No. 2), 221 Pa. 259.

³⁰ Armstrong's Est., 2 C. C. 166.

³¹ Jack v. Shoenberger, 22 Pa. 416, Woodward, J., following the old law; Wallace v. Blair, 1 Grant, 75; Black and Lowrie dissenting; Fransen's Will, 26 Pa. 202, Woodward modifying his opinion in Jack v. Shoenberger; Gable v. Daub, 40 Pa. 217; Gillespie's Est., 5 D. R. 65.

³² Shoenberger v. Jack, 26 Pa. 208 *n.* Gibson, C. J. Neff's Ap., 48 Pa. 501; Wilson's Will, 12 D. R. 649; Rankin's Est., 4 W. N. C. 203.

³³ Flintham v. Bradford, 10 Pa. 82; Stephenson's Est., 6 C. C. 628; Boudinot v. Bradford, 2 Yeates, 170.

³⁴ Forquer's Est., 216 Pa. 331.

³⁵ Hoover's Est., 9 Dauphin Co. 258. Under the civil law, the making of executors was called the *testamentum*.

³⁶ Smith's Will, 9 Phila. 362.

³⁷ Gillespie's Est., 5 D. R. 65; Wilson's Will, 12 D. R. 649.

CHAPTER XXXIV.

WILLS — CONTESTS OF.

1. Caveat against probate of a will.
2. Form of caveat.
3. Form of petition for appointment of administrator *pendente lite*.
4. Security for costs.
5. Form of bond on caveat.
6. Dismissal of cause for want of bond.
7. Register's duties on caveat.
8. Appeals from register's order granting an issue.
9. Rules as to appeals — Philadelphia.
10. Rules as to appeals — Allegheny.
11. Form of appeal from probate in Allegheny.
12. Petition to be filed on appeal, Philadelphia.
13. Form of issue, Philadelphia.
14. Form of appeal, Philadelphia.
15. Form of petition for issue, for undue influence, etc.
16. Form of decree.
17. Form of petition for citation, for illegal execution.
18. Form of order awarding citation.
19. Order of contested will.
20. Time of hearing appeals, Philadelphia.
21. Hearings to continue, Philadelphia.
22. Judge to determine question, *nisi*, Philadelphia.
23. Final decree — contains what.
24. Appeals from orders as to costs.
25. Replication and joinder.
26. Form of order dismissing appeal.
27. Form of decree of probate.
28. Granting of an issue.
29. Form of petition for a precept.
30. Form of precept to the Common Pleas.
31. Proceedings before the register.
32. Party who may contest a will.
33. Issue upon the right to contest.
34. Notice to parties in interest.
35. Rule as to petitions and citations in Philadelphia.
36. Rule in Philadelphia on failure to answer.
37. Parties to a contest, addition, etc.
38. Loss of right by laches.
39. Fixing security for costs.
40. When an appeal lies.
41. Petition on appeal — request for issue.
42. Hearing.
43. When an issue will be granted.
44. The issue — form and scope.
45. Parties to the issue.
46. Trial of the issue.
47. Testamentary capacity.
48. Delusions and aberrations.
49. Presumptions and burden of proof.
50. Undue influence.
51. Acts of beneficiaries and others.
52. The burden of proof.
53. Evidence.
54. Expert testimony and opinions.
55. Declarations of beneficiaries, etc.
56. The writing itself as evidence.
57. Province of the court and jury.
58. Verdict and judgment.
59. Form of certificate after trial.
60. Form of order to file decision in the Orphans' Court.
61. Appeals.
62. Costs.
63. Effect of contest.
64. *Res judicata*.
65. Protection of rights in equity.

1. Caveat against probate of a will.

The preliminary step to initiate a contest against a will or supposed will is the *caveat* or caution to the register not to admit it to probate

without notice; and then a party in interest may apply for the issuance of letters *pendente lite*, if there be perishable goods or need of haste to preserve the estate intact. The register will use his best judgment in the premises.

2. Form of caveat against probate of will.

In the Estate of Robert T. Pettebone, deceased.

To Charles Smith, Esq., Register of Wills of Luzerne County.

Sir:

You are hereby cautioned not to probate any will or to issue any letters testamentary or letters of administration upon the estate of Robert T. Pettebone, late of the borough of Wyoming, deceased, without first notifying us and giving us an opportunity to be heard.

Respectfully yours,

Frank T. McCormack.

Jas. L. Lenahan,

Attorneys for the Widow.

January 20, 1911.

3. Form of petition for appointment of administrator *pendente lite*.

In the matter of the estate of Robert T. Pettebone, deceased, to C. B. Smith, Register of Wills of the County of Luzerne.

The petition of Kate P. Dickson respectfully represents: 1st. That she is the sister and next of kin of the deceased who died at Wyoming, in the County of Luzerne, on the 17th day of January, A.D. 1911.

2nd. That said decedent died intestate as your petitioner is informed and verily believes.

3d. That *caveats* have been filed against the probate of any paper purporting to be the last will and testament of said decedent.

4th. That the affairs of the estate are such as immediately require the services of an administrator, and that there is no person legally authorized to discharge such duties during the pendency of the present proceedings before the register to determine the parties entitled to share in said estate.

Wherefore your petitioner prays that there may be appointed an administrator *pendente lite* of the estate of the said Robert T. Pettebone, deceased, and she will ever pray, etc.

County of Luzerne, ss.

[Affidavit to truth.]

Upon which the register appointed J. Frank Nuss.

4. Security for costs on caveat against a will.

Section 1 of the act of June 6, 1887, P. L. 359, provides:

"It shall not be lawful for any register of wills having jurisdiction of the probate of wills and the granting of letters testamentary and of administration within this commonwealth, to entertain, consider, or regard any *caveat* against the probate of any last will and testament, or the granting of letters testamentary, or of administration, or any appeal from the probate of any such will, or from the grant of any letters testamentary or of administration, unless such caveator or caveators, appellant or appellants, shall, within ten days after the filing of

such *caveat* or appeal, enter into a bond, in the name of the commonwealth of Pennsylvania, with at least two sufficient sureties to be approved by the register, in a penal sum of not less than five hundred dollars — and not to exceed five thousand dollars, as may be determined by the said register, conditioned for the payment of all or any costs which may be occasioned by reason of such *caveat* or appeal, and which may be decreed by such register or by the Orphans' Court to be paid by such caveator or appellant, which bond shall remain on file in the office of the register."

5. Forms of bond on caveat.

In re estate of Robert T. Pettebone, late of Wyoming Borough, deceased.

Before the Register of Wills of Luzerne County, Pennsylvania, No. 49 of 1911. Know all men by these presents that we, Minnie Harris Pettebone and James L. Lenahan and Edward H. Post, are held and firmly bound unto the Commonwealth of Pennsylvania, her certain attorney or assigns in the sum of five hundred dollars, lawful money, to which payment well and truly to be made, we do bind ourselves, our heirs, executors and administrators firmly by these presents.

Whereas, Minnie Harris Pettebone has filed a *caveat* against the probate of any will or the granting of letters of administration in the above estate. Now the condition of this obligation is such that if the said Minnie Harris Pettebone shall pay all costs which may be occasioned by reason of the said caveat and which may be decreed by the register or by the Orphans' Court of Luzerne County, to be paid by the said Minnie Harris Pettebone, then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in presence of

John J. Morgan.

Minnie Harris Pettebone, [Seal.]

Jas. L. Lenahan, [Seal.]

Edward H. Post, [Seal.]

Now the 23rd day of January, 1911, bond of five hundred dollars is fixed in within *caveat* proceedings.

Charles B. Smith, Register.

6. Dismissal of caveat or appeal when no bond is filed.

Section 2 of the act of 1887, *supra*, provides:

"In case no bond, such as aforesaid, shall be filed within ten days after the filing of any *caveat* or appeal, as aforesaid, such *caveat* or appeal shall be considered as abandoned and shall be dismissed, and proceedings may be had in all cases as if no such *caveat* or appeal had been filed."

7. Register's duties on caveat.

The register is virtually a vice-judge when hearing a cause on a demand for an issue to the Common Pleas. He hears the testimony of the contestants and proponents, and decides whether to admit the will to probate or send a precept to the Common Pleas. In either event, since the act of 1905, *infra*, an appeal lies from his decision to the Orphans' Court. In this respect sections 13 and 25 of the act of

1832, *supra*, have been modified. His duty to certify to the Orphans' Court by the latter section embraces cases "where objections are made to the granting of letters of administration to any person applying therefor, or where any question of kindred or other disputable and difficult matter comes into controversy."

Under this section, it is the register's duty to certify the case to the Orphans' Court when the evidence before him raises a disputable question as to the decedent's physical and mental capacity to make a will, and as to the existence of undue influence, and it may be enforced by mandamus. No special form of request is necessary, the party being interested.¹ Having appealed in due form to the Orphans' Court, a mandamus is not necessary;² nor where he grants an issue *d. v. n.*³ Where the duty of the register is ministerial, mandamus will lie to enforce it.⁴

8. Appeal from register's order granting an issue.

The act of February 28, 1905, P. L. 26, provides:

"That an appeal shall lie to the Orphans' Court of each county of the Commonwealth from all decisions rendered * * * by the register of wills for said county, granting an issue *devisavit vel non*, in a contest concerning the validity of a will. Said appeals shall be taken and perfected within the time, and shall be heard and determined in the way and manner, in which appeals are now taken and heard from decisions of such register allowing probate of will."

9. Rules as to appeals.

Section 1 of rule 2, Philadelphia, provides:

"No appeal from the judicial act or decision of the register of wills will be considered by the court, unless such appeal has been first filed with the register, the security as required by the act of June 6, 1887, duly entered, and the record of the proceedings had before him, duly certified by the register and filed in this court."

10. Appeals from the register, in Allegheny County.

Section 1, of rule 1, Allegheny County, provides:

"In all cases where an appeal has been taken from a judicial act or decision of the register, the appellant or appellants shall present a petition to this court setting forth, that an appeal has been taken, that bond, if required by law, has been filed with and approved by the register, the facts upon which the appellant or appellants rely, and the names and residences of all the parties interested, and whether of age or not, and if minors, the names of the guardians, if any; whereupon, if such facts appear to be *prima facie* sufficient, a citation will be granted on all parties interested to show cause why such an appeal should not be sustained, and the judicial act or decision complained of should not be set aside, or an issue awarded, if demanded; if the appeal be from the probate of a will, notice of such citation shall

¹ Newcomb, J., in *Comth. v. Allen*, 16 D. R. 615; *Burns' Will*, 11 Phila. 35; *Taylor v. Comth.*, 103 Pa. 96.

² *Comth. v. Thomas*, 163 Pa. 446.

³ *Comth. v. Clark*, 1 W. N. C. 179.

⁴ *Comth. v. Bunn*, 71 Pa. 405; *Wickersham's Ap.*, 75 Pa. 334.

be given to the register, who shall on or before the return day thereof, file the record in the case in the clerk's office."

11. Form of appeal from order admitting a will to probate.

The following form is given in Percy Digby's Rules of Court for Allegheny County, as complying with the rules in that county:

Allegheny County, }
 State of Pennsylvania, } ss.
 To the Register of Wills of Allegheny County.
 Estate of ———, deceased.

The undersigned hereby appeals to the Orphans' Court of said county from the decision of the register of wills in the above estate, admitting to probate a certain paper writing, dated the ——— day of ———, A.D. 19—, as the last will and testament of said decedent, and granting letters testamentary thereon [or, finding that ——— is the widow of said decedent and entitled to administration of his estate, etc.].

Form of Affidavit.

Allegheny County, ss.

——— being duly sworn doth depose and say that the above mentioned appeal is not intended for delay.

Sworn to, etc.

Order Fixing Bond.

Now ——— day of ———, A.D. 19—, security in the above appeal is fixed in the sum of ——— dollars.

———,
 Register.

Approval of Bond.

Now ——— day of ———, A.D. 19—, bond of appellant, with sureties in the sum of ——— dollars, filed and approved.

———,
 Register.

12. Petition to be filed on appeal.

Section 2 of rule 2, Philadelphia, provides:

"In all cases where any party in interest shall take an appeal from a judicial act or decision of the register, the appellant shall present a petition to the court, setting forth what has been done and the facts and circumstances upon which he relies; whereupon, if such facts and circumstances appear to be *prima facie* sufficient, a citation will be granted on all parties interested (whose names must be set forth in the petition) to show cause why the said appeal should not be sustained, and the judicial act or decision complained of set aside."

13. Form of issue *devisavit vel non*.

Section 3 of rule 2, Philadelphia, provides:

"Where an issue *devisavit vel non* is asked for, the form of the issue or issues must be specifically set forth in the petition."

14. Form of appeal from register.

In the estate of Patrick Franey, deceased.
To the Register of Wills of — County.

The undersigned, being a daughter and heir at law of Patrick Franey, late of said county, deceased, hereby appeals to the Orphans' Court of said county, from the decision of the register of wills in the above estate, admitting to probate a certain paper writing dated the — day of —, A.D. 19 —, alleged to be the last will and testament of said decedent, and granting letters testamentary thereon.

Lizzie Franey.

Form of Affidavit.

— County, ss.

Lizzie Franey being duly sworn says that the appeal in this case is not taken for the purpose of delay.

Lizzie Franey.

Sworn to.

Fixing Security.

And now — day of —, A.D. 19 —, security required in the above appeal is fixed at the sum of \$500.

— — —
Register of Wills.

15. Form of petition for issue d. v. n. for undue influence, etc.

To the Honorable — —, President Judge, etc.

The petition of Lizzie Franey respectfully represents that Patrick Franey departed this life on the — day of —, A.D. 19 —, in the county of —, leaving as the persons entitled to his estate under the intestate laws [give names of wife, if any, and children], of which your petitioner is one; that on the — day of —, A.D. 19 —, a certain paper writing, dated the — day of —, A.D. — (a true copy of which is hereunto annexed) and alleged to be the last will and testament of said decedent, was admitted to probate by the register of wills and letters testamentary thereon issued to Pearl Smith, the executrix therein named; that on the — day of —, A.D. 19 —, your petitioner filed her appeal from the said judicial act or decision of the register of wills, duly entered the security required by the act of Assembly of June 6, 1887, and the record of the proceedings had before the register has been duly certified by him and filed in this court; that your petitioner believes and expects to be able to prove that said decedent, at the time of the date of the execution of the alleged will, was not of sound disposing mind, memory and understanding, but, on the contrary was of unsound mind and incompetent to execute any paper requiring the exercise of discretion, mind, memory or understanding; and being so, the said paper alleged to be his will, was prepared and his signature thereto was procured by the artful contrivances of said Pearl Smith named therein as executrix, and by her undue influence, so contrived and exerted upon a weakened mind and failing memory and understanding, as follows, to-wit: [Here the particular facts relied upon may be set forth.]

Your petitioner therefore prays the court to award a citation, directed to all parties interested, to-wit: to show cause why the said appeal should not be sustained, and the judicial act or decision of

the register complained of be set aside, and why an issue should not be awarded to try the following questions:

A. Whether or not the said Patrick Franey at the time of the execution of said writing, dated the — day of —, 19—, alleged to be his last will and testament, was of sound disposing mind, memory and understanding;

B. Whether or not the making of said writing was procured by undue influence on the part of Pearl Smith and other persons.

C. Whether or not the said writing is the last will and testament of said Patrick Franey, deceased.

Form of Affidavit.

— County, ss.

Lizzie Franey being duly sworn says that the facts set forth in the above petition are true to the best of her knowledge and belief.

Lizzie Franey.

Sworn to, etc.

16. Form of decree.

And now, — day of —, 19—, it is ordered and decreed that a citation be awarded, directed to all the parties interested named in the foregoing petition, to show cause why the appeal from the decision of the register of wills, admitting to probate a certain writing, dated the — day of —, A. D. 19—, as the last will and testament of Patrick Franey, deceased, should not be sustained and the said decision set aside, and also why an issue should not be awarded to try the following questions, to-wit: [as above] returnable according to law.

By the Court.

After the filing of proof (or acceptance) of service of the citation, answer and replication, the cause is placed on the list for a hearing.

17. Form of petition for citation on appeal, for illegal execution.

To the Honorable William F. Solly, President Judge of the Orphans' Court in and for the County of Montgomery and State of Pennsylvania:

The petition of Herbert Stroud respectfully represents that your petitioner is an heir-at-law and one of the next of kin of Agnes J. Stinson, deceased.

That the heirs-at-law of the said Agnes J. Stinson, deceased, are as follows; [give names and relationship].

That the said Agnes J. Stinson died on April 11, 1908, unmarried and without issue, leaving a testamentary writing written upon the first three pages of a legal cap folio; that said testamentary writing is as follows: [copy of same in full].

[This followed by an unexecuted codicil.]

That page one of said testamentary writing and so much of page two as precedes the signature of the decedent was admitted to probate as a valid will on April 16, 1908, by the register of wills of Montgomery County.

That Emma Stroud and Agnes A. Jameson, who are mentioned in said testamentary writing as legatees, and Mrs. Jane S. Shick and Francis G. Stinson who are mentioned as executors died during the

lifetime of the decedent; and George Shannon, who is mentioned as an executor, renounced: that on April 16, 1908, the register of wills of Montgomery County issued what purported to be letters testamentary upon the estate of Agnes J. Stinson, to George R. Kite and Isabel G. Ralston [the surviving executors appointed].

That the said testamentary writing purporting to be the will of the decedent is not signed at the end thereof within the meaning of section 6 of the act of April 8, 1833, and is therefore not a valid will, and that the decree of the register of wills admitting it to probate is null and void. That on October 20, 1908, your petitioner filed an appeal from the said decree with the register of wills, and entered security as required by law, therefor.

Wherefore your petitioner prays your honorable court that a citation may go forth to [naming all the persons interested, as well as their residences] being all the parties interested in the will of the said Agnes J. Stinson, deceased, to show cause why the said appeal should not be sustained and the decree of the register of wills admitting said testamentary writing to probate should not be set aside and the letters testamentary granted to Isabel G. Ralston and George R. Kite, as executors thereof be revoked. And he will ever pray, etc.

Herbert Stroud.

[Affidavit to truth should be appended.]

18. Form of order awarding citation.

And now, to-wit, this fourth day of November A. D. 1908, the foregoing petition having been presented and approved, it is on motion of Theodore Lane Bean, Esq., attorney for the petitioner, ordered and decreed that a citation be awarded to [naming the parties as above] to show cause why the appeal of Herbert Stroud should not be sustained and the decree of the register of wills of Montgomery County admitting the said testamentary writing of said Agnes J. Stinson to probate should not be set aside, and letters testamentary to Isabel G. Ralston and George R. Kite, as executors thereof be revoked. Returnable November 17, 1908, at 10 A. M.

By the Court,
Wm. F. Solly, P. J.

19. Order of the proposed will.

In order to understand the controversy raised by the appeal, the description of the alleged testamentary writing by the appellants is given here:

"The document alleged by the proponents to be the will of Agnes J. Stinson, consists of a single sheet of legal cap paper, folded in the middle, in the usual way along the short dimension, so as to make four pages of equal size. No writing appears on the fourth page. All the writing in issue, appears on the first, second and third pages. * * * The document is holographic, and it will be seen, upon inspection, that the signature of Agnes J. Stinson appears about the middle of the second page, following the usual *testimonium*, and accompanied (on the left) by the signatures of two subscribing witnesses." The whole will including the unsigned codicil was in the handwriting of the testator. The only question, therefore, as stated by Bland, J., presiding, specially, was whether the signature on the

second page, when the writing was logically continued from the first to the third page and from the third to the second page (woman-like) was at "the end thereof." He held this to mean the logical end.⁵

20. Time of hearing appeals, etc., Philadelphia.

Section 4 of rule 2, Philadelphia, provides:

"The third week of each month, except during vacation, will be devoted to the hearing by one of the judges, of testimony of witnesses upon appeals from the register, and demands for an issue *devisavit vel non*; and also where any question of kindred or other disputable and difficult matter has arisen before the register, and, upon request of the parties interested, or either of them, is certified by him to the court for determination."

21. Hearings to continue.

Section 5 of rule 2, Philadelphia, provides:

"Said hearings, when commenced, shall proceed continuously; and continuances will not be granted, except upon cause shown satisfactory to the judge by whom the hearing is held. Depositions of witnesses, commissions for taking testimony, and subpoenas for witnesses, shall be taken as now provided by rule of court."

22. Judge to determine question, nisi.

Section 6 of rule 2, Philadelphia, provides:

"The judge before whom the testimony is taken shall determine preliminarily whether an issue *devisavit vel non*. shall be granted; and whether an issue upon any other matter of fact, arising upon the appeal, shall be granted, together with any question of kindred or other disputable and difficult matter certified by the register; subject, however, to exceptions to his ruling, which must be filed on or before the third Saturday after the order or decree shall be filed with the clerk, otherwise such order or decree to be confirmed absolutely. And said exceptions shall be heard by the court *in banc* as in case of exceptions to adjudications."

Section 7 of rule 2 provides that the testimony shall be taken by the stenographer of the court and filed of record.

23. Final decree, what to contain.

Section 3 of the act of 1887, *supra*, provides:

"Such registers of wills and the Orphans' Court of the proper county, in all cases of appeal from the decree of the register, shall have power and they are hereby directed, in all cases which may be instituted or adjudicated before them, or any of them, and in all proceedings which may be had upon or by reason of any such *caveat* or appeal, to direct, in the final order or judgment he or they shall make in each case, what amount of costs have been incurred, or occasioned by the proceeding, and by whom such costs shall be paid; and when such costs or any part thereof shall be finally adjudged and decreed to be paid by any *caveator* or appellant as aforesaid, any party to whom such costs are due and payable, or who may have advanced

⁵ Affirmed in *Stinson's Est.*, 228 Pa. 475.

money to pay the same as the proceedings shall have progressed, may institute an action in the proper court upon such bond for his own benefit, or that of all other parties interested, and may proceed thereon to final judgment and execution, if the same shall be necessary, as in other cases."

24. Orders and decrees as to costs, appealable

Section 4 of the act of 1887, *supra*, provides:

"All the orders and decrees of the said register of wills relating to the amount and sufficiency of the security to be required by this act and to the disposition of costs in proceedings upon *caveats* and appeals before him as aforesaid, shall be subject to the right of appeal to the Orphans' Court of the proper county, by or on behalf of any and every person, who may appear or have appeared before him as litigants, or who may be affected by such order of appeal."

25. Replication and joinder.

After service or acceptance of service by the parties the proponent files a replication and the contestant may file a joinder of issue. Testimony may be taken if the parties so desire, by depositions, *pro et con*, if the rules of court so provide, or in open court as in this case.

26. Form of order dismissing appeal.

The appeal from the decision of the register of wills admitting it to probate as the last will and testament of Agnes J. Stinson, is, accordingly dismissed and his decision affirmed; the costs in the proceeding to be paid by the appellants.

By the Court,
H. Willis Bland,
President Judge of the Orphans' Court of
Berks County, specially presiding.

December 16, 1908.

27. Form of decree of probate.

Be it remembered that on the 16th day of April, 1908, the foregoing will of Agnes J. Stinson, late of the Borough of Norristown, deceased, was duly proved and approved and letters testamentary granted unto George R. Kite and Isabel G. Ralston, two of the executors in said will named (Francis G. Stinson and Jane S. Shick being deceased and George Shannon having renounced), they first being duly qualified according to law.

Edward J. Caine,
Register.

28. Granting of an issue.

Under section 13 of the act of 1832, *supra*, the register may grant an issue to the Common Pleas, but he is not required to do so imperatively.⁶ If he refuses, an appeal may be taken to the Orphans' Court, as already shown.⁷

⁶ Wikoff's Ap., 15 Pa. 281; Parke's Est., 4 Phila. 193; P. & L. Dig., vol. 23, col. 40251.

⁷ Wikoff's Ap., *supra*.

29. Form of petition for precept.

— County, ss.

Estate of A. Hewit, deceased.

To Joseph Hendler, Esq., Register for the Probate of Wills, etc.

The petition of William Hewit, a son and heir-at-law of A. Hewit, deceased, respectfully represents:

That he avers and hath shown, that in the matter now before you the alleged will is not the will of said decedent, because (1) that at the time of making the alleged will, to-wit, on the — day of —, 19—, the said decedent was not of sound mind, and (2) that James Johnson, a legatee, procured the making of said will by fraud and threats, and so the same was not the free act of the said decedent with a full knowledge of its contents, all of which he avers he believes he can prove to the satisfaction of a jury. He therefore requests and demands that you send a precept to the judges of our Court of Common Pleas, directing them to cause an issue to be framed, to try by a jury, the questions of fact alleged as aforesaid.

William Hewit.

(Affidavit of truth.)

This form may be adjusted to the Orphans' Court.

30. Form of precept to the Common Pleas.

[L. s.] — County, ss.

The Commonwealth of Pennsylvania, to the judges of the Court of Common Pleas of the said county, greeting:

Whereas, A. B., on the — day —, A. D. 18—, presented to G. H., our register of wills of said county, for probate, a certain writing hereto annexed, purporting to have been made the — day of —, A. D. 18— [or otherwise describing the paper in question], which said writing the said A. B. avers is the last will and testament of the said C. D., and *whereas* E. D., who is a son and heir of the said C. D. [or intermarried with F. D., who is a daughter and heir, etc., according to the fact] hath objected before our said register that the said writing was procured by duress and constraint [stating the matters of fact objected]; *And whereas*, the said A. B. [or E. D.] hath requested that an issue may be directed into our said court to try by a jury the validity of the said writing, and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be framed upon the merits of the controversy between the said parties, and tried in due course, according to the practice of our said courts in actions commenced by writ; and further that you cause all other persons who may be interested in the estate of the said C. D. as heirs, devisees, legatees or executors to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into the office of our said register.

Attest:

—, —,
Register of wills of said county.

The above form may be adjusted when the Orphans' Court directs

an issue to be certified, on appeal from the register. The issue being framed in the certificate no pleadings will be necessary. But in case the issue is not framed the court will direct it to be framed. By rule in Philadelphia, *supra*, the issue must be framed in the petition (see form *supra*) which is commended as the better practice.

31. Proceedings before the register.

It has been seen that when the will is once admitted to probate the register is powerless to revoke it,⁸ nor can he, much the less, open a decree of the Orphans' Court refusing probate.⁹ It has been intimated, however, that where a probate has been improvidently made the register may entertain a petition for a rehearing;¹⁰ and where a will was probated in another state and ancillary letters issued thereon proceedings to revoke such letters and a citation to produce the will are properly begun before the register and not the Orphans' Court.¹¹ A contest must be initiated and conducted in the county of decedent's domicile¹² and not at the place where ancillary letters are issued,¹³ and upon a petition to revoke such letters the court will not inquire into the validity of the will.¹⁴

32. Party who may contest a will.

An issue may be certified on the request of any one whose interest is affected by the will; as an executor;¹ a creditor of an heir excluded by it,² or an heir³ or a minor by a next friend⁴ where there is no guardian; but if there is one, then by the guardian. But if the guardian neglects or disagrees to the suit, then a next friend may intervene.⁵

This becomes important where the heir being a minor still under the guardianship for nurture, has been disinherited by a will of his mother procured by his father by undue influence, for example.

The *prochein ami* then becomes the procurator for the infant plaintiff,⁶ as distinguished from the guardian *ad litem*, who represents an infant defendant.

In Massachusetts the next friend is an officer of the court.⁷ If it transpires that the guardian has been improperly appointed, the infant shall not go out of court without day, but the law will hold his

⁸ Mathews v. Biddell, 8 Supr. C. 112; Beatty's Est., 193 Pa. 304; Bilger's Est., 28 C. C. 513; McAndrew's Est., 206 Pa. 366.

⁹ Hoopes' Est., 185 Pa. 167.

¹⁰ Bilger's Est., 28 C. C. 513; Rice's Est., 3 D. R. 262; 173 Pa. 298.

¹¹ McKeown's Est., 10 D. R. 332.

¹² Hannum v. Worrell, 2 Del. Co. 49.

¹³ McKeown's Est., 10 D. R. 332.

¹⁴ Mackins' Est., 14 Phila. 328.

¹ King's Est., 9 W. N. C. 207; Royer's Ap., 13 Pa. 569.

² Shepard's Est., 1 D. R. 238.

³ Schwilke's Ap., 100 Pa. 628.

⁴ Emma A. Smith's Est., Monroe County. Craig, P. J. Middleditch v. Williams, 47 N. J. Eq. 585.

⁵ Hardy v. Scanlin, 1 Miles, 87.

⁶ Turner v. Patridge, 3 P. & W. 175.

⁷ Tripp v. Gifford, 155 Mass. 108.

right and standing, by considering the guardian as his next friend.⁸ A child in *ventre sa mere*, may be represented by next friend.⁹

The rule is that a near relative may be next friend, though not necessarily a blood relative. A sister may be next friend¹⁰ but it was held the master of an apprentice might not be.¹¹

One who has no interest in any event has no standing to demand an issue¹² and the proof of his interest must be definite, not mere family gossip.¹³ But if a party, with interest appears, at any stage of the proceedings, his right to be heard is fixed.¹⁴ The widow, who is not bound by the will but can elect to take against it, cannot contest it.¹⁵ Where one cites another to show cause why an issue should not be granted, he cannot afterwards challenge the right of respondent as a party.¹⁶ It is not the duty of an executor to become a party in defense of the will;¹⁷ but when he has done so, he should not be permitted to withdraw unless the costs are paid.¹⁸ An administrator *c. t. a.* does not stand in the same relation as an executor, to a contest;¹⁹ but one who would take by failure of an exercise of a power of appointment under the will, may contest it.²⁰ The wife of a lunatic cannot contest in his right.²¹ It must be done by committee. A creditor of a disappointed heir has no standing as a contestant.²² A mortgagee of the interest of the only child, has been held to have a standing to contest a will giving the child only a life estate.²³

33. Issue upon the right to contest.

The question of the right to contest a will is a preliminary one which the proponents have a right to have settled first. This may be raised in the answer to the citation, and if an issue be awarded on the will and also upon the question of interest the latter will be first determined.²⁴ It was held by Hawkins, P. J., that the competency and interest of the contestant might be determined on a motion to dismiss in the Orphans' Court, after the register has certified the question.²⁵

⁸ Johnson v. Blair, 126 Pa. 426.

⁹ Bierly on Executors, Etc., p. 15.

¹⁰ Comth. v. Roach, 1 Ashmead, 27.

¹¹ Comth. v. Kendig, 1 S. & R. 366.

¹² Widdowson's Est., 189 Pa. 338.

¹³ Andrade's Will, 7 Phila. 251.

¹⁴ Whitaker's Est., 14 Phila. 275.

¹⁵ McMasters v. Blair, 29 Pa. 298; McAvoy's Est., 8 Phila. 595; Kase's Est., 10 D. R. 497.

¹⁶ Seiler's Est., 14 Supr. C. 504.

¹⁷ Royer's Ap., 13 Pa. 569.

¹⁸ Carter's Est., 2 D. R. 578.

¹⁹ Coleman's Est., 4 D. R. 105.

²⁰ Coleman's Est., 4 D. R. 105.

²¹ Ballard v. Maxwell, 4 Leg. Op. 603.

²² Shepard's Est., 170 Pa. 323; Shepard v. Montg. Natl. Bank, 170 Pa. 330.

²³ Cosgrove's Est., 28 Pitts. L. J. 272.

²⁴ Rogers' Est., 154 Pa. 217; Whitaker's Est., 14 Phila. 275; Taylor v. Comth., 103 Pa. 96.

²⁵ Flanigan's Est., 48 Pitts. L. J. 260; 50 Pitts. L. J. 289.

34. Notice to parties in interest.

The proceedings in the Orphans' Court, as already stated, must be by petition, citation, answer and replication, and this applies to proceedings upon the request for an issue *devisavit vel non*; for when some of the heirs are left out and not cited, they will not be bound.²⁶ Actual notice, although not formal, is sufficient as against a legatee after a decree sustaining the appeal.²⁷ A petition for an appeal will be dismissed, if it appears that not all the heirs have been made parties.²⁸ So, also, where the parties are omitted who are interested in the remainder.²⁹ After an appeal is taken the court will see that notice is given to all the parties, so that they may prepare for the trial.³⁰

35. Rule as to petitions and citations in Philadelphia.

Section 2 of rule 12 of the Orphans' Court of Philadelphia, provides: "In every case in which a petition or application shall be made to the court, upon which a citation or rule shall be awarded, a copy of the petition or application shall be served with the citation or rule on the party or parties against or upon whom an order or decree is asked, and the proof of the service of such copy shall be made upon return of the citation or rule. A copy of the answer, demurrer or replication filed in the cause shall also be served upon the counsel of the opposite party: *Provided, however*, that the court, in granting the citation or rule, may, upon proper cause being shown, dispense with the service of the petition or application upon which the same is awarded."

36. Rule as to failure to answer in Philadelphia.

Section 3 of rule 12 provides:

"If the defendant shall not appear in obedience to the requisition of the citation, it shall be lawful for the court, at any time after the return day, upon proof by affidavit, setting forth the time and manner of service, and after the expiration of ten days from the date of such service, to order the petition upon which the citation was awarded, to be taken as confessed, and to make such further order or decree thereon as may be just and necessary, according to the acts of Assembly in such case made and provided."

37. Parties to an issue, addition, etc.

Parties may be added on their own petition or by citing them to appear and show cause why the appeal should not be sustained.¹ They cannot be added *nunc pro tunc*, except upon their own application or agreement by all interested in the matter.² But they may be added by citation.³ Where one of the legatees died before issue decreed,

²⁶ Miller's Est., No. 1, 159 Pa. 562; Hall's Est., No. 1, 10 Northam. 93.

²⁷ Johnston's Ap., 4 W. N. C. 80.

²⁸ Miller's Est., No. 2, 159 Pa. 575.

²⁹ Hanan's Est., 2 D. R. 127.

³⁰ Miller's Est., 166 Pa. 97; King's Est., 9 W. N. C. 207.

¹ Atcheson's Est., 10 D. R. 297.

² Eisele's Est., 7 D. R. 115.

³ Griffin's Est., 9 D. R. 248.

and there was no substitution, but he was represented by counsel, the decree will not be opened on that ground.⁴ The purchaser of devised land has been made a party proponent.⁵ An executor having become a party cannot insist that the trustees of the residuary estate be also made parties, when they object.⁶ After the issue is framed before the Register or in the Orphans' Court and certified to the Common Pleas, it has no power to change the parties.⁷ And it seems when the issue is made up before the register the Orphans' Court has no authority to permit another person to intervene.⁸ The contestants having obtained leave to withdraw and are decreed to pay the costs they cannot appeal afterwards, although they have not paid the costs. Their motion for leave to withdraw was an abandonment of the cause, which binds them.⁹

38. Loss of right by laches.

When one who disputes the validity of a will fails to file a *caveat*, permits it to be probated and takes no further action for more than a year, his laches imputes to him a want of good faith.¹⁰ Where the contest is begun by the commonwealth to escheat the estate the utmost diligence is required.¹¹ But where the delay between the parties is due to honest efforts to effect a family settlement, the court will not dismiss¹² unless there be manifest and inexcusable delays thereafter.¹³ The filing of a *caveat* does not prevent the probate from becoming conclusive after three years.¹⁴ Where an appeal is taken by one whose interest is challenged and his right determined against him, another person who has an interest is not precluded thereby from contesting in his own right.¹⁵

39. Fixing security for costs.

The register is not required to call on a party for a bond, and if none is filed within ten days, he may dismiss the appeal. The contestant is required to tender a bond.¹⁶ If no bond be given and the register certifies the appeal to the Orphans' Court, it will be stricken off, on motion.¹⁷ The same result follows where the bond is defective.¹⁸ The register should mark the bond filed and date it when he so files it.¹⁹

⁴ Hoopes' Est., 185 Pa. 167; Trainer v. McGarrity, 40 Supr. C. 57.

⁵ Mushrush v. Mushrush, 7 D. R. 743.

⁶ Carter's Est., 2 D. R. 578.

⁷ Dotts v. Fetzer, 9 Pa. 88; Sheets v. Whitaker, 13 Phila. 29.

⁸ Whitaker's Est., 14 Phila. 289.

⁹ Eichert's Est., 155 Pa. 59.

¹⁰ Bull's Est., 12 D. R. 393.

¹¹ Cardwell's Est., 10 C. C. 318.

¹² Beaver's Will, 17 Phila. 494.

¹³ Beaver's Est., 17 W. N. C. 256.

¹⁴ Nichols' Est., 174 Pa. 405.

¹⁵ Whitaker's Est., 14 Phila. 275.

¹⁶ Nichols' Est., 2 Lack. Jur. 421.

¹⁷ Reidlinger's Est., 13 L. R. 153.

¹⁸ Winklefoose's Est., 5 York, 151.

¹⁹ McCowan v. McCowan, 13 Lanc. L. R. 345.

40. When an appeal lies.

No appeal lay from an order of the register granting an issue prior to the act of February 28, 1905, P. L. 26, *supra* (par. 8).²⁰ In strict practice an appeal from the decree of the register should not be taken when he refuses an issue, until letters testamentary are issued, for that completes the probate.²¹ There is no other method to contest a will, than by appeal from the decision of the register.²² Exceptions do not lie to the decision of the Orphans' Court *in banc*, the remedy being by appeal.²³ The probate of a will cannot be attacked collaterally on the audit of an account.²⁴ As stated above the time in which an appeal from a probate can be taken is three years by act of June 25, 1895, P. L. 305.²⁵ The dismissal of an appeal, improperly brought, does not affect the right of a party to bring his appeal properly, but he must commence anew and within time.²⁶

41. Petition on appeal — Request for issue.

A bare appeal brings up only the record of the register. The petition, sworn to or affirmed, should set out the issue and the facts.²⁷ In some jurisdictions the courts do not hold so strictly to the rules, but permit amendments to perfect an appeal.²⁸ An appeal must be supported by evidence taken in writing as required by section 40 of the act of March 15, 1832, P. L. 135;²⁹ and must show a substantial dispute, sufficient to entitle petitioner to an issue.³⁰ The proponents are entitled to be heard in answer.³¹ When the register has probated a will and an appeal is taken in due form, he should certify the case to the Orphans' Court in a proper manner.³² In that case it will be presumed that a *caveat* was filed.³³

42. Hearing.

If an issue *d. v. n.* was not requested before the register it may be demanded on hearing in the Orphans' Court,³⁴ and substantive matter of contest added, since it is a hearing *de novo* in the Orphans'

²⁰ McCarter's Ap., 78 Pa. 401.

²¹ King's Est., 9 W. N. C. 207.

²² Moore's Est., 14 D. R. 401; McCort's Ap., 98 Pa. 33.

²³ Hazzard's Est., 19 D. R. 671.

²⁴ Wiltbank's Est., 18 D. R. 515.

²⁵ Hoopes' Est., 185 Pa. 172; Patterson's Est., 47 Pitts. L. J. 72; Morgan's Est., 12 D. R. 341.

²⁶ Texter's Est., 3 D. R. 364; Miller's Est., 2 D. R. 335.

²⁷ Hoge's Will, 2 Brewster, 450; Cozzen's Will, 61 Pa. 196; Shaw's Will, 11 Phila. 51; Colegate's Will, 12 Phila. 48. (See rules of court, *supra*; Wright's Est., 9 C. C. 235. See section 2, rule 5, Lancaster County; Metzler's Est., 20 Lanc. L. R. 21.)

²⁸ Cooper's Est., 16 York, 78.

²⁹ Naylor's Est., 11 Phila. 46.

³⁰ Dockerty's Est., 8 Lack. L. N. 157. (See rules in Lackawanna County; Merrill's Est., 8 Lack. L. N. 336.)

³¹ Hayford's Ap., 3 Walker, 72; P. & L. Dig., vol. 23, col. 40265.

³² Heenan's Est., 2 W. N. C. 264.

³³ Wainwright's Est., 3 W. N. C. 458.

³⁴ Ketterer's Est., 17 Phila. 525; South's Est., 11 Phila. 107; Lankhuff's Est., 218 Pa. 585.

Court.³⁵ If the proponent files a petition admitting that decedent did not have capacity to make a will, the appeal from the probate will be dismissed.³⁶

43. When an issue will be granted.

There have been so many decisions on granting or refusing an issue, that it is not within the purview of this volume to digest them all.³⁷ The phrase *devisavit vel non* means whether or not he devised;¹ i. e., whether or not the writing was decedent's true and rational speaking or disposition. The early practice in Pennsylvania shows to have accorded a liberal construction in favor of the right of heirs and parties interested to contest the validity of a will, just as our laws have always favored the freedom of the individual to make a will at any time and in his own manner. But the courts have drawn the rule tighter and tighter until the whole question now lies within a judicial nut-shell, to-wit: If in the opinion of the judge twelve men would not have sufficient reason to set the will aside, or if they did set it aside the judge would be constrained to set their sworn verdict aside, no issue should be awarded. This is a bald proposition, without bit or cinch. Let the authorities which follow modify it, if they can. In the early days it was held that the Supreme Court had inherent power to direct an issue to try the validity of a will.² It was also held that the request for an issue was of right and it should be granted if there was a substantial issue of fact upon the validity of the alleged disposition.³ If it was a matter of right, the only discretion left the court was as to the character and relativity of the disputed facts; and as to this relation and character the courts exercised their discretion.⁴ When a request is made for an issue it must be supported with evidence pertinent to the reasons alleged.⁵ A bare averment or a statement disputing the evidence is insufficient to raise an issue.⁶ If the disputed fact is immaterial and if the facts alleged are insufficient to destroy the validity, an issue will not be granted.⁷ In *De Haven's Appeal*⁸ a new rule of measuring the character and the sufficiency of the evidence of contest was set for the appellate court, which the courts below were swift to arrogate to themselves and by the rationale of "anticipative consequences," as-

³⁵ *Bowman's Est.*, 6 D. R. 763; *Bearmer's Ap.*, 126 Pa. 77; *Kuntz's Est.*, 17 D. R. 1056; *Missimer's Est.*, 23 Montg. 49.

³⁶ *Eichert's Est.*, 9 C. C. 479. (See 2 C. R. A., col. 4253; P. & L. Dig., vol. 23, col. 40269.)

³⁷ See P. & L. Dig., vol. 23, col. 40271, *et seq.*

¹ Devise is from the French *deviser*, to speak.

² *Williams v. Williams*, 2 Yeates, 167.

³ *De Haven's Ap.*, 75 Pa. 337; *Schwilke's Ap.*, 100 Pa. 628; *Knauss' Ap.*, 114 Pa. 10; *Sharpless' Est.*, 134 Pa. 250; P. & L. Dig., vol. 23, col. 40273.

⁴ *Bradford's Will*, 1 Parsons, 153; *Baxter's Ap.*, 7 Phila. 66; *Wright's Est.*, 9 C. C. 235; *Ruoff's Ap.*, 26 Pa. 219.

⁵ *Harrison's Ap.*, 100 Pa. 458; *South's Est.*, 11 Pa. 107; *Rickey's Est.*, 15 Phila. 616; *Boyer's Will*, 13 Phila. 254.

⁶ *Cozzen's Will*, 61 Pa. 196.

⁷ *Graham's Ap.*, 61 Pa. 43.

⁸ 75 Pa. 337, per Agnew, C. J. 1874.

sumed to decide what a jury might probably find and if they did so find what the court might do thereupon. .Conceding that under section 41 of the act of March 15, 1832, *supra*, an issue was demandable of right; still the appellate court "ought not to reverse if the court below would have been bound to set aside the verdict as contrary to the manifest weight of the evidence." Following this retrospective view, many cases have been decided refusing issues under varying circumstances, so that *stare decisis* appears to be fortified in that rule like Pelion upon Ossa piled and it is nothing short of temerity to attempt to challenge the righteousness thereof.⁹ Nevertheless, the frequency of the assertion of the supposed right and the reiteration of the denial of it, in which some of the brightest legal minds of the state are concerned, would seem to raise a proper query as to the correctness of the rule. It has been suggested in one of the recent contest cases that the rule should be so modified that an issue will not be awarded, if upon the testimony of the contestants alone, the court would be constrained to set aside a verdict in their favor.¹⁰ This would eliminate from the consideration of the preliminary adjudication anticipation of what a jury might or might not do and if they did or did not so do what the court then ought to do. The statement of the legal alternative in bald Anglo-Saxon should draw the question out of the realm of legal guess-work. To recur to De Haven's appeal, for a moment, it will be seen that Chief Justice Agnew did not say what the court below ought to do, but the Supreme Court "ought not to reverse," under the facts in that case. It was recently said that if the court would not be justified in setting aside a verdict against the will, an issue should be awarded.¹¹ Upon the question of granting an issue it is the duty of the court to consider all the pertinent evidence¹² and the judge should not constitute himself a jury and usurp their function anticipatively.¹³ Where the proponent of the will was the confidential advisor and the circumstances shift the burden of proving good faith upon him an issue ought to be awarded, even if the presumption is rebutted by the evidence.¹⁴ And where the proponent demands an issue, the witness having proved its due execution, although the testimony against the validity of the will is overwhelming, an issue is a matter of right.¹⁵ The manner of obtaining the information necessary to determine whether an issue should be granted is left discretionary with the Orphans'

⁹ The cases are all imposingly arrayed in chronological order of their decision in vol. 23, P. & L. Dig., col. 40275, 4 C. R. A., col. 2629, citing White's Est., 33 Supr. C. 533; Fuller's Est., 222 Pa. 182; to which may be added: Schweitzer's Est., 228 Pa. 231; Graham's Est., 225 Pa. 314; Wainwright's Ap., 89 Pa. 220; Tyson's Est., 223 Pa. 596; Macauley's Est., 224 Pa. 1; Thornley's Est., 25 Montg. 94; Donnelly's Est., 227 Pa. 609; Chidester's Est., 227 Pa. 560; McNitt's Est., 229 Pa. 71.

¹⁰ White's Est., 33 Supr. C. 533; Brauning's Est., 15 D. R. 836; Fuller's Est., 222 Pa. 182 (expert case); Nonnemacher v. Nonnemacher, 159 Pa. 634.

¹¹ Sheard's Est., 5 Schuylkill Co. 181.

¹² Seiler's Est., 14 Supr. C. 504.

¹³ Miller's Est., 179 Pa. 645; Palmer's Est., 6 C. C. 541.

¹⁴ Adams' Est., 220 Pa. 531.

¹⁵ Crawford v. Schooley, 217 Pa. 429 (a forged will).

Court,¹⁶ but the rules of each court must be observed. In Philadelphia the finding of the judge before whom the appeal first comes, must stand unless there is no evidence to support it.¹⁷

When undue influence or want of disposing mind and memory are alleged, an issue will be refused if the evidence is insufficient or the weight is in favor of the proponent.¹⁸ Evidence of delusions is insufficient to raise an issue of mental incapacity, unless they directly enter into and affect the will itself.¹⁹ Old age itself is no evidence of incapacity.²⁰ It is no error to refuse an issue where the witnesses testify to mental capacity at or near the time of disposition.²¹ But, on the averment of undue influence, an issue was granted, where a large part of the estate was given to the physician who was also business agent for the decedent.²²

44. The issue — Form and scope.

The pleadings in a feigned issue must conform to the decree¹ and no extraneous questions should be imported.² Where the averment is want of capacity, in the form of insane delusions, the form of issue is whether or not at the time testator was of sound disposing mind, memory and understanding. Delusions are only evidence of mental unsoundness.³ It has been held that where one question was whether decedent had testamentary capacity and the other whether at the time of executing the will he understood the nature of the writing and the dispositions made, the latter was improper and superfluous.⁴ Issues on the validity of the will should not be encumbered with inquiries as to the domicile of the testator or the *situs* of the principal part of his goods.⁵ The issue must contain a full proposition of fact showing the ground of contest. Whether or not the writing is the will of decedent is entirely too general.⁶ It has been mooted whether, strictly speaking, there can be such an issue for a jury as *devisavit vel non* — which is a question of mixed law and fact, partly for the court and partly for the jury.⁷ But there need be no difficulty if the court will obey the time honored maxim that questions of law are for the court and questions of fact for the jury, and utilize the su-

¹⁶ Schwilke's Ap., 100 Pa. 628; Clime's Est., 22 Lanc. L. R. 373; Lancaster County, see new rules.

¹⁷ Heier's Est., 13 D. R. 414.

¹⁸ P. & L. Dig., vol. 23, col. 40279; Loeser's Est., 167 Pa. 498; Bull's Est., 12 D. R. 393; Fow's Est., 147 Pa. 264; Knight's Est., 167 Pa. 453; Hook's Est., 207 Pa. 208; Malunny's Est., 208 Pa. 21; Donnelly's Est., 227 Pa. 609; Chidester's Est., 227 Pa. 560; Brink v. Brady, 224 Pa. 116.

¹⁹ Helferty's Est., 18 D. R. 324; Brannon's Est., 18 D. R. 338.

²⁰ Rose's Est., 223 Pa. 454. (See *De Senectute*, Cicero.)

²¹ Tyson's Est., 223 Pa. 596; Macauley's Est., 224 Pa. 1; Thornley's Est., 25 Montg. 94; Graham's Est., 225 Pa. 314; Schweitzer's Est., 228 Pa. 231.

²² Holland's Est., 5 Schuylkill Co. 63.

¹ Ingersoll v. Bradford, 4 Yeates, 175.

² Bridahan v. King, 6 W. N. C. 261; Wright's Est., 9 C. C. 235.

³ Carter's Est., 2 D. R. 578. Penrose, J.

⁴ Keebler v. Shute. 183 Pa. 283.

⁵ Coleman's Est., 4 D. R. 105.

⁶ Bitner v. Bitner, 65 Pa. 347.

⁷ Yardley v. Cuthbertson, 108 Pa. 395.

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EXCEPTIONS ON THE TRIAL

No. 179.

Approved—the 11th day of May, A. D., 1911.

AN ACT

Relating to the time and manner of taking exceptions in any case, civil or criminal, in any court of record in this Commonwealth; to the effect thereof; to transcribing the evidence taken upon the trial of any case; to the correction and perfection of such transcript for the purposes of review; and providing that exceptions need not be taken where the decision of the court appears in the proceedings of a case.

Section 1. Be it enacted, &c., That from and after the passage of this act, it shall not be necessary on the trial of any case, civil or criminal, in any court of record in this Commonwealth, for the trial judge to allow an exception to any ruling of his; but, upon request by counsel, made immediately succeeding such ruling, the official stenographer shall note such exception, and it shall thereafter have all the effect of an exception duly written out, signed, and sealed by the trial judge.

Section 2. Exceptions may be taken, without allowance by the trial judge, to any part or all of the charge, or to the answers to points, for any reason that may be alleged regarding the same in the hearing of the court, before the jury retires to consider its verdict, or, thereafter, by leave of the court; and they shall be thereupon noted by the official stenographer, and thereafter have all the effect of exceptions duly written out, signed, and sealed by the trial judge, at the time of the trial.

Section 3. The official stenographer shall transcribe the notes of the evidence taken upon the trial of any case, under the following circumstances and those only: (a.) When directed by the court so to do; or (b.) when an appeal has been taken to the Supreme or Superior Court; or (c.) when he shall be paid for a copy thereof by a person requesting him to transcribe it.

Section 4. When the evidence in any case is transcribed, it shall be the duty of the official stenographer to lodge the same with the prothonotary or clerk of the court, and notify the parties interested or their counsel that the same will be duly certified and filed, so as to become part of the record, if no objections be made thereto within fifteen days after such notice. If objections be made, the matter shall be heard by the court, and such order made regarding the same as shall be necessary in order to comport with the occurrences at the trial. If no objections be made, or when, after objection, the transcript shall have been so made to comport with the occurrences at the trial, said transcript shall be duly certified by the official stenographer and by the trial judge, shall be filed of record in the case, and shall be treated as official and part of said record for the purposes of review upon appeal, and shall be considered as prima facie accurate whenever thereafter offered in evidence in the same or any other proceeding, without the necessity of calling the stenographer as a witness to prove the same.

Section 5. The appellants and appellees, by writing filed and approved by the lower court, may agree that any part of the evidence appearing in the transcript as certified and filed shall be considered as excluded therefrom upon the review of the case by the Supreme Court or Superior Court; and, if they cannot agree, the court below, upon motion of appellants and notice to appellee, may order that any part or portion of the evidence may be omitted by appellant in printing the transcript for the purpose of review in such case: **Provided**, however, That appellees may themselves print such evidence, which printing shall be at their own expense, unless it be otherwise ordered by the Appellate Court; or the Appellate Court may order any part or all thereof to be printed by appellant, whenever said court shall deem it necessary so to do.

Section 6. Whenever the decision of a court of record shall appear in the proceedings of a case, it shall not be necessary, for the purpose of a review of that decision, to take any exception thereto; but the case shall be heard by the Appellate Court with the same effect as if an exception had been duly written out, signed, and sealed by the court.

perior discriminating powers of the court to send only issues of fact properly framed, to a jury. So the court may award a general issue as to the validity of the whole will and special issues as to particular bequests under it.⁸ "As part of a will may be declared void and the remainder sustained, an issue may be awarded as to one legatee and not as to another."⁹ Whilst a will and a codicil are treated in law as one will, a contest of the will includes the codicil; but a separate issue may be awarded as to the will and each codicil, if requested;¹⁰ and where necessary they should be separated if one should prove valid and the other not.¹¹ Where the contest is between two wills, the issue is not double.¹² One claiming to have a later will should appeal from the probate of the earlier one and if it is duly proved, the Orphans' Court will open the decree of probate and direct the later will to be brought before the register to be proceeded upon further.¹³

In cases where testamentary capacity and undue influence are interwoven the issue should embrace both questions.¹⁴ The precept should have the writing attached to it, for the issue must be confined to it.^{14a}

45. Parties to the issue.

In framing the issue the proper rule was stated by Maynard, J.,¹⁵ to be that he who has the affirmative of the issue shall be plaintiff regardless of who was the original actor. The court which awards the feigned issue should name the parties and prescribe the form of it.¹⁶ The law does not require the proponents to be made plaintiffs, because they allege the validity of the will;¹⁷ but by the long established practice in Philadelphia those who offer the will for probate are made plaintiffs.¹⁸ The framing of the issue is wholly within the discretion of the Orphans' Court and not reviewable.¹⁹

46. Trial of the issue.

The certificate of the issue to the Common Pleas should have attached the writing in issue and the inquiry there will be confined to it,²⁰ and no other writing²¹ can enter into the verdict. The paper

⁸ Erwin's Est., 4 D. R. 219.

⁹ Scott, J. Hall's Est., No. 2, 10 Northam. 97.

¹⁰ Carter's Est., 2 D. R. 578.

¹¹ Hoxworth v. Miller, 7 Pa. 458.

¹² Irwin v. Hanthorn, 1 Supr. C. 149; Rhome v. Morris, 31 Supr. C. 254.

¹³ Lynn's Est., 10 Lack. Jur. 214; Comth. v. Stone, 56 Pitts. L. J. 379.

¹⁴ Gibson's Will, 15 Phila. 536; Kates' Will, 17 Phila. 464; Weaver's Est., 9 C. C. 616; Armor's Est., 154 Pa. 517; Hennessy's Will, 27 C. C. 127; Wilson's Ap., 99 Pa. 545.

^{14a} Lappe's Est., 215 Pa. 424.

¹⁵ Brown's Est., 3 Luz. L. R. 27; Yardley v. Cuthbertson, 108 Pa. 395.

¹⁶ Dotts v. Fetzer, 9 Pa. 88.

¹⁷ Newhard v. Yundt, 132 Pa. 324; Stier's Est., 4 C. C. 639.

¹⁸ Ruddach v. Reichenbach, 1 C. C. 500; Carter's Est., 2 D. R. 578. (See 17 W. N. C. 551.)

¹⁹ Palmer's Est., 132 Pa. 297.

²⁰ Lappe's Est., 215 Pa. 424.

²¹ Rhome v. Morris, 31 Supr. C. 254.

in issue may be admitted in evidence after the subscribing or other competent witnesses have proved its execution.²² It may be read to the jury for the purpose of identification as the thing in issue.²³ What is sufficiency of proof is for the court, but the credibility of it is for the jury.²⁴ The evidence of two witnesses will carry it to the jury.²⁵ The probate endorsed on the will goes with the writing itself when offered in evidence and may be taken out by the jury into their room.²⁶ The register in certifying the issue should not attach plats of lands devised.²⁷ A deposition taken in support of the will before the register which was certified with the will and issue was held to be evidence on the trial²⁸ but depositions read in the Orphans' Court can only be read on the trial when the deponent is dead.²⁹ Depositions taken abroad cannot be read as against the legatee not served with the rule and who had no notice of the citation.³⁰ In an issue to try the validity of the signature the burden of proof is on the proponents.³¹ When the proponents have proved the due execution of the will they may rest. But if they see fit to go into testamentary capacity and freedom from influences, they are bound to prove the case in chief.³²

47. Testamentary capacity.

"A disposing mind and memory, in the view of the law, is one in which the testator is shown to have had, at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed; an understanding of the disposition he wished to make of it by the will and of the persons and objects he desired to participate in his bounty."¹ No high standard of mentality is requisite.² If he understands in detail what he is doing it is sufficient³ even though he be enfeebled by disease.⁴ If his mind and memory are sufficiently sound to dispose of his estate with judgment and discretion, the disposition is valid.⁵ Mere eccentricities of the mind in its bodily relation are not enough to affect a will.⁶ Old age

²² Hoar v. Leaman, 2 Mona. 321.

²³ Cowden v. Reynolds, 12 S. & R. 281; Rees v. Stille, 38 Pa. 138.

²⁴ Vernon v. Kirk, 30 Pa. 218.

²⁵ Rohrman v. Stehman, 1 Watts, 442.

²⁶ Sholly v. Diller, 2 Rawle, 177.

²⁷ Zimmerman v. Zimmerman, 23 Pa. 375.

²⁸ Ottinger v. Ottinger, 17 S. & R. 142; Spence v. Spence, 4 Watts, 165.

²⁹ Dietrich v. Dietrich, 1 P. & W. 306; Comth., Etc., Co. v. Gray, 150 Pa. 255.

³⁰ Hall's Est., 10 Northam. 93, 97.

³¹ Bradley v. Pierce, 180 Pa. 262.

³² Reichenbach v. Ruddach, 127 Pa. 564. (See also Robinson v. Robinson, 203 Pa. 400, on the order of proof.)

¹ Lewis, J., in Leech v. Leech, 21 Pa. 67; Mulholland's Est., 217 Pa. 65.

² Heister v. Lynch, 1 Yeates, 108.

³ McMasters v. Blair, 29 Pa. 298; Stevenson v. Stevenson, 33 Pa. 469; Daniel v. Daniel, 39 Pa. 191.

⁴ Rees v. Stille, 38 Pa. 138; Doyle's Est., 7 C. C. 657.

⁵ Shaver v. McCarthy, 110 Pa. 339; Thompson v. Kyner, 65 Pa. 368; Main v. Ryder, 84 Pa. 217; Hopple's Est., 13 Phila. 259.

⁶ Corson's Est., 3 Montg. 103.

is not of itself a test of mental incapacity;⁷ nor physical infirmity, if at the time the testator was able to transact business and was sensible and intelligent;⁸ although he had suffered two strokes of apoplexy, which affected his speech though not his mental functions.⁹ It is well to bear in mind the psychological fact that the mind itself is untouched, except relatively as it is affected in its manifestations through this mortal house, the body. By reason of the material clog, at times, the person may be wildly disordered and betimes as calm and placid, as sane and reasonable as the most eminent of our kind. So, even a confirmed lunatic may have capacity to make a will in what is termed a lucid interval.¹⁰ In the case of *Dame Byzantine Clarke v. Cartwright*, Sir William Wynne stated the law to be the same as the civil law.¹¹ Testimony as to delusions which are not connected with the will itself may be disregarded.¹² If the decedent, in addition to old age, suffered from loss of memory and weakening of the mental organs so that it amounted to senile dementia, he was incapacitated.¹³ But the time of such disorganization or derangement of the faculties must be shown to be the same as the time of executing the paper.¹⁴ Whatever the causes, mere weakness of memory and feebleness of mental power are not in themselves sufficient to render invalid a testamentary disposition which shows sanity on its face.¹⁵ So, age, infirmity of body, sickness, decrepitude, extreme suffering are insufficient to prove a person lacking in disposing mind and memory, when through it all the soul, the intellect retains its power and sway and is able to command the situation as it wills.¹⁶ The presumption of law is that of sanity, competency, virility, potency, and this must be overthrown by more than trivialities, eccentricities, occasional states of derangement of the normal relation of the mind to the body and the external world. Even the extremity of age does not overthrow this presumption.¹⁷ Even in the supreme moment of dissolution of the union of mind to matter, when the members cease to obey the will, the clarity of the mind may rise triumphant above all mortal ills. Thus our statute provides that even before man closes his eyes, he may with his last conscious breath command another to affix his

⁷ *Rose's Est.*, 223 Pa. 454.

⁸ *Miller v. Oestrich*, 157 Pa. 264; *Shotwell's Est.*, 1 D. R. 257; *Cameron's Est.*, 3 D. R. 101.

⁹ *Rowson's Est.*, 175 Pa. 150. (See P. & L. Dig., vol. 23, cols. 39934-5-6 for many cases in point.)

¹⁰ *White v. Driver*, 1 Phillimore Ec. R. 84.

¹¹ 1 Phillimore Ec. R. 90, quoting Institutes, Lib. 2, tit. 12, section 2. "*Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.*"

¹² *Masseth's Est.*, 213 Pa. 136.

¹³ *Thompson's Est.*, 9 Lack. Jur. 322. Sando, P. J.

¹⁴ *Mulholland's Est.*, *supra*; *Masseth's Est.*, *supra*; *Schusler's Est.*, 198 Pa. 81.

¹⁵ P. & L. Dig., vol. 23, cols. 39939-40-1, 2, 3, 4; *Pensyl's Est.*, 157 Pa. 465; *Royer's Est.*, 6 Supr. C. 401; *Vogelsong's Est.*, 196 Pa. 194; *Seiler's Est.*, 14 Supr. C. 504; *Barbey v. Boardman*, 202 Pa. 185; *Klein's Est.*, 207 Pa. 191; *Hook's Est.*, 207 Pa. 203.

¹⁶ P. & L. Dig., vol. 23, cols. 34945 to 39956.

¹⁷ *Browne v. Molliston*, 3 Wharton, 129. Huston, J.

name to that which is his will, but his dying hand cannot sign.¹⁸ An eccentric man is not intestable, and if he makes an eccentric will it cannot be set aside.¹⁹ The same applies to a woman, and though she be extremely vulgar and miserly, it is not to be defalked from her mental capacity.²⁰ Indecent habits have no relativity to business ability.²¹ Being old, intemperate and irascible is not a disqualification;²² neither peculiarities, eccentricities, passion, and absurd opinions and acts destroy the power of a man to dispose of his possessions.²³ A habitual drunkard who is sober and sane when he makes his will is not incapable.²⁴

48. Delusions and aberrations.

A delusion is a concept of a false fact — a belief in the mind that a thing exists which does not. If a will is made under such an influence it is not a valid disposition; but the delusion must enter into the testamentary attempt.²⁵ Of the same effect is partial insanity or aberrations, due to derangement of the organ of the mind.²⁶ These aberrations assume various phases, sometimes religious, sometimes social, but they are all traceable to psychic causes — disturbing the normal mental manifestations through the physical personality known as the human body. For distinguishing traits examine cases cited below.²⁷ The rule is stated above that all such states and conditions, to be relevant evidence must be brought down to the time when the alleged will is made,²⁸ although the *res gestæ* may enlarge the scope of inquiry,²⁹ and connected circumstances are admissible, such as

¹⁸ See Cox's Est., 167 Pa. 501; Heston's Est., 13 D. R. 760; Allison's Est., 210 Pa. 22; Masterson v. Berndt, 207 Pa. 284; Harvey's Est., 181 Pa. 207; Lenhart's Est., 199 Pa. 618; Douglass' Est., 162 Pa. 567; Kearney's Est., 148 Pa. 218.

¹⁹ McMasters v. Blair, 29 Pa. 298.

²⁰ Tallman's Est., 148 Pa. 286.

²¹ Houser v. Lightner, 1 Lanc. L. R. 374.

²² Keating's Ap., 2 Mona. 4.

²³ Mintzer's Will, 5 Phila. 206; Cauffman v. Long, 82 Pa. 72; Knight's Est., 167 Pa. 453; Wright's Est., 202 Pa. 395; Richmond's Est., 206 Pa. 219.

²⁴ Sullivan's Est., 130 Pa. 342; Harmony Lodge's Ap., 127 Pa. 269; Levi's Est., 140 Pa. 179; Miller's Est., 179 Pa. 465; Tasker's Est., 205 Pa. 455.

²⁵ Mintzer's Will, 5 Phila. 206; Boyd v. Eby, 8 Watts, 66; Drinkhouse's Est., 14 Phila. 291; 17 Phila. 23.

²⁶ Shaver v. McCarthy, 110 Pa. 339; Thomas v. Carter, 170 Pa. 272; Wuller's Est., 14 D. R. 89; Safe Deposit, Etc., Co. v. Lange, 207 Pa. 527.

²⁷ Taylor v. Trich, 165 Pa. 586; Boyer's Est., 166 Pa. 630; Shreiner v. Shreiner, 178 Pa. 57; Hemingway's Est., 195 Pa. 291; Englert v. Englert, 198 Pa. 326; Dockerty's Est., 8 Lack. L. N. 157; Safe Deposit, Etc., Co. v. Lange, 207 Pa. 527; Foster's Est., 142 Pa. 62; McGovran's Est., 185 Pa. 203; Bennett's Est., 201 Pa. 485; Buchanan v. Pierie, 205 Pa. 123.

²⁸ P. & L. Dig., vol. 23, col. 39975; Egbert v. Egbert, 78 Pa. 326; Lillibridge's Est., 133 Pa. 211; Miles v. Treanor, 194 Pa. 430; Walton's Est., 194 Pa. 528; Wright's Est., 202 Pa. 395; Kane's Est., 206 Pa. 204.

²⁹ Grubbs v. McDonald, 91 Pa. 236; Irish v. Smith, 8 S. & R. 573; P. & L. Dig., vol. 23, col. 39984; Swails v. White, 149 Pa. 261.

previous testamentary intentions, such as a previous will³⁰ or directions to draw one.³¹

49. Presumptions and burden of proof.

Every person is presumed to be sane and the burden of proving an abnormal mental relation sufficient to destroy "disposing mind and memory," is upon him who avers that the writing is not a valid will,³² and the weight of the evidence is for the jury.³³ But when a state of insanity or imbecility has once been established it will be presumed to continue and the burden is then shifted to the party who alleges sanity.³⁴ This rule applies to one duly found by legal proceedings to be a lunatic or habitual drunkard, the decree being *prima facie* evidence of disability which may be overcome with proof of a lucid interval or a state of sane sobriety.³⁵ The like application is made to persons under the act of June 25, 1895, P. L. 300, which provides that "the said person shall be wholly incapable of making any contract or gift whatever, or any instrument in writing."³⁶

50. Undue influence in obtaining a will.

Undue influence in obtaining the execution of a will is such as controls the disposing mind to make dispositions which it would not have made otherwise if free from it, and it must operate at the very time of making the alleged will.¹ This does not embrace some silent occult and intangible influence which is not susceptible of proof.² There must necessarily be some latitude as to evidence of acts which constitute the *res gestæ* and lead up to the execution of the paper called a will.³ In the kind of influence tending to invalidate the will, proper persuasion, kindness, and prudent counsel are not included.⁴ The natural and lawful relations of the parties and the ties of friendship, gratitude and benevolence create a presump-

³⁰ Irish v. Smith, *supra*.

³¹ Titlow v. Titlow, 54 Pa. 216.

³² Grahill v. Barr, 5 Pa. 441; Egbert v. Egbert, 78 Pa. 326; Messner v. Elliott, 184 Pa. 41; Hoyt's Est., 10 Kulp, 166; Pennypacker v. Pennypacker, 8 Atl. 634; P. & L. Dig., vol. 23, col. 39989.

³³ Phila. Trust Co. v. Drinkhouse, 17 Phila. 23; Reichenbach v. Rudach, 127 Pa. 564.

³⁴ Boyd v. Eby, 8 Watts, 66; Landis v. Landis, 1 Grant, 284; Hoopes' Est., 174 Pa. 373; Thompson v. Kyner, 65 Pa. 368; Thomas' Est., 4 C. C. 270; Wuller's Est., 14 D. R. 89.

³⁵ Titlow v. Titlow, 54 Pa. 216; Leckey v. Cunningham, 56 Pa. 370; Dugan's Est., 6 D. R. 222; Bull's Est., 12 D. R. 393.

³⁶ Hoffman's Est., 209 Pa. 357. (See P. & L. Digest, vol. 23, col. 39994.)

¹ P. & L. Dig., vol. 23, cols. 39996-40002; Lenhart's Est., 199 Pa. 618; Englert v. Englert, 198 Pa. 396; Harvey's Est., 181 Pa. 207; Cahill's Est., 180 Pa. 131; Loeser's Est., 167 Pa. 498; Hindman v. Van Dyke, 153 Pa. 243; Trost v. Dingler, 118 Pa. 259. (See note 18, par. 43, for latest cases.)

² Masterson v. Berndt, 207 Pa. 284.

³ Thompson v. Kyner, 65 Pa. 368; Steadman v. Steadman, 14 Atl. 406; Robinson v. Robinson, 203 Pa. 400.

⁴ Miller v. Miller, 3 S. & R. 267; Zimmerman v. Zimmerman, 23 Pa. 375; Dean v. Negley, 41 Pa. 312; Harrison's Ap., 100 Pa. 458; Eddy's Est., 14 W. N. C. 551; McEnroe v. McEnroe, 201 Pa. 477.

tion against undue influence which must be overcome with definite proof of unfair advantage, threats, excessive and overmastering importunities, fraud or imposition. The cases illustrating the various phases are cited in Vol. XXIII, P. L. Dig. col. 40002-3-4. To overthrow a will on this ground it must be shown that the undue influence was the dominating factor⁵ at the time. An illicit relation, with other competent evidence showing undue influence may sustain a verdict against a will;⁶ but standing alone it is insufficient proof.⁷ There is a modicum of allowance in the law for human frailty upon the masculine side as well as the feminine, in accordance with the exhortation: "Let him that is without sin cast the first stone." To impeach a will the influence must amount to coercion.⁸

Mental or physical weaknesses alone are not conditions from which undue influence is inferable.⁹ They are only facts which may be considered in deciding whether the person yielded to actual restraint which must be proven.¹⁰

51. Acts of beneficiaries and others.

There is nothing improper about the presence of beneficiaries or others at the making of a will.¹¹ It depends wholly upon what they say or do to influence the disposing mind unduly,¹² and whether it does so affect it.¹³ A change of mind or purpose by the testator is not of itself evidence of undue influence by anyone. He has a right to change his mind as often as he sees fit, as long as he is under no coercion or imposition;¹⁴ and therefore the manner in which he distributes his own, whether he disappoints expectant legatees or disinherits his children, does not ordinarily impeach the disposition.¹⁵

52. The burden of proof.

All these questions are liable to come up on the trial of the issue and are therefore essential to correct practice. The burden of proving undue influence, fraud or imposition is upon him who alleges it.¹⁶

⁵ White's Est., 33 Supr. C. 533.

⁶ Dean v. Negley, 41 Pa. 312; Boyd v. Boyd, 66 Pa. 283; P. & L. Dig., vol. 23, col. 40014, for lower court cases.

⁷ Rudy v. Ulrich, 69 Pa. 177; Main v. Ryder, 84 Pa. 217; Wainwright's Ap., 89 Pa. 220; Houser v. Lightner, 32 Pitts. L. J. 338; Pepper's Est., 148 Pa. 5; Johnson's Est., 159 Pa. 630; Lewis' Est., 210 Pa. 599.

⁸ Penrose, J., in Heilbrun's Est., 9 C. C. 350; Allshouse v. Kelly, 219 Pa. 652.

⁹ Eckert v. Flowry, 43 Pa. 46; Thompson v. Kyner, 65 Pa. 368.

¹⁰ Tawney v. Long, 76 Pa. 106; Reichenbach v. Ruddach, 127 Pa. 564; Robinson v. Robinson, 203 Pa. 400; Miller's Est., 179 Pa. 645; 159 Pa. 562; 166 Pa. 97; Morgan's Est., 219 Pa. 355.

¹¹ Burdon's Will, 14 Phila. 332; Pennypacker v. Pennypacker, 8 Atl. 634.

¹² Krepps v. Krepps, 4 Brewster, 38.

¹³ Hook's Est., 207 Pa. 203; P. & L. Dig., vol. 23, cols. 40026-7-8; Perret v. Perret, 184 Pa. 131.

¹⁴ Slater v. Slater, 209 Pa. 194; Keisler's Est., 213 Pa. 9; McDonald's Est., 130 Pa. 480; P. & L. Dig., vol. 23, col. 40033.

¹⁵ Herster v. Herster, 122 Pa. 239; McCuen's Est., 13 D. R. 222; Messner v. Elliott, 184 Pa. 41.

¹⁶ Frew v. Clarke, 80 Pa. 170; Yorke's Est., 185 Pa. 61; Alexander's

This is the general rule; but where the beneficiary under the will takes a large share and he stood in a confidential relation at the time of making it, as pastor, priest, physician, attorney or agent, the burden of showing good faith and voluntary disposition is shifted upon him; especially where he is a stranger to the blood.¹⁷ The rule has also been applied where the advisor was a son,¹⁸ a brother¹⁹ or a first cousin,²⁰ and it is particularly so where the decedent was of weak mind and the confidential agent wrote the will in which he was made the chief beneficiary.²¹ Where there is conflicting testimony, the court properly lets it go to the jury.²² Failure to call the beneficiary as a witness may turn the scales against him where erstwhile in trembling poise they hung.²³ It is not every act of the chief beneficiary, however, that may be construed into such influence as to place upon him the burden of disproof; for instance, merely copying the will as directed by the scrivener;²⁴ writing by the husband of a legatee;²⁵ or by one who would have been a large beneficiary without a will;²⁶ or where the advisor's benefit is small.²⁷ That he was made an executor is not enough to apply the rule to him.²⁸ Where the testator's mind was strong and active and it is shown that the will was his own wish and act, the confidential advisor stands exonerated.²⁹ If the beneficiary did not write the will or request it to be written, or solicit it, the rule does not apply to him.³⁰ A will may be sustained in part and set aside as to part obtained by undue influence.³¹

Est., 49 Pitts. L. J. 127; McNitt's Est., 229 Pa. 71; Nonnemacher v. Nonnemacher, 159 Pa. 634.

¹⁷ Boyd v. Boyd, 66 Pa. 283; Dushane's Ap., 4 W. N. C. 78; Cuthbertson's Ap., 97 Pa. 163; Wilson's Ap., 99 Pa. 545; Wilson v. Mitchell, 101 Pa. 495; Yardley v. Cuthbertson, 108 Pa. 395; Herster v. Herster, 116 Pa. 612; Murdy's Ap., 123 Pa. 464; Swails v. White, 149 Pa. 261; Armor's Est., 154 Pa. 517; Hoopes' Est., 174 Pa. 373; Messner v. Elliott, 184 Pa. 41; Kaufman v. O'Conner, 198 Pa. 213; Adams' Est., 220 Pa. 531; Tyson's Est., 24 Montg. 135.

¹⁸ Blume v. Hartman, 115 Pa. 32; Miller's Est., 179 Pa. 645; Miller v. Miller, 187 Pa. 572.

¹⁹ Albright's Est., 17 York, 109.

²⁰ Scattergood v. Kirk, 192 Pa. 263, 195 Pa. 195.

²¹ Yardley v. Cuthbertson, 108 Pa. 395.

²² Caven v. Agnew, 186 Pa. 314.

²³ Weaver's Est., 9 C. C. 616.

²⁴ Hindman v. Van Dyke, 153 Pa. 243.

²⁵ Newlin's Est., 7 C. C. 648.

²⁶ Caldwell v. Anderson, 104 Pa. 199; Coleman's Est., 185 Pa. 437.

²⁷ Stokes v. Miller, 10 W. N. C. 241; Hambleton v. Mendenhall, 17 Phila. 73.

²⁸ Linton's Ap., 104 Pa. 228.

²⁹ P. & L. Dig., vol. 23, cols. 40052-61; Trost v. Dingler, 118 Pa. 259; Yorke's Est., 185 Pa. 61; Logan's Est., 195 Pa. 282; Seiler's Est., 14 Supr. C. 504; Friend's Est., 198 Pa. 363; Wingert's Est., 199 Pa. 427; McEnroe v. McEnroe, 201 Pa. 477; Adams' Est., 201 Pa. 502; Roberts v. Clements, 202 Pa. 198; Alexander's Est., 206 Pa. 47; Caughey v. Bridenbaugh, 203 Pa. 414; Rockhill's Est., 208 Pa. 510.

³⁰ Miller v. Oestrich, 157 Pa. 264; Douglass' Est., 162 Pa. 567; Messner v. Elliott, 184 Pa. 41; Kane's Est., 206 Pa. 204; Miles v. Treanor, 194 Pa. 430.

³¹ Steadman v. Steadman, 14 Atl. 406; Griffin's Est., 9 D. R. 248.

53. Evidence.

Mental incapacity and undue influence may be established by either positive direct proof or circumstances in connection with direct evidence.¹ A subscribing witness may give his opinion as to the mental state of the decedent at the time of the execution without stating the reasons for it.² But if he does state the facts upon which his opinion is founded and they are insufficient, his opinion is without weight.³ The testimony of subscribing witnesses may be contradicted, but it is entitled to proper import.⁴ If there is no evidence of lack of testamentary capacity, undue influence must be proved by clear, direct and convincing testimony.⁵ The subscribing witnesses may be recalled by the proponent in support of the will,⁶ and the contestant may cross-examine them upon the condition of mind of the testator as a part of the *res gestæ*.⁷ A subscribing witness may be contradicted by the proponent when he swears differently on the trial from his oath at the probate.⁸ But if the contestants call him they make him their witness and cannot impeach him, if they are surprised.⁹ Contradictory statements by subscribing witnesses are for the jury, but little weight need be given to them.¹⁰

54. Expert testimony and opinions.

Expert testimony on questions concerning the known principles of the arts and sciences which are exact are considered valuable to aid courts and juries in arriving at just conclusions. But when it concerns mental relations and motives, whilst admissible in evidence, they are almost valueless to the cause of truth,¹¹ however valuable to the experts who ordinarily are arrayed against each other reproachfully enough, in about equal numbers and standing as experts. That courts admit them there is no doubt,¹² and if the hypothetical question embraces fairly all the facts in the case *pro et con*, their opinion may be worth as much as the jurors are willing to accord it.¹³ The legislature has even gone so far as to loosen the solemnity of a witness' obligation and enable him to testify although he has no belief in a

¹ Reichenbach v. Ruddach, 127 Pa. 564; 121 Pa. 18; Logan's Est., 195 Pa. 282; Robinson v. Robinson, 203 Pa. 400; Tawney v. Long, 76 Pa. 106; Cuthbertson's Ap., 97 Pa. 163; Deshong's Est., 9 Del. Co. 339

² Logan v. McGinnis, 12 Pa. 27; Pidcock v. Potter, 68 Pa. 342.

³ Cook's Est., 16 Phila. 322.

⁴ Mintzer's Will, 5 Phila. 206; P. & L. Dig., vol. 23, col. 40070.

⁵ South Side Trust Co. v. McGrew, 219 Pa. 606; Tyson's Est., 24 Montg. 135; Masseth's Est., 213 Pa. 136; Morgan's Est., 219 Pa. 355.

⁶ Titlow v. Titlow, 54 Pa. 216.

⁷ Egbert v. Egbert, 78 Pa. 326.

⁸ Cowden v. Reynolds, 12 S. & R. 281; Harden v. Hays, 9 Pa. 151 (6 Pa. 409.)

⁹ Dickson's Est., 20 C. C. 152.

¹⁰ Rees v. Stille, 38 Pa. 138; P. & L. Dig., vol. 23, col. 40074; Coleman's Est., 185 Pa. 437.

¹¹ Palmer's Est., 12 Phila. 124; Boyer's Will, 13 Phila. 254; Richmond's Est., 206 Pa. 219.

¹² Pidcock v. Potter, 68 Pa. 342; Wilson v. Mitchell, 101 Pa. 495; Wulter's Est., 14 D. R. 89.

¹³ Miller's Est., 179 Pa. 645; Draper's Est., 215 Pa. 314; Morgan's Est., 219 Pa. 355; Jacob's Est., 17 D. R. 369; Palmer's Est., 219 Pa. 303.

Supreme Being and the doctrine of theocratic sanction.¹⁴ Laymen are permitted to give their opinion of the mental condition of decedent when they have testified to facts which show that they knew by observation, contact or business relations, what his condition was at the time of disposition;¹⁵ otherwise not.¹⁶

55. Declarations of beneficiaries and the testator.

The declarations of some of the beneficiaries under a will which would be prejudicial to others are incompetent and must be excluded.¹⁷ But the declarations of the chief beneficiary are admissible on the question of confidential relation,¹⁸ or undue influence.¹⁹ The declarations of the testator and the devisee may be admissible as part of the *res gestæ*, where a fraud by the devisee is alleged.²⁰ The declarations of the testator near the time of execution, either before or after, pertinent to the alleged will, may be admissible.²¹

56. The writing itself as evidence.

Upon the questions of mental condition and fraud, or unreasonable dispositions, the writing itself may be potent evidence.²² Its inherent character is to be considered with the other evidence concerning its execution.²³

57. Province of the court and of the jury.

The questions of sanity or testamentary incapacity are for the jury under proper instructions;²⁴ and the court should not so qualify the submission as to be almost equivalent to binding instructions.²⁵ The court may determine the sufficiency of the evidence;²⁶ and the judge may express his opinion to the jury, though not to bind theirs.²⁷

¹⁴ Act of April 23, 1909, P. L. 140 (Atheist's relief act).

¹⁵ Shaver v. McCarthy, 110 Pa. 339; Newhard v. Yundt, 132 Pa. 324; Swails v. White, 149 Pa. 261; Comth., Etc., Co. v. Gray, 150 Pa. 255; Roche v. Wegge, 202 Pa. 169.

¹⁶ Dickinson v. Dickinson, 61 Pa. 401; Englert v. Englert, 198 Pa. 326; P. & L. Dig., vol. 23, col. 40083, *et seq.*

¹⁷ P. & L. Dig., vol. 23, col. 40090; Yorke's Est., 185 Pa. 61; Hoar v. Leaman, 2 Mona. 321.

¹⁸ Robinson v. Robinson, 203 Pa. 400.

¹⁹ Perret v. Perret, 184 Pa. 131.

²⁰ Kenyon v. Ashbridge, 35 Pa. 157.

²¹ Norris v. Sheppard, 20 Pa. 475; Herster v. Herster, 122 Pa. 239; McTaggart v. Thompson, 14 Pa. 149; P. & L. Dig., vol. 23, cols. 40099-40109.

²² Patterson v. Patterson, 6 S. & R. 55; Baker v. Lewis, 4 Rawle, 356; Thomas v. Carter, 170 Pa. 272; Bitner v. Bitner, 65 Pa. 347; Callery's Will, 46 Pitts. L. J. 6.

²³ Colegate's Will, 12 Phila. 48; Gray's Est., 18 Phila. 132; Foley's Est., 50 Pitts. L. J. 417; P. & L. Dig., vol. 23, col. 40113, *et seq.*; Jacob's Est., 17 D. R. 369.

²⁴ Heister v. Lynch, 1 Yeates, 108; Rees v. Stille, 38 Pa. 138; Hefley v. Poorbaugh, 10 Atl. 12; Keebler v. Shute, 183 Pa. 283.

²⁵ Pidcock v. Potter, 68 Pa. 342; Shaver v. McCarthy, 110 Pa. 339; Young v. Ayres, 26 Pitts. L. J. 62.

²⁶ Cauffman v. Long, 82 Pa. 72; Irvin v. Deschamps, 11 W. N. C. 365.

²⁷ Thompson v. Kyner, 65 Pa. 368; Yardley v. Cuthbertson, 108 Pa. 395; McCormick v. McCormick, 194 Pa. 107; Bitner v. Bitner, 65 Pa. 347.

Upon the trial, if the evidence is of such a character that a verdict against the will could not be sustained, the court should not submit it to the jury.²⁸ He may direct a verdict for proponent, if the evidence would not support the contestant.²⁹

58. Verdict and judgment.

If two or more questions were propounded in the issue sent over from the Orphans' Court, it is the duty to find separately upon each, either for the plaintiff or the defendant;³⁰ and if they have found the fact, but omitted for which party the court may amend it so as to show it.³¹ If the issue embraces want of testamentary capacity and averment of undue influence the verdict must cover the whole issue.³² A verdict by consent of the parties to the issue will not bind others who were not parties to the agreement.³³ Judgment should be entered on the verdict as in other cases and costs follow it.³⁴

Judgment should not be entered on the verdict until after four days have expired, within which a motion may be made for a new trial, and then only on motion and by direction of the court whose duty it is to order the verdict and judgment certified to the register.³⁵ The court may grant a new trial even after the term.³⁶

59. Form of certificate after trial of issue.

I, ———, prothonotary of the Court of Common Pleas of ——— County, do certify, that at a Court of Common Pleas, held at ———, on the ——— day of ———, A.D. 19—, on an issue framed to try the validity of the within will, wherein Hebe Doe was plaintiff and stood for the will, and Adam Rowe was defendant, and stood against the will, a special jury being called, came to-wit: A. B., C. D., etc., who being duly sworn or affirmed, on their respective oaths or affirmations did say that they do find for the plaintiff and assess the damages at six cents with costs [or for the defendant] which is our return to the precept sent into our court by you, dated the ——— day of ———, A.D. 19—, a copy of which, together with a copy of the will which you attached to the same, is hereto attached.

In testimony whereof, etc.

[Seal.]

—————,
Prothonotary.

60. Form of order to file decision in Orphans' Court.

When the Orphans' Court has certified an issue to the Common Pleas to be found and that court, by agreement under the act of

²⁸ Wilson v. Mitchell, 101 Pa. 495; Herster v. Herster, 122 Pa. 239.

²⁹ Roberts v. Clemens, 202 Pa. 198.

³⁰ Keebler v. Shute, 183 Pa. 283.

³¹ Jackson v. Tozer, 154 Pa. 223.

³² Butts v. Armor, 164 Pa. 73.

³³ Hambleton v. Mendenhall, 17 Phila. 13.

³⁴ McMasters v. Blair, 31 Pa. 467.

³⁵ Whitaker's Will, 13 Phila. 22.

³⁶ Hambleton v. Yocum, 108 Pa. 304; Hohein v. Hohein, 25 Lanc. L. R. 105.

April 22, 1874, P. L. 109, tries the case without a jury, its finding and opinion will be certified to the Orphans' Court in the form following:

"We direct this conclusion, together with the foregoing opinion and findings to be certified to the Orphans' Court upon the expiration of thirty days after the filing hereof, to the attorneys of the parties (such notice to be forthwith given them by the prothonotary) unless exceptions are sooner filed, as provided by the act of April 22, 1874, P. L. 109."³⁷

By the Court.

61. Appeals.

An appeal from the judgment is not such a supersedeas as to prevent partition.¹ The order of the Orphans' Court directing an issue *d. v. n.* is not a definitive decree, from which an appeal lies, but an order refusing an issue is.² When an issue is awarded, letters testamentary revoked and an administrator *pendente lite* appointed, no appeal lies.³ Where the verdict and judgment were against the will, on appeal, the court will review the evidence to ascertain whether a mistake has been made.⁴ If there was sufficient evidence to justify the finding, the verdict must stand.⁵ For immaterial and harmless error the appellate court will not reverse.⁶

62. Costs.

Upon dismissal of an appeal from the register and refusal of an issue, the costs may be placed upon the appellant.⁷ When the appellate court reverses and enters judgment with costs, costs before the register are not included.⁸ If the register has not taxed any costs, the presumption is that the parties were to bear them who incurred them, or none were due.⁹ The prothonotary may docket the costs before the register and they will then be collected with the other costs.¹⁰ Where two persons contest a will and one dies, each is liable for half the costs to that point—but if the legal representative of deceased refuses to go further, no further liability for costs is incurred.¹¹ Death revokes a power of attorney and one giving it is liable only to that time.¹² Counsel for contestant may claim his fees where the will is proved to be a forgery.¹³ A trustee who defends a

³⁷ Bradley v. Comber, 19 D. R. 130.

¹ Mushrush's Est., 23 C. C. 629.

² Schwilke's Ap., 100 Pa. 628; Shepard's Est., 170 Pa. 323.

³ Gelsinger's Ap., 2 Walker, 196.

⁴ Robinson v. Robinson, 203 Pa. 400; Shreiner v. Shreiner, 178 Pa. 57; Masterson v. Berndt, 207 Pa. 284.

⁵ Bradley v. Pierce, 180 Pa. 262; McCormick v. McCormick, 194 Pa. 107.

⁶ Hoar v. Leaman, 2 Mona. 321; Messner v. Elliott, 184 Pa. 41; Daniel v. Daniel, 39 Pa. 191.

⁷ Winpenny's Ap., 8 W. N. C. 415; Wood's Est., 2 W. N. C. 82.

⁸ McMasters v. Blair, 31 Pa. 467; Mathews v. Biddell, 8 Supr. C. 112.

⁹ Patterson's Est., 47 Pitts. L. J. 72.

¹⁰ Dellinger v. Dellinger, 1 C. C. 13.

¹¹ McGeary's Est., 36 Pitts. L. J. 152.

¹² Yerkes' Ap., 99 Pa. 401.

¹³ Simcox's Est., 15 C. C. 386.

will for his *cestui que trust* is entitled to credit in his account for expenses incurred in such defense.¹⁴ But a legacy given free from "charges of whatever kind" cannot be diminished for costs of a contest to sustain the will.¹⁵

63. Effect of contest.

Pending the contest distribution will be suspended.¹⁶ If the executor pays a legacy he does so at his own risk, for, if the will is set aside he must bear the loss.¹⁷ Unless the letters issued are revoked these are the executor's badge of authority and he cannot be compelled to give security¹⁸ except for waste.¹⁹

But the carrying out of a contested will and codicil is suspended until the main issue is determined.²⁰

64. Res judicata.

A verdict and judgment upon an issue determines and settles only what is embraced in it. Thus where there are two alleged wills, one of which was not directly involved, those claiming under the last are not concluded.²¹ If the contest is only upon the legitimacy of the contestant, that is the only question involved and adjudicated and the validity of the will is not in issue.²²

65. Protection of rights in equity.

A court of Equity has jurisdiction to preserve and protect rights under a will, if distribution is not sought,²³ and, in a proper case, it might take custody of the will itself, as where proceedings to declare the maker a lunatic are pending;²⁴ but it will not assume jurisdiction where the case is not a clear one.²⁵

¹⁴ Hoffman's Est., 19 Supr. C. 70.

¹⁵ Baugh's Est., 12 D. R. 303. (See P. & L. Dig., vol. 23, col. 40308.)

¹⁶ Neal's Est., 16 Phila. 330, 359.

¹⁷ Hinkle v. Eichelberger, 2 Pa. 483.

¹⁸ Smith's Est., 14 C. C. 161.

¹⁹ Stewart's Est., 7 C. C. 603.

²⁰ Smith's Est., 177 Pa. 17.

²¹ Cawley's Est., 162 Pa. 520 (136 Pa. 628); Lappe's Est., 215 Pa. 424.

²² Whitaker's Est., 14 Phila. 275.

²³ Goodwin v. Colwell, 213 Pa. 614.

²⁴ Rex's Pet., 2 Montg. 175.

²⁵ Marshall v. De Haven, 209 Pa. 187; Morris v. Jameson, 2 P. & W. 399.

CHAPTER XXXV.

LETTERS TESTAMENTARY AND OTHER FORMS — APPOINTMENT AND RENUNCIATION OF EXECU- TORS.

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| <ol style="list-style-type: none"> 1. Issuance of letters testamentary. 2. Appointment of executor. 3. Married woman as executor. 4. Debtor or creditor made executor. 5. Right to letters. 6. Acceptance and renunciation. 7. Form of renunciation. 8. Form of certificate granting letters. 9. Form of letters testamentary. 10. Revocation of letters. 11. Letters of administration <i>c.t.a.</i> 12. Power of acting executor over real estate. 13. Powers of acting executor and admr. <i>c.t.a.</i> 14. Administrator <i>c.t.a.</i>, powers of. | <ol style="list-style-type: none"> 15. Surviving or acting executor's powers. 16. Executor, nonresident, bond. 17. Appointment of administrator <i>de bonis non.</i> 18. Bond of administrator <i>de bonis non.</i> 19. Form of letters <i>de bonis non.</i> 20. Form of letters <i>pendente lite.</i> 21. Foreign letters have no force in Pennsylvania. 22. Ancillary letters, necessity for. 23. Power of foreign executor to revive judgment. 24. Transfer of public loans by foreign executors. 25. Transfer of funds to foreign executors. |
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I. Issuance of letters testamentary.

Upon probate of a will, if there be a testament, that is, an appointment of an executor, it will be the duty of the register to issue letters testamentary to the person or persons therein named as executor or executors, unless some or all renounce, in which case he may issue letters of administration with the will annexed.¹ The first step, however, is to take proof of the time and place of the death of the testator which may be in the following form:

— County, ss.

Register's office, — —, 19—.

This day, before me, — —, Register of Wills, etc., in and for said county, personally came — —, who being duly sworn, according to law, deposes and says, that — —, late of the —, of —, in said county, deceased, died on —, the — day of —, 19—, at — o'clock —M., to the best of deponent's knowledge and belief.

A — B —.

Sworn and subscribed before me, }
this — day of —, 19—, }

— —,
Register.

— —,
Deputy.

¹ *Cum testamento annexo.*

2. Appointment of executor.

To appoint an executor no express words are necessary. If the intention to appoint is clear, it is sufficient to award letters.² An alien may be, or make, an executor provided he be an alien *am*y and not enemy.³ While a person under the age of twenty-one years is incompetent to make a will⁴ he is not thereby disqualified from being appointed executor. At the common law, it was settled that at the age of 14, an infant could make a will and also an executor, but not sooner.⁵ There was no time that an infant could not be appointed executor; even while yet in *ventre sa mere*, he might be named both as legatee and executor, or either.⁶ But the executorship could not be committed to him until he became 17, by the law spiritual, meanwhile the administration was committed to another *durante minore ætate*.⁷ If a female infant be made executrix, if she be married to a male who is seventeen or more, the execution is committed to him. But this was placed at twenty-one years by statute 38 Geo. 3, section 6, C. 87. When a testator appointed a child in *ventre sa mere* executor and there happened to be two or more born, all were entitled equally.⁸ Of such infant executor, being seventeen, it was solemnly determined that his release, without payment of the debt or duty, would not bind or bar him.⁹ The appointment of an executor implies the payment of the testator's debts out of the estate committed to him. "For that cause and end he is principally to have and enjoy all the goods and chattels of the testator and all sums of money to him owing."¹⁰

The office is for life only and the testator may provide for a successor.¹¹ He may appoint executors successively and as many as he deems fit, in as many countries as he has an estate.¹² In appointing he need not call him his executor. His office as such may be determined by the character of the duties imposed upon him.¹³ His appointment in the will is ratified and confirmed by its probate, and until he renounces, or has refused to appear and take out letters, after having been cited to do so, there is no authority to appoint an administrator *c. t. a.* nor can the register try the question of the alleged insanity of the executor.¹⁴

² Grant v. Leslie, 3 Phillimore, 116; Carpenter v. Cameron, 7 Watts, 51; Hayes' Est., 7 Supr. C. 160.

³ Wells v. Williams, 1 Lutwyche, 34. By statute of 9 & 10 Wm. III, ch. 32, no one could act as executor who for a second time denied the Trinity, or the Holy Scriptures or the truth of Christianity, 1 Woodes, 374.

⁴ Section 3, act of 1833.

⁵ Brown's Case, Jones, 210; 1 Coke's Inst. 89 b.; Bishop v. Sharp, 2 Vernon, 469.

⁶ Lawrence v. Wallis, 2 Brown's Ch. R. 320; Northey v. Strange, 1 Peere Williams, 342; Wallis v. Hodson, 2 Atkyns, 117; Swift v. Duffield, 5 S. & R. 40.

⁷ Stat. 38, Geo. 3, section 6, c. 87.

⁸ 3 Bacon's Abr. 8; Godolphin, 102.

⁹ Russell's Case, 5 Coke, 27; Coke on Litt. 172.

¹⁰ Wentworth on Ex. 10.

¹¹ Edwards' Est., 5 W. N. C. 431. Penrose, J.

¹² Pepper's Est., 32 W. N. C. 323.

¹³ Carpenter v. Cameron, 7 Watts, 51.

¹⁴ Miller's Est., 216 Pa. 247.

3. Married woman as executor.

Formerly a married woman was incapable of being executrix, without her husband, but as she was gradually emancipated from the ban of chivalry, which even subjected the person of the female ward to the will of her guardian (so unchivalrous was knight lordliness over the *feme* slave), she was clothed with some rights independently of the baron. If a *cestuy que use* had devised that his wife should sell his land and made her executrix — she being then sole, when he died, and she afterwards married, she was empowered to sell to her second husband; for this she did *en auter droit*, i. e., the executorship, and the vendee would thus be in title by the first husband.¹⁵

4. Debtor or creditor made executor.

The old rule of the law in England was that when a testator appointed his debtor executor he took away the remedy to collect the debt, since "no man can maintain an action against himself and the right of action by the appointment is vested in the debtor."¹⁶ It was left to "a court of conscience" to order the executor to yield his dues to the creditors of the estate. The equitable powers of the Orphans' Court will compel an executor to account for his debt.¹⁷ When a creditor was made executor under the English law he was given leave thereby to prefer his claim and pay himself before all others, where his claim was a specialty or of record.¹⁸ This was called the right to retain, as against any other creditor standing in equal degree.¹⁹ But all the refinements of old disappear now in the equitable jurisdiction of the Orphans' Court, and his debt becomes an asset immediately.²⁰

5. Right to letters.

Where there are two executors and only one takes out letters and then dies, the other is not barred from assuming his duties as executor.²¹ If a second will revokes the first it also revokes the appointment, although it republishes some of the provisions and letters go to the executors named in the latter.²² If the widow is named as executrix and elects to take against the will it has been doubted whether she could retain the executorship.²³ But being interested to the extent of her dower and statutory sums, and her claim must be made through the executor, why should she not herself retain the office?²⁴ If the will postpones the time of taking out letters, there being no debts, its limitation is binding.²⁵ The executor derives his power

¹⁵ Sulyard v. Preston, 2 Wilson, 402.

¹⁶ 3 Bacon's Abr. 11.

¹⁷ Clemson v. Pusey, 9 S. & R. 204; Winship v. Bass, 12 Mass. 199.

¹⁸ Coke's 1 Inst. 264 b. (See note 15a.)

¹⁹ 3 Bacon's Abr. 10; Meason, *ex parte*, 6 Binney, 167.

²⁰ Griffiths v. Chew Exs., 8 S. & R. 17; Eichelberger v. Morris, 6 Watts, 43; Linsenbigler v. Gourley, 56 Pa. 166; Bowman's Ap., 62 Pa. 166.

²¹ Gallagher v. Gallagher, 6 Watts, 473.

²² Nelson's Est., 147 Pa. 160.

²³ James' Est., 20 Phila. 43. Ashman, J.

²⁴ Gallagher's Est., 76 Pa. 296.

²⁵ Lininger's Ap., 101 Pa. 161.

from his appointment in the will and not by the probate;²⁶ and it may be proved by the will.²⁷ His right to administer derived from the will is such that he cannot be deprived of it except by his record renunciation or refusal to appear when cited.²⁸ It has been said that letters should not be granted to an insolvent executor.²⁹

6. Acceptance and renunciation.

The Orphans' Court has no jurisdiction where the executors refuse or renounce. The register has exclusive authority to grant letters in such case.¹ The least interference with the estate by the executor will be considered an election to accept.² Mere delay is not an acceptance nor a renunciation, which must be placed on the record. Payment of funeral expenses out of their pockets is not an acceptance when they renounce on citation.³ A refusal *in pais* is not a sufficient renunciation under section 2, act of March 12, 1800, 3 Sm. L. 433. It must appear on the record.⁴ No particular form of renunciation is requisite. It may be by letter declining and asking the appointment of another, if filed of record.⁵ He may renounce even after he has taken the oath of office;⁶ but he may also be compelled to perform his duties if he has assumed the office and cannot then renounce without the consent of the parties interested.⁷ He cannot renounce a part of the trust, though the estate lies in two states.⁸ If he is also trustee he cannot renounce the executorship and retain power over the trust.⁹ Where there are several executors and one renounces, in case the acting executor becomes incapacitated the one who renounced may recant and take charge of the administration.¹⁰ Where the executor is a nonresident of the state and refuses to give security as required by law, such refusal is a renunciation.¹¹ Even before he qualifies he is an executor and the service of notice of protest of testator's note may be made upon him as the legal representative appointed.¹² It does not require deliverance of letters to him, for the letters are but the certificate of his authority.¹³

7. Form of renunciation of executor.

If the executor renounces, it may be done in the following form:
To ———, Esq., Register of Wills:

I, Henry Fell, appointed executor in the last will and testament of

²⁶ Neal's Est., 14 W. N. C. 258; Pomeroy's Ap., 127 Pa. 492.

²⁷ Rife v. Galbreath, 3 P. & W. 204.

²⁸ Bowman's Ap., 62 Pa. 166.

²⁹ McArthur's Est., 26 Pitts. L. J. 57.

¹ Langton's Est., 14 W. N. C. 46.

² Hermes' Est., 32 Pitts. L. J. 474; Bowman's Ap., 62 Pa. 166.

³ Ralston's Est., 158 Pa. 645.

⁴ Heron v. Hoffner, 3 Rawle, 393.

⁵ Comth. v. Mateer, 16 S. & R. 416.

⁶ Miller v. Meetch, 8 Pa. 417.

⁷ Hermes' Est., 32 Pitts. L. J. 474.

⁸ Ross v. Barclay, 18 Pa. 179.

⁹ Strobel's Est., 2 W. N. C. 409; McIlvaine's Est., 1 Del. Co. 248.

¹⁰ King, P. J., in Taggart's Pet., 1 Ashmead, 321.

¹¹ Rhone, P. J., in Fellows' Est., 6 Luz. L. R. 244.

¹² Shoenberger v. Lanc. Sav. Inst., 28 Pa. 459.

¹³ Bowman's Ap., 62 Pa. 166.

John Ruhl, Sr., now deceased, do hereby renounce my right to act as such and request you to appoint some suitable person in my place and stead and that you enter this my renunciation of record in your office.

Witness my hand this — day of —, 19—.

Henry Fell.

8. Form of certificate of granting letters testamentary.

Commonwealth of Pennsylvania,

Clinton County, ss.

I, Samuel B. Snook, register for the probate of wills and granting letters of administration in and for the county of Clinton, in the commonwealth of Pennsylvania, do hereby certify and make known that on the — day of —, in the year of our Lord one thousand nine hundred and —, letters testamentary on the estate of John Bierly, Sr., deceased, were granted in due form of law unto Peter S. Bierly, he having been appointed executor, as a duly authenticated copy of the will of said decedent on file in this office sets forth, and he having first been qualified in said state, well and truly to administer the same.

Given under my hand and seal of office this — day of —, 19—.

[Seal.]

Register.

The same form of oath to perform his duties as required from an administrator will answer, with slight changes.

9. Form of letters testamentary.

The Commonwealth of Pennsylvania,

Clinton County, ss.

To Peter S. Bierly, greeting:

I, Samuel B. Snook, register for the probate of wills and granting letters of administration in and for said county, do make known to all men, that on the day of the date hereof, at Lock Haven, before me was proved and approved the last will and testament of John Bierly, Sr., late of Logan Township, said county, deceased (a true copy whereof is to these presents annexed), having whilst he lived and at the time of his death, divers goods, chattels, rights and credits, within the said commonwealth, by reason whereof and the laws and usages of this commonwealth, the approbation and insinuation of the last will and testament, and the committing the administration of all and singular the goods, chattels, rights and credits which were of the said deceased to me are manifestly known to belong. And that the administration of all and singular the goods, chattels, rights and credits of the deceased in any way concerning his last will and testament, was committed to you, who are in the said testament named as executor, having first been sworn well and truly to administer the goods, chattels, rights and credits of the said decedent, according to law, and also diligently and faithfully to regard, and well and truly to comply with the provisions of the law relating to collateral inheritances, and make a true and perfect inventory thereof, and exhibit the same into the register's office at Lock Haven on or before the — day of —, A. D. 19—, next, and to render a true and just

account, calculation, and reckoning of the said administration, on or before the — day of — A. D., 19—.

In testimony whereof I have hereunto set my hand and affixed the seal of said office, at Lock Haven, this — day of — A. D. 19—.
[Seal.]

Sam'l B. Snook,
Register of Wills.

10. Revocation of letters.

It is doubtful whether the register may revoke letters testamentary after issuing them.¹⁴ It is certain he cannot annul the will appointing the executor. His appointment of an *admr. d. b. n. c. t. a.* does not affect the power of a surviving executor.¹⁵ The Orphans' Court will not exercise a power of revocation without first citing the parties interested.¹⁶

11. Letters of administration c. t. a.

Section 18 of the act of 1832, *supra*, provides:

"Whenever the executors named in any last will and testament, shall all refuse or renounce the trust and execution thereof, the register, having jurisdiction as aforesaid, may receive the probate of such will and grant letters of administration with it annexed, to the person by law entitled thereto."

The register has exclusive jurisdiction to grant letters of administration *cum testamento annexo*,¹⁷ but he should first give notice of his purpose, to the next of kin.¹⁸ There must be a refusal or a renunciation first.¹⁹ In case the will appoints no executor, or where the executors shall be all dead, renounce or are disqualified to act, the register is empowered to appoint an administrator with the will annexed, who is by the acts of March 12, 1800 (section 2) and section 1 of the act of February 7, 1814, 6 Sm. L. 102, given all the powers of an executor.

The form of letters *cum testamento annexo* is as follows:
Commonwealth of Pennsylvania,

County of Clearfield, ss.

To Thomas Ball, greeting:

I, —, register for the probate of wills and granting letters of administration, in and for said county, do make known unto all men:

That, whereas, on the — day of —, A. D. 19—, before me, the register aforesaid, was proved and approved in due form of law, the last will and testament of James Wilson, late of the city of Dubois in said county, deceased, wherein he appointed Mabel Wilson as sole executrix, who in due form renounced the said appointment [or if no executor was appointed, so state], as in and by the said will and

¹⁴ Taggart's Pet., 1 Ashmead, 321; Neal's Will, 17 W. N. C. 191; 17 Phila. 486.

¹⁵ Packer v. Owens, 164 Pa. 185.

¹⁶ Chambers' Est., 3 W. N. C. 188; Schwilke's Ap., 100 Pa. 628.

¹⁷ Langton's Est., 14 W. N. C. 46.

¹⁸ Maupay's Est., 2 Brewster, 491.

¹⁹ Comth. v. Mateer, 16 S. & R. 416; Taggart's Pet., 1 Ashmead, 321; Miller v. Meetch, 8 Pa. 417; Bowman's Ap., 62 Pa. 166.

the records filed in the register's office at Clearfield, will more fully appear. And the said James Wilson having while he lived and at the time of his death, divers goods and chattels, rights and credits within this commonwealth, the power of granting letters of administration thereof is vested in me. I, therefore, in order that the goods and chattels, rights and credits, which were of the said deceased, may be well and truly administered, converted and disposed of according to his last will, do grant unto you, Thomas Ball, full power to administer the goods and chattels, rights and credits of said decedent, which at the time of his death were to him owing or did in anywise belong, and to pay the debts of the deceased, so far as the said goods and chattels, rights and credits will extend, according to their rate and order of law. And I do hereby require you, the said Thomas Ball, upon your solemn oath, in all other respects, well and truly to administer the goods and chattels, rights and credits of said decedent, according to law, and also diligently and faithfully to regard and well and truly to comply with the provisions of the law relating to collateral inheritances. And I do by these presents ordain, constitute, and depute you, the said Thomas Ball, administrator of all and singular the goods and chattels, rights, and credits, which were of the said deceased, to and for the use and for the purposes mentioned in the said will, a true copy whereof is to these presents annexed, saving harmless and forever indemnifying me and all other officers and persons against loss or damage, by reason of your administration aforesaid.

In testimony whereof, I have caused the seal of the Register's office of said county to be hereunto affixed, dated at Clearfield, the — day of —, A. D. 19—.

[Seal.]

—, —,
Register.

Such letters can be granted only by the register of the county where the will was proved.²⁰

All the powers of an executor pass to the administrator with the will annexed.²¹ He may maintain ejectment against the vendee of the executor, for the purchase money due.²² This power over the real estate is derived from the acts of March 12, 1800, 3 Sm. L. 433, February 7, 1814, 6 Sm. L. 102, and section 14 of the act of February 24, 1834, P. L. 70, *infra*. It was for a time adjudged that those acts were repealed by the act of 1834.²³

When the will gives the executor a power of sale, this passes to the administrator *c. t. a.*^{23a} and the Orphans' Court has no jurisdic-

²⁰ Eyster's Est., 5 Watts, 132.

²¹ Morrow's Est., 15 W. N. C. 240; P. & L. Dig., vol. 23, col. 12229, *et seq.*

²² Cornell v. Green, 10 S. & R. 14; McManus' Est., 3 D. R. 183.

²³ See discussion in Meredith's Est., 1 Parsons, 433; Ross v. Barclay, 18 Pa. 183; Kirk v. Carr, 54 Pa. 285; Bell's Ap., 66 Pa. 498; Evans v. Chew, 71 Pa. 47; Lantz v. Boyer, 81 Pa. 325; Waters v. Margerum, 60 Pa. 39; Jackman v. Delafield, 6 W. N. C. 9. (See act April 22, 1856, P. L. 532.)

^{23a} Keefer v. Schwartz, 47 Pa. 503; Evans v. Chew, 71 Pa. 47; Jackman v. Delafield, 85 Pa. 381; Nesbit v. Clarke, 1 Penny. 483; Potts v. Brenneman, 182 Pa. 295; Snyder's Est., 9 D. R. 128; Torrence v. Reuther, 185 Pa. 279.

tion in the premises.^{23b} A trust, however, specially committed to the executor, which is collateral to the administration, does not pass over to the administrator *c. t. a.*^{23c} For the purposes of distribution, one or all the administrators *c. t. a.* may make a sale.^{23d}

12. Power of acting executor over real estate.

Section 1 of the act of March 12, 1800, 3 Sm. L. 433, provides:

"In all cases wherein testators have devised, or may hereafter devise their real estates, or any part thereof, to their executors, to be sold, or have authorized and directed, or may hereafter authorize and direct such executors to sell and convey such real estates to be sold, without naming or declaring who shall sell the same, if one or more of such executors is or are since dead, or shall hereafter die, it shall and may be lawful for the surviving executor or executors to bring actions for the recovery of possession thereof, and against trespassers thereon; to sell and convey such real estates, or manage the same for the benefit of the persons interested therein, as fully and completely as he, she or they, together with his, her or their co-executor or co-executors would be empowered to do if he, she or they were still living."

13. Powers of acting executor and admr. *c. t. a.*

Section 2 of the act of March 12, 1800, *supra*, confers like powers upon the acting executor when one or more executors has refused or renounced; section 3 confers the like powers upon the administrator with a will annexed; and section 4 provides similar power and authority to the administrator *c. t. a.* or *de bonis non* where the executors are dismissed and the letters testamentary vacated, which see. Section 5 saves the testator's power to direct otherwise in his will.

Where an executor dies, the Common Pleas cannot appoint a trustee for a trust annexed to the office of executor. The estate must be settled by an administrator *de bonis non*.²⁴

14. Administrator *c. t. a.* given all the powers of executor.

Section 1 of the act of February 7, 1814, 6 Sm. L. 102, provides:

"All the powers and authorities vested in administrators with the will annexed, in case of death, refusal, renouncing or dismissal of executor or executors, by the act to which this is supplementary, be and are hereby extended to, and vested in administrators with the will annexed, in those cases where no executor or executors shall have been appointed, to be exercised as fully as any executor or executors might have done if appointed."

15. Surviving or acting executor's powers.

Section 14 of the act of February 24, 1834, P. L. 70, provides:

"The survivor or survivors of several executors of any last will,

^{23b} Gideon's Est., 2 W. N. C. 355.

^{23c} Ebert's Ap., 9 Watts, 300; Children's Hospital's Ap., 10 W. N. C. 313; Finch's Est., 43 Pitts. L. J. 142; Ross v. Barclay, 18 Pa. 179; Nixon's Est., 7 Phila. 505; Waters v. Margerum, 60 Pa. 39; Best's Est., 14 D. R. 307.

^{23d} Meredith's Est., 1 Parsons, 433; Lantz v. Boyer, 81 Pa. 325; Still's Est., 12 C. C. 379; Dorff's Ap., 10 W. N. C. 335.

²⁴ Olwine's Ap., 4 W. & S. 492.

containing a devise of real estate to such executors for the purpose of sale or otherwise, or a power or naked authority only to them to sell the same as aforesaid, also the acting executor or executors of any such will, where one or more of them resign, refuse or renounce the trust, or are discharged or dismissed therefrom, shall have the same interest in and power over such estate, for all purposes of sale, conveyance and remedy as aforesaid, as all the executors might have or exercise for the like purposes, saving always to every testator, his right to direct otherwise."²⁵

16. Executor residing out of state — condition of bond.

Section 16 of the act of March 15, 1832, P. L. 135, provides:

"Before the register shall issue letters testamentary to any executor, not being an inhabitant of this commonwealth, he shall take from him a bond, with two or more sufficient sureties, being inhabitants of this commonwealth, respect being had to the value of the estate to be administered, in the name of the commonwealth, with the following condition, viz.:

"The condition of the obligation is, that if the said A. B., executor of the last will and testament of C. D., deceased, shall make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, being within this commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands, and possession of any other person for him, and the same so made do exhibit into the office of the register of the County of —, within thirty days from the date hereof, and the same goods do well and truly administer according to law, and make a just and true account of all his actings and doings therein, in one year from the date hereof or when thereunto lawfully required, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances, and in all other respects with the laws of this commonwealth relating to his duty as executor, then this obligation to be void, otherwise of force and effect.'"

A bond by administrators *c. t. a.* which omitted the clause in relation to "collateral inheritances" was held binding on the principals and sureties, notwithstanding.²⁶ The liability of the bond concerns only property of deceased within this commonwealth, which cannot be carried beyond the state and be administered upon there.²⁷

The register has a wide discretion in fixing the amount of bond for a nonresident executor.²⁸ Exception to his security must be taken before the register within a year under section 28 of the act of 1832.²⁹ The Orphans' Court cannot order the register to require security from a resident executor.³⁰ Ancillary letters to a resident though the executors be nonresident require no security.³¹ An executor's sureties

²⁵ Lippincott v. Phila. Trust Co., 106 Pa. 295.

²⁶ Hartzell v. Comth., 42 Pa. 453; Comth. v. Miller, 195 Pa. 230.

²⁷ Freeman's Ap., 68 Pa. 151.

²⁸ Fellow's Est., 6 Luz. L. R. 244. Rhone, P. J.

²⁹ Simmons' Est., 3 Phila. 172.

³⁰ Harberger's Ap., 98 Pa. 29.

³¹ Mackin's Est., 11 W. N. C. 207.

can only be held liable under the act of June 14, 1836, P. L. 637.³² Under the act of May 9, 1889, P. L. 159, a trust company may become the sole surety on the bond.³³

17. Appointment of administrator *de bonis non*.

Section 19 of the act of 1832, *supra*, provides:

"Whenever a sole executor, or the survivor of several executors, shall die, leaving goods or estate of his testator unadministered, the register having jurisdiction, shall, notwithstanding such executor may have made his last will and testament and appointed an executor or executors thereof, grant letters of administration of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will, and the executor of such deceased executor shall in no case be deemed executor of the first testator."

An administrator *de bonis non* will not be appointed for the sole purpose of charging a money legacy upon the land.³⁴ Where one is appointed on the removal of an executor, the decree vacating the probate of the will, which was found to be a forgery, does not vacate the letters *d. b. n. c. t. a.*³⁵

18. Bonds of admr. *d. b. n. c. t. a.*

A bond which follows a general administration bond omitting the clause of surrender and that concerning the collateral tax is sufficient and binding.³⁶ But the sureties are not liable for nonpayment of a legacy, where the bond omits that duty.³⁷ Where an estate has been settled letters *d. b. n.* are a nullity and the applicant an intermeddler.³⁸ When a distribution has been decreed the trust connected with the office of executor is ended, and any vacancy in a prolonged trust must be filled by the Orphans' Court.³⁹

19. Form of letters *de bonis non*.

Commonwealth of Pennsylvania.

— County, ss.

I, —, Esq., register for the probate of wills and granting letters of administration, in and for the County of —, in the Commonwealth of Pennsylvania.

To Thomas Edwards, Esq., of the — of —, in the County of —, greeting:

Whereas, Miles B. Crary, Esq., late register for the probate of wills and granting letters of administration, in and for said county, did on the — day of —, 19—, duly appoint Peter Catlin, of the county

³² Maguire's Est., 4 W. N. C. 15.

³³ Comth. v. Miller, 195 Pa. 230.

³⁴ Ruddy's Est., 37 Supr. C. 533.

³⁵ Brockway v. Aetna Life Ins. Co., 4 Kulp, 207.

³⁶ Hartzell v. Comth., 42 Pa. 453; Comth. v. Forney, 3 W. & S. 353; Zeigler v. Sprengle, 7 W. & S. 175; Shalter's Ap., 43 Pa. 83; Comth. v. Miller, 195 Pa. 230.

³⁷ Small v. Comth., 8 Pa. 101.

³⁸ Hill's Ests., 23 Lanc. L. R. 30; Silkman's Pet., 5 Lack. Jur. 299.

³⁹ Hart's Est., 12 D. R. 47.

aforesaid, administrator of all and singular the goods, chattels, rights and credits, which were of Abram Hewit, late of the said county, deceased. And the said Peter Catlin, having rendered his account upon the estate of the said deceased to the Orphans' Court of the county aforesaid, on the — day of —, 19—, and the said court, upon due consideration thereof, having accepted and confirmed the same, was, upon his application made for that purpose, dismissed and exonerated by the same court from the further duties of his said appointment (or having been removed, etc.).

Now know ye that I, — —, register for the probate of wills and granting letters of administration in and for said county, desiring that the remainder of the goods and chattels, rights and credits of the said deceased, may be well and truly administered, converted, and disposed of agreeably to the laws and usages of this commonwealth, do hereby grant unto you, the said Thomas Edwards (in whose fidelity in this behalf I very much confide), full power, by the tenor of these presents, to administer the goods and chattels, rights and credits of the said deceased, which remain unadministered within the said commonwealth; as also to demand, collect, levy, recover and receive all the credits whatsoever of the said deceased, which remain yet unpaid; and to pay the debts in which the said deceased stood obliged, so far forth as the said goods and chattels will extend, according to the rate and order of law; and in all other respects to well and truly administer the goods and chattels, rights and credits of said deceased; and a just and true account and reckoning make of said estate according to law, also to diligently and faithfully regard and well and truly to comply with the provisions of the law relating to collateral inheritances, etc. And I do by these presents ordain, constitute and appoint you, the said Thomas Edwards, administrator as aforesaid, within the limits aforesaid, saving harmless and forever indemnifying me and all other officers and persons whomsoever against loss or damage, by reason of your administration aforesaid.

In testimony whereof, etc.

[Seal.]

— —,
Register.

20. Form of letters pendente lite.

Pending a contest on the right to have letters testamentary, or upon the validity of the will, letters *pendente lite* are issued which are in form as follows:

Commonwealth of Pennsylvania.

— County, ss.

I, — —, Esq., register for the probate of wills and granting letters of administration in and for the County of —, in the Commonwealth of Pennsylvania.

To Thomas Edwards, Esq., of the — of —, in the county aforesaid, greeting:

Whereas, Abram Hewit, late of the — of —, in the said County of —, did, by a certain instrument of writing, purporting to be his last will and testament, bearing date the — day of —, 19—, appoint the aforesaid Thomas Edwards, executor thereof. And whereas, at a trial or hearing before the register, held at —, in said county, the — day of this instant, for the purpose of trying the validity of said instrument of writing, an issue was ordered to be sent into the

Court of Common Pleas, of said county, to try the said fact, which said issue was sent up accordingly, as will appear by the records of the said court. And now, to-wit, — day of —, 19—, I, — —, register of wills in and for said county, desiring that the goods and chattels, rights and credits, of the said Abram Hewit, deceased, may be well and truly administered, converted, and disposed of according to law, during the trial of the said issue, do grant unto you, the said Thomas Edwards, full power to administer the goods and chattels, rights and credits, which were of the said deceased, within the said commonwealth; as also to demand, collect, levy, recover, and receive the credits whatsoever of the said deceased, which at the time of his death were owing or did in any way belong to him, and to pay the debts in which the said deceased stood obliged, so far forth as the said goods, chattels, rights and credits will extend, according to the rate and order of law; and also to diligently and faithfully regard and well and truly to comply with the provisions of the law relating to collateral inheritances. And I do hereby require you, the said Thomas Edwards, upon your solemn oath (or affirmation), to make a true and perfect inventory and conscionable appraisement of the goods and chattels, rights and credits, whereof the said deceased, and to exhibit the same into the register's office at —, on or before the — day of —, 19—, and that on the termination of the said issue you will, if required, surrender the said letters into the register's office aforesaid; and also that you render a just and true account, calculation, and reckoning of your said administration, upon your solemn oath or affirmation, on or before the — day of —, 19—, or when thereunto legally called or required. And I do by these presents ordain, constitute, and depute you, the said Thomas Edwards, administrator of all and singular the goods and chattels, rights and credits, which were of the said deceased, within the limits aforesaid, pending the litigation aforesaid, saving harmless, and forever indemnifying me, and all other officers and persons whomsoever, against loss or damage by reason of your administration aforesaid.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said office, etc.

[Seal.]

— —,
Register of Wills.

21. Letters granted beyond the state, of no force in Pennsylvania.

Section 6 of the act of March 15, 1832, P. L. 135, provides, in part:

"No letter testamentary or of administration, or otherwise purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this state."

U. S. bonds specially deposited in Pennsylvania, and transferrable by endorsement, may be surrendered to a foreign executor without offending against the above section.¹

Neither does the inhibition of the section apply to a suit for dam-

¹ Shakespeare, Admr., v. Fidelity, Etc., Co., 97 Pa. 173.

ages in Pennsylvania by a New Jersey administrator, under the law of New Jersey and the decisions in Pennsylvania.²

The section above was doubtless passed to meet the case of *M'Cullough v. Young*,³ which held that "letters of administration granted in a sister state are a sufficient authority to maintain an action here." Said Woodward, J.:⁴ This section "was merely declaratory of the common law, according to which the title of executors and administrators cannot, *de jure*, extend beyond the territory of the government which grants it and the movable property therein." A foreign executor by virtue of his foreign letters can maintain no action in Pennsylvania⁵ except to recover assets for which no letters are issuable here.⁶ He must take out ancillary letters in order to come into court erect.⁷ The assignee of a claim may sue when the debtor was a resident of the state where decedent died domiciled.⁸ A nonresident executor who has qualified under letters issued in Pennsylvania is not a foreign executor.⁹ A resident of Pennsylvania may sue a foreign executor, when he can get legal service upon him.¹⁰

The transfers of stocks and bonds in Pennsylvania, by foreign executors which the courts had winked at and decided were not contrary to the act of 1832, were expressly authorized by act of April 8, 1872, P. L. 44.¹¹

The Orphans' Court has jurisdiction to determine the domicil of a testator, although the probate court of another state probated his will and issued letters testamentary thereon.¹² The word "residence" above means domicil, which must be determined from the party's intention gathered from his words and conduct.¹³

A foreign administrator's assent to the issuance of an execution against his estate without a *sci. fa.* is null.¹⁴ A will duly executed by a resident of the State of New York, according to the laws of that state and of Pennsylvania also, can be admitted to probate and letters issued, in Pennsylvania where the principal part of his real estate is, before it is probated in New York.¹⁵

22. Ancillary letters — Necessity for.

When a foreign executor brings a promissory note into Pennsylvania and procures the appointment of an ancillary administrator and

² *Boulden v. Penna. R. Co.*, 205 Pa. 264, citing *Knight v. West Jersey R. Co.*, 108 Pa. 250, and *Usher v. West Jersey R. Co.*, 126 Pa. 206.

³ *McCullough v. Young*, 1 Binney, 63.

⁴ *Moore v. Fields*, 42 Pa. 467.

⁵ *Sayre v. Helme*, 61 Pa. 299; *Laughlin v. Solomon*, 180 Pa. 177.

⁶ *Schley's Est.*, 11 Phila. 139.

⁷ *Caldwell's Est.*, 33 Pitts. L. J. 398; *Mansfield v. McFarland*, 202 Pa. 173; *Lewis v. Linton*, 207 Pa. 320.

⁸ *Elmer v. Hall*, 148 Pa. 345.

⁹ *McCahan v. Reeder*, 10 D. R. 298.

¹⁰ *Leaming's Est.*, 10 D. R. 389.

¹¹ *Grimes v. Penna. R. Co.*, 189 Pa. 619. (For lower court cases see vol. 7, P. & L. Dig., col. 12216.)

¹² *Dalrymple's Est.*, 215 Pa. 367.

¹³ *Lewis' Est.*, 10 C. C. 331. (See also *Jacobs on Domicil*.)

¹⁴ *Bomberger v. Raymond*, 12 C. C. 460.

¹⁵ *Brown's Est.*, 13 C. C. 289.

surrenders the note to him, that being the only asset of the estate in Pennsylvania, such administrator is entitled to administer in preference to an administrator appointed in a different county where the maker of the note resides. The situs of the note was in the county where the note was delivered for administration and not where the debtor resided. Said Dean, J.:¹⁶ "In refusing to recognize the powers of the foreign executor here, the state does not question the legality of his appointment or his right to the possession of the asset; the comity between civilized states requires of them an acknowledgment of each other's local laws determining rights of property. But this comity does not extend so far as an acknowledgment of the right of the foreign representative to take possession of and remove the asset beyond the jurisdiction of the state, when such removal may be prejudicial to creditors who are citizens of this state. Hence the ancillary administrator must take possession of the asset, and in his hands it is under the jurisdiction of our courts, subject to the just claims of Pennsylvania creditors. When these are satisfied the Pennsylvania representative must pay over the balance to the foreign one. The intent of the law, as so held, is not to favor a home debtor, for he needs no favor if he desires to pay an honest debt, but to favor the home creditor; to save him the hardship and expense of going into a foreign jurisdiction to collect his debt out of assets removed from his own state to the foreign jurisdiction."

The situs of personalty is wherever the owner has it.¹⁷ Where the fund has no situs, the decedent having died in another state and the executor renounced, it is primarily distributable at the domicil of the decedent and an ancillary *admr. c. t. a.* must account at the domicil, the law of which governs as to charitable bequests.¹⁸ When a copy of a will is brought from another jurisdiction, it should be accompanied with a certified copy of the proceedings of probate.¹⁹ Ancillary letters issued within Pennsylvania have preference over letters to foreign executors although they file an exemplification of the will and proceedings here.²⁰ If it be claimed that ancillary letters were procured by fraud a petition to revoke must first be presented to the register of wills.²¹ Ancillary letters only concern assets in this state and not elsewhere;²² and of such assets he is entitled to hold possession even against the executor in the foreign jurisdiction.²³ He is trustee for all resident claimants, whether heirs, legatees or creditors and he must file an account where appointed.²⁴ If there is any balance he must transmit it to the domiciliary jurisdiction for distribution.²⁵ Real estate in Pennsylvania will not be sold for the pay-

¹⁶ Viosca's Est., 197 Pa. 280.

¹⁷ Stokely's Est., 19 Pa. 482.

¹⁸ De Renne's Est., 12 W. N. C. 94; Dooley's Est., 18 D. R. 138.

¹⁹ Herron's Est., 57 Pitts. L. J. 259.

²⁰ Brooks' Ex. v. Litchfield, 12 Northam. 43.

²¹ Mackin's Est., 14 Phila. 328; Troxell's Est., 13 Montg. 68.

²² Freeman's Ap., 68 Pa. 151; Watt's Ap., 31 Leg. Int. 182; P. & L. Dig., vol. 7, col. 12221.

²³ Willing v. Perot, 5 Rawle, 263.

²⁴ Parker's Est., 6 Phila. 369; Warrington's Est., 7 D. R. 712.

²⁵ Barry's Ap., 88 Pa. 131; Foster's Est., 25 Pitts. L. J. 100; Troxell's Est., 15 Montg. 29.

ment of debts on petition of nonresident creditors when there is sufficient personalty in the domicil to pay them.²⁶ The court may, in its discretion, hold the fund for distribution if there are no debts in the domiciliary jurisdiction.²⁷ The circumstances must determine the exercise of its discretion.²⁸ The distribution here will be according to the laws of the domicil.²⁹ It is the duty of the legal representative at the domicil to demand from the ancillary administrator that he send the balance to him, as found by the account.³⁰ A Pennsylvania administrator who takes out ancillary letters in another state and collects assets in a third, must account for all here.³¹ He is obliged as a fundamental article to account for everything in the shape of assets that comes or ought to come into his hands.³² If it be alleged that ancillary letters were improperly issued, the appeal must first be made to the register, who may require security or revoke them.³³

23. Power of foreign executor to revive judgment.

Section 1 of the act of June 27, 1883, P. L. 163, provides:

"It shall be lawful for foreign executors or administrators to issue, or cause to be issued, in the name of such foreign executor or administrator, *scire facias*, within this commonwealth, on all judgments, the lien of which is about expiring, and in favor of the testator so represented: *Provided*, That before any further proceedings are had, letters of administration must be granted within this commonwealth as now provided by law."

24. Transfer of public loans by foreign executors.

Section 3 of the act of April 14, 1835, P. L. 275, so far modifies the sixth section of the act of March 15, 1832, *supra*, and the seventh section of the act of March 29, 1832, so that the public debt or loan of this commonwealth shall pass and be transferable and the dividends thereon accrued and to accrue shall be receivable in like manner in all respects and under the same and no other regulations, powers and authorities as were used and practiced before the said recited acts were passed. That is to say, foreign executors and guardians were not restricted in respect to the loan or public debt of Pennsylvania.³⁴ This exemption or privilege was extended to stocks and dividends of banks and incorporated companies by section 3 of the act of June 16, 1836, P. L. 682; to the loans or stock of the City of Philadelphia, by section 5 of the act of March 12, 1842, P. L. 66; to any incorporated company within the state, by the act of May 15, 1850 (section 8) P. L. 764; and the act of April 8, 1872, P. L. 44, enlarged the repre-

²⁶ Robb's Est., 18 Phila. 239.

²⁷ Dent's Ap., 22 Pa. 514; Parker's Ap., 61 Pa. 478; Welles' Est., 161 Pa. 218.

²⁸ P. & L. Dig., vol. 7, cols. 12225-6.

²⁹ Ehrhart's Est., No. 2, 18 York, 134.

³⁰ Stokely's Est., 19 Pa. 476; Del Valle's Est., 5 Atl. 441.

³¹ Baldwin's Ap., 81 Pa. 441. (But see *Mothland v. Wireman*, 3 P. & W. 185.)

³² Page's Est., 75 Pa. 87.

³³ Troxell's Est., 13 Montg. 68; Mackin's Est., 14 Phila. 328.

³⁴ Hobbs v. Bank, 8 W. N. C. 131.

sentative character so as to cover them all, acting under authority of every sovereignty, in the matter of transfer of stocks, debts, loans, etc. The act of May 15, 1874, P. L. 195, restricted the other acts so as to require such foreign representative to produce evidence of his authority certified under the hand and seal of any minister plenipotentiary, charge d'affaires, consul or vice consul; and also required him to file an affidavit with the clerk of the Orphans' Court of the county in which is situated the office for the negotiation of loans, that said decedent is not indebted to any person in this commonwealth and that the proposed transfer is not made for the purpose of removing any of the assets of said decedent beyond the reach of any of his creditors in this commonwealth. Without such affidavit the transfer is void.

25. Transfer of funds from domestic executors, etc., to foreign executors.

The act of March 31, 1905, P. L. 91, provides:

"That hereafter executors and administrators in this commonwealth shall not be required to deliver to any foreign executor or administrator any fund which has been devised or bequeathed, in whole or in part, by will of the decedent, valid under the laws of this commonwealth, and duly probated at the domicil of such decedent, where any person claiming such fund, or any part thereof, is or shall be a citizen of this commonwealth. But such fund shall be distributed, under the direction of the Orphans' Court of the proper county, to legatees, devisees and creditors, according to the terms of said will and the laws of this commonwealth."³⁵

³⁵ Ehret's Est., 31 Supr. C. 120.

CHAPTER XXXVI.

OFFICE OF EXECUTOR, RIGHTS AND DUTIES.

1. Office of executor.
2. Possession of the goods of the testator.
3. Nature of executor's possession.
4. Interest which executor has in the goods.
5. Debts which the executor is bound to pay.
6. Devastation or waste, as to debts.
7. Executor *de son tort*.
8. Divided or conditional powers.
9. Inventory and appraisement.
10. Assets of the estate.
11. Widow's exemption.
12. Payment of debts.
13. Notice of, devises, etc., to bodies corporate.
14. Revival of judgment against debtor executor.
15. Executors authorized to vote corporate stock.

1. Executor, office of.

"Executor, *ab exequendo*, is he that is appointed by any man in his last will and testament to have the disposition of all his substance according to the contents of the said will." "An executor * * * hath the property or interest in the testator's goods and chattels upon confidence to dispose of them according to the will as the law directs."¹ The executor also steps into the shoes of the testator, as to the debts due at his death, and though the land passes to the heir he is authorized by section 29 of the act of February 24, 1834, P. L. 70, to sue for and recover rent in arrear and also to distrain for it upon the premises. But if the tenant be dead the right to distrain is gone.²

2. Possession of the goods of the testator.

Immediately upon testator's death, and before the will is proved, a legatee may not intermeddle with the goods, except where they are in possession of the donee. And if the executor named is made a donee under the will, when he comes into his office, he takes possession by virtue of it, and not as legatee, but upon his express or implied election to take as legatee subsequently,³ and then subject to his duty to first pay the debts of his testator, to which he is tied. If any legatee should help himself to the goods bequeathed the executor may maintain trespass or trover for them.⁴ The legacies must abate for the payment of debts. But before probate of the will, when it be-

¹ Note of H. Curson, Gent. to Wentworth on the Office of Executors, a work which appeared anonymously in 1641, and was later attributed to "Thomas Wentworth of Lincoln's Inn," but Sir Samuel Toller, who also wrote a work on Executors, says that the bar ascribed the work to Justice Dodderidge and the fictitious name was first prefixed to the third edition.

² Gandy, Admr., v. Dickson, 166 Pa. 422.

³ 3 Bacon's Abr. 84.

⁴ Mead v. Orrery, 3 Atkyns, 240; Wilson's Ex. v. Rhine, 1 H. & J. 138.

comes known that he is by the will appointed, if he accepts, the executor "may seize and take into his hands the goods of the testator; yea, enter into the house of the heir, if not locked, so to do, and to take the specialties of debts; and generally he may do all things which to the office of an executor pertain (except only bringing of actions and prosecution of suits). He may pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases or acquittances of debts owing by the testator" and release an action;⁵ or sell any of the goods or chattels of the deceased, or deliver a specific legacy, if the estate is solvent. Whilst all these and other things are allowed to be done at the common law, there is scarce occasion now to do them, when the will may be so readily probated and thus express authority be given. However, where there may be difficulties in the probate, or delay, the right to take the custody and care, for the preservation of the goods, is with the appointee.

It was formerly held that if the executor die before probate, it is in law a dying intestate, which was held to mean without an executor.⁶ The will, however, stands, and the court will appoint an administrator, with the will annexed. The same is true in case of refusal or renunciation. If the executor named be unknown, or cannot be found, administration may be granted until he appear, when he may claim the probate.⁷ And when one of several executors renounces and the others die, he who renounced, may come in and administer.⁸ A refusal to take the oath is a renunciation of the office.⁹ Pending an issue *devisavit vel non* before the register, a mandamus will not lie to compel probate.¹⁰ The proving of the will by one executor, proves it for all.¹¹

3. Nature of executor's possession.

The executor, by his appointment in the will obtains constructive possession of all the goods, chattels, rights and credits, which were of the deceased at the instant of his death. The probate is merely a legal certificate of that right.¹² If any are taken, he may maintain trespass or trover in his own name forthwith.¹³

"Where goods are purloined or embezzled and the executor makes no effort to regain them or their value, his forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the embezzlers be, is a shrewd evidence or proof; then shall the executor be adjudged a haver of them and so stand charged as having them."¹⁴ So, also, if he hath made a fraudulent gift of assets, he is liable.¹⁵ He is liable, when goods are taken out of his

⁵ Wentworth on Ex., p. 81; 1 Inst. 292 b.; Coke on Litt., 264 b. n.

⁶ Manningham's Case, Hetley, 115.

⁷ 4 Burns' Ec. L. 202.

⁸ Taggart's Case, 1 Ashmead, 321; 3 Bacon's Abr. 42.

⁹ Rex v. Raines; Lord Raymond, 363.

¹⁰ 4 Burns' Ec. L. 204-5.

¹¹ Hensloe's Case, 9 Coke, 37-40. Touchstone, 29.

¹² Smith v. Milles, 1 T. R. 480.

¹³ Jenkins v. Plombe, 6 Modern, 181; Bollard v. Spencer, 7 T. R. 358.

¹⁴ Wentworth on Ex., p. 233.

¹⁵ 3 Bacon's Abr. 58.

hands, which have come into them after he has administered.¹⁶ An action of breach of promise of marriage does not survive against executors, and it was queried whether it would survive if it occasioned an immediate injury to property.¹⁷ Where an executor is charged with the duty of carrying on his testator's trade or business and he does so, he must account for the profits.¹⁸

4. Interest which an executor has in his testator's goods.

"The interest which an executor hath, as executor in the goods of his testator is much different from the absolute, proper and ordinary interest which everyone hath in his own proper goods."¹⁹ "The goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, statute or judgment had against him."²⁰ So, if the executor become bankrupt, the goods of his testator do not become subject to the proceedings,²¹ and if he die, his executor or administrator has nothing to do with them.²² If there are survivors in the trust, they succeed to the management and execution of it;²³ if none, an administrator *de bonis non administravit* must be raised. He cannot bequeath to another what is entrusted to him: "For that he hath not them properly as his own or to his own use,"²⁴ but as trustee for next of kin or legatees.^{24a}

Where executors carry on testator's business for the benefit of the estate and not directed so to do by the will, they assume the risks unless with the consent and direction of the Court of Chancery,²⁵ our Orphans' Court.²⁶ If a mortgage provide that it shall be paid to the mortgagee or his heirs and the mortgagee dies, it is payable to the heirs and not executor: *in hoc casu designatio unius personæ est exclusio alterius et expressum facit cessare tacitum*.²⁷ If, now, it were payable to the heirs or executor the mortgager would have an election between them. Where there is a valid *donatio mortis causa*, nothing passes to the executor. The donee is entitled to the thing until needed for the satisfaction of creditors.^{27a}

5. Debts which the executor is bound to pay.

The executors do more actually represent the person of the testator than the heir does; for if a man binds himself his executors are

¹⁶ Read's Case, 11 Viner's Abr. 230.

¹⁷ Lattimore v. Rogers, 13 S. & R. 183.

¹⁸ Garland, *ex parte*, 10 Vesey, J., 110; Hood v. Burlton, 2 Vesey, 33.

¹⁹ Wentworth on Ex., p. 192.

²⁰ Wentworth on Ex., p. 193.

²¹ 11 Viner's Abr. 272.

²² Bransby v. Grantham, Plowden, 525; McCoy v. Kennedy, 1 Miles, 169.

²³ 11 Viner's Abr. 68.

²⁴ Wentworth on Executors, 41.

^{24a} Wilson v. Wilson, 3 Binney, 557; Boudinot v. Bradford, 2 Dallas, 266; Petrie v. Clark, 11 S. & R. 377; Abbott v. Reeves, 49 Pa. 494; Turner's Est., 7 Kulp, 481; Linton's Ap., 14 W. N. C. 450; Bohrer's Est., 7 D. R. 307.

²⁵ Barker v. Barker, 1 T. R. 295.

²⁶ Gratz v. Bayard, 11 S. & R. 41.

²⁷ 1 Inst. 210a.

^{27a} Michener v. Dale, 23 Pa. 59.

bound, though they be not named; ¹ but not so of the heir.² When the heir is forced to pay the debt of the ancestor, he shall be reimbursed out of the personal estate as far as it goes.³

The executor is answerable for rent due at the death of his testator. In an action of assumpsit against the executor for a debt due from his testator it is not necessary to aver that he has assets of his testator in his hands.⁴

It is error to sue an executor jointly with another, because the executor is liable only *de bonis testatoris*, whereas the other is liable *de bonis propriis*.⁵

As to a covenant of warranty as against the testator or his heirs and all claiming under him or his ancestors, the executor need not answer for an eviction by or under a title from a stranger.⁶ "An express warranty cannot be created by will; for a will in writing is no deed. But if a man devise lands for life, or in tail, reserving a rent, the devisee shall take advantage of this warranty in law, albeit the ancestor was not bound."⁷

6. Devastation or waste, as to debts.

The duties of an executor to his testator's estate are thus quaintly put by Wentworth:⁸ "First, to do truly, and thereunto are they sworn, saith this book; secondly, to be diligent, viz.: with sedulity to attend the discharge of the trust. Thirdly, to do lawfully; nor well can this latter be without knowledge what is lawful or required by the law."

"*Devastaverunt bono testatoris*, is when the executors will deliver legacies, or make restitution for wrongs done by their testator, or pay his debts due upon contracts or specialties, whose days of payment are not yet come, etc., and keep not sufficient in their hands to discharge those debts upon record or specialties which they are compellable by the law to satisfy in the first place; then they shall be constrained to pay these out of their own goods, according to the value of what they voluntarily delivered or paid. And where a judgment recovered in the King's Court shall be satisfied before a recognizance, etc.: And if the ordinary have goods of the intestate by sequestration; and an action of debt to the value of the goods is brought against him, as ordinary he shall not dispose or administer these goods to any other, but is bound to satisfy the debt for which action was first brought."⁹

Wentworth specifies these divers ways of wasting:¹⁰

1. "By the executor, his plain, palpable, and direct giving, selling, spending, or consuming the testator's goods after his own will, leaving debts unpaid.

¹ Harrison Ex. v. Sampson, 2 Wash. 155.

² 1 Inst. 209 a.; 209 b.; 210 a.

³ Armitage v. Metcalf, Cases in Chancery, 74.

⁴ Pinchon's Case, 9 Rep. 87-90.

⁵ Hall v. Huffam, 2 Levinz, 228.

⁶ Nokes v. James, 4 Coke, 80; 5 Coke, 17.

⁷ 1 Inst., 386 a.

⁸ Wentworth on Ex., p. 299.

⁹ *Termes de la ley*.

¹⁰ Wentworth on Ex. 300.

2. By paying what is not to be paid; which yet is to be understood where there are debts payable and unpaid.

3. By * * * the not observing the right method and order of payment.

4. By assenting to a legatee's having a thing bequeathed, debts being unpaid.

5. By selling goods of the testator at an undervalue for (be the appraisement what it will and let him sell for what he will) he must stand charged to the best and utmost value towards the creditors. Upon a *sci. fa. sur* judgment and plea of *non devastavit*, etc., it was held *per tout le court*, that where an executor took new security he discharged the ancient right to the goods, and so it was a *quasi* sale of them and assets presently, and he was held, judgment being given for the plaintiff.¹¹

Said Wentworth: "Thus may executors fall under prejudice, not only by wilful wasting or unfaithful miscarriage (wherein they are not to be pitied), but through incogitancy and unskilfulness also," whereupon, it is noted, that "even a judgment in a court of *Pie-poudre* is binding."

The danger of mismanaging the personal estate is greater where there are creditors and legatees to be reckoned with, and says Wentworth: "This descry of danger may breed caution; and *qui timent et cavent, vitant*."¹² Formerly, if an executor promised to pay the debt of his testator he was personally held to it;¹³ but this is not so now under the statute which provides to the contrary.¹⁴ A bare suggestion of a *devastavit* is insufficient, but the oath of the plaintiff is required.¹⁵ The rule as to waste by the executor was:

"Pro possessore habetur qui dolo desiit possidere."

7. Executor de son tort.

An executor of his own wrong, or as the Law-French has it—*de son tort*, is he who "takes upon himself the office of executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution, substituted by ordinary to administer."¹⁶ The slightest intermeddling with the testator's goods, without authority, is sufficient to constitute one an executor *de son tort*.¹⁷ It was held even taking a dog or milking the cows of decedent, was sufficient.¹⁸ But if he acts by authority of the executor himself he is not an executor of his own wrong,¹⁹ and it seems, also where he came into lawful possession and authority as *pendente lite* or *durante minore*

¹¹ Norden v. Levit, 2 Levinz, 189.

¹² Wentworth on Ex., p. 306.

¹³ Grier v. Huston, 8 S. & R. 402.

¹⁴ Act April 26, 1855, P. L. 308; Seip v. Drach, 14 Pa. 352; Robb v. Mann, 11 Pa. 300; Paxson v. Nields, 137 Pa. 385; Hollenback v. Clapp, 103 Pa. 60; P. & L. Dig., vol. 7, col. 11640.

¹⁵ 3 Bacon's Abr. 101.

¹⁶ Wentworth on Ex., C. 14, p. 320.

¹⁷ Padget v. Priest, 2 T. R. 100.

¹⁸ Stokes v. Porter, Dyer, 166, b.

¹⁹ Cottle v. Aldrich, 4 M. & S. 175.

aetate.²⁰ But if his authority is limited and he exceeds it, he then becomes such.²¹ "So administrators *durante absentia*, *minoritate* or *pendente lite* have not an unlimited authority to sell or alienate, but only in cases of *bona peritura*, or to recover debts which might otherwise be lost, or do such other act which cannot be delayed without prejudice to the estate."²² It was said by Lord Dyer "that the possession and occupation of or meddling with the goods is that which gives notice to creditors whom they are to sue as executor. But doubtless creditors must look farther before suit; for else can they not know whether he so intermeddling be executor or administrator."²³ "As for him who administered by virtue of a will after disproved, or controlled by a later, he must not doubtless stand free for the goods before administered, but either as rightful or wrongful executor, stand liable to the creditors."²⁴ If a creditor takes out administration he may recover from the wrongful executor not only his debt, but also the goods taken and disposed of by him.²⁵ If there be a lawful executor or administrator and the goods be taken from him, it is trespass or trover — but where there is no personal representative legally constituted, one who takes the goods of the deceased into his hand as a stranger is an executor *de son tort*.²⁶ He must be sued generally by the name of executor of the deceased,²⁷ and his defense will disclose in what character. Whether the acts constitute him an executor of his own wrong is for the court, the jury to find only the facts.

He may rejoin that having been executor *pendente lite*, administration has since been granted to him, and justify the retainer,²⁸ for his right relates back to the date of the death of decedent.²⁹

An executor *de son tort* "becomes subject both to the action of the executor, who hath right to the goods wrongfully intermeddled withal by him, though it were before the proving of the will; and also to the action of the creditor, who hath right to the satisfaction of his debt."³⁰ If he get possession of a term he may be sued in waste committed thereon,³¹ and for a legacy, in respect to the assets which have come into his hands.³² But he is liable as to the value of the goods he wrongfully administered.³³ He may not retain to pay himself, because that would be taking advantage of his own wrong.³⁴ All these preliminaries, drawn from the English common law, are instructive as to the powers, rights and duties of an executor and furnish the foundation of the law in Pennsylvania.

²⁰ 11 Viner's Abr. 98; 1 Sid. 57.

²¹ 11 Viner's Abr. 87.

²² 3 Bacon's Abr. 13.

²³ Wentworth on Ex., p. 322.

²⁴ Wentworth on Ex., p. 324, 5 Coke, 30; Cro. El. 630.

²⁵ Ashby and Child, Style, 384.

²⁶ Wentworth on Ex. 326, citing Read v. Carter, decided by Lord Coke.

²⁷ Prince v. Rowson, 1 Mod. 208.

²⁸ Vaughan v. Brown, 2 Strange, 1106; Pyne v. Woolland, 2 Ventris, 180; Williamson v. Norwich, Style, 337.

²⁹ Kenrick v. Burges, 72 Eng. R., p. 483; Moore, 126; 3 Bacon's Abr. 25.

³⁰ Wentworth on Ex. 331.

³¹ Major v. Johnson, 3 Levinz, 35.

³² 4 Bacon's Abr. 448.

³³ Stokes v. Porter, Dyer, 166 b.; 3 Bacon's Abr. 25.

³⁴ Coulter's Case, 5 Coke, 30. (But see Stat., 43 d., Eliz. C. 8.)

One who without appointment in a will or letters granted by the register intermeddles with the effects of a decedent is a trespasser and in the old Law-Latin, an executor *de son tort*.¹ The remedy against him is for trespass or by bill for an account.² Suit may be brought by the executor or administrator duly constituted,³ and the intermeddler has no other defenses than a mere trespasser would have.⁴ If one purchases goods from him he does so at his own peril.⁵ A creditor cannot by intermeddling with the goods gain a preference.⁶ Neither can the widow give title before letters are issued.⁷ An executor *de son tort* is entitled to credit for debts of decedent which he paid *bona fide*.^{7a}

8. Divided or conditional powers of executors.

A man may by his will nominate a number of executors and clothe them with joint powers; or he may divide their powers and authority, specifying the control which each shall have over his property in particular, both as to locality and kind of property, or he may designate a succession of time in the office.⁸ He may appoint an executor to act during the minority of his son or the widowhood of his wife, even a child *in ventre sa mere*.⁹

9. Inventory and appraisement.

The executor having given notice of his appointment, in the same form as an administrator (which see *supra*), will also proceed in the same manner to have an inventory and appraisement made, unless it be postponed by the will.¹⁰ If he does not file an inventory and the will is contested, the contestant may cite him to file an inventory,¹¹ before the register and not in the Orphans' Court.¹²

If an executor meddles with the goods of the testator and refuses to make an inventory, he may be called to account. However, as to such things as pertain to the funeral, and perishable goods, he may dispose of before filing the inventory,¹³ the law fixing the limit within thirty days. If a creditor or legatary excepts that more goods came into the executor's hands than are exhibited in the inventory, he must prove it.¹⁴ A creditor has a standing to except and the executor shall

¹ Peebles' Ap., 15 S. & R. 41; Power's Est., 10 W. N. C. 208; Harrison v. Farrell, 22 Supr. C. 141; Fahey's Est., 10 D. R. 399.

² Delbert's Ap., 83 Pa. 462; Power's Est., 10 W. N. C. 208; Piening's Est., 15 W. N. C. 384.

³ Lee v. Wright, 1 Rawle, 149.

⁴ Saam v. Saam, 4 Watts, 432.

⁵ Meigan v. McDonough, 10 Watts, 287; Roumfort v. McAlarney, 82 Pa. 193.

⁶ Nass v. Van Swearingen, 7 S. & R. 195.

⁷ Sellers v. Licht, 21 Pa. 98.

^{7a} Cooper v. Eyrich, 41 W. N. C. 370.

⁸ Lynch v. Bellew, 3 Phillimore, 424; Wentworth on Exs., p. 22.

⁹ 3 Bacon's Abr. 28; Thellusson v. Woodford, 4 Vesey, Jr., 322.

¹⁰ Lininger's Ap., 101 Pa. 161; Logan's Est., 1 C. C. 76.

¹¹ Heenan's Est., 15 Phila. 588.

¹² Stevens' Est., 2 Lanc. Bar, No. 36.

¹³ P. Swinburne, p. 6, section 5.

¹⁴ P. Swinburne, p. 6, section 10.

answer on oath.¹⁵ The appraisement at the common law is not conclusive, before confirmation, and the same rule obtains in Pennsylvania.¹⁶

In this inventory he must include his debt to the testator,¹⁷ but such inclusion does not prevent his claiming the bar of the statute of limitations against it.¹⁸ If he does not include it an additional inventory will be required,¹⁹ as also if any goods, etc., come into his hands later.²⁰ The inventory is *prima facie* binding upon the executor²¹ but he may overcome it with proof;²² but not by an unsworn statement.²³ An auditor is not concluded by the inventory.²⁴

10. Assets of the estate.

If the person who has the asset would be entitled to receive it from the executor, he will not be compelled to pay it over to be returned to him.¹ The administrator *d. b. n.* may recover money received by a legal representative *mala fides*, and retained² or a fund deposited by the deceased executor as such in bank.³

The executor holds the assets as trustee for the legatees, next of kin and creditors and equity will follow them into the hands of anyone not a purchaser for a valuable consideration.⁴ The widow who takes against the will, still takes through the legal representative.⁵

The assets of his testator are no part of the executor's assets when he dies, and do not pass to his executor or administrator.⁶ Where an executor owes a person and sells a mortgage in favor of his testator to his creditor the latter takes it subject to the claims of creditors, etc.⁷ When an executor is directed to sell lands and invest the proceeds for the beneficiaries, he may collect the rents, etc.⁸ If he occupies land equitably converted by the will and does not account for the profits, he will be surcharged.⁹

An executor who is also a legatee and borrowed from the estate, giving a mortgage, cannot be surcharged against his legacy, the dif-

¹⁵ Toller on Ex. 58.

¹⁶ Runyan's Ap., 27 Pa. 121; Seller's Est., 82 Pa. 153; Allentown's Ap., 109 Pa. 77; Kaufman's Ap., 112 Pa. 649.

¹⁷ Gilson's Est., 4 Lanc. L. R. 27.

¹⁸ Bell's Est., 25 Pa. 92.

¹⁹ Hoke's Est., 11 York, 162.

²⁰ Fraley's Est., 2 W. N. C. 494.

²¹ Billheimer's Est., 2 Lanc. L. R. 198.

²² Kalbfell's Est., 47 Pitts. L. J. 273 (184 Pa. 25); McCourt's Ap., 11 W. N. C. 161; Semple's Est., 189 Pa. 385.

²³ Stewart's Ap., 110 Pa. 410.

²⁴ Kulp's Est., 1 Leg. Gaz. 37.

¹ Marsden's Ap., 102 Pa. 199; McGeary's Est., 3 Lanc. L. R. 204.

² Eisenbise v. Eisenbise, 4 Watts, 134.

³ Stair v. York Natl. Bank, 55 Pa. 364.

⁴ Petrie v. Clark, 11 S. & R. 377; Abbott v. Reeves, 49 Pa. 494; Wilson v. Wilson, 3 Binney, 557; P. & L., vol. 7, col. 11456.

⁵ Gallagher's Est., 76 Pa. 296.

⁶ McCoy v. Kennedy, 1 Miles, 169.

⁷ Linton's Ap., 14 W. N. C. 450.

⁸ Wetzel's Est., 25 Lanc. 225.

⁹ Tasker's Est. (No. 2), 15 D. R. 166.

ference between the mortgage and the amount realized at the sheriff's sale.¹⁰

11. Widow's exemption.

The same appraisers who appraise the personal estate of the decedent also appraise and set aside the widow's exemption of \$300. The same rules and forms apply whether the estate be testate or intestate and have been fully covered in a preceding chapter.

12. Payment of testator's debts.

The subject of payment of debts and the order of preference have been fully considered in a preceding chapter. The latest cases pertinent are here noted. All the assets which come into an executor's hands are first liable for the debts of the testator, except such as are set aside for the widow or children. It has been held recently that the plaintiff in a judgment against the testator may enforce his lien by execution against a decedent's estate.¹¹ But costs taxed against a dead plaintiff's administrator are not a charge on the land.¹² If the widow pays preferred claims she is entitled to the same preference.¹³ The lien for debts given by the act of May 3, 1909, P. L. 386, cannot be carried beyond two years without being filed and indexed.¹⁴ Funeral expenses will be allowed in accordance with the character and solvency of the estate.¹⁵ Where a son-in-law voluntarily pays the debt of his father-in-law and takes no obligation, it will be presumed to have been a gift.¹⁶ But the loan made by a wife to her husband is a proper claim upon his estate.¹⁷ A son is incompetent under the act of 1887, to prove a claim against his father's estate.¹⁸ The declarations of decedent proved by competent witnesses that services rendered were to be paid for, are sufficient.¹⁹ Where an aged woman gave her notes based upon faith cure hallucinations they will be disallowed as void for want of consideration.²⁰ A contemporaneous check not in payment of a judgment is not evidence to defeat the claim for the amount.²¹ Whilst a lien must be entered on the judgment docket as legal notice, yet a party may have such actual notice of the debt as to affect him.²² A claim may be lost by laches.²³ If one advances money to save an estate he shall be entitled to preference.²⁴ Where decedent had been a pauper, the poor district cannot

¹⁰ Wall's Est., 25 Lanc. L. R. 227.

¹¹ Perret v. Lepper, 226 Pa. 528.

¹² Beyer v. Keylor, 27 Lanc. L. R. 203.

¹³ Sapper's Est., 57 Pitts. L. J. 605.

¹⁴ McDermott's Est., 19 D. R. 385; Reinbold's Est., 11 Northam. 377.

¹⁵ Webb's Est., 18 D. R. 179; Miller's Est., 18 D. R. 216; Kieffer's Est., 27 Lanc. L. R. 41.

¹⁶ Hirsh's Est., 26 Lanc. L. R. 75.

¹⁷ Levi's Est., 224 Pa. 233.

¹⁸ Fry's Est., 229 Pa. 473.

¹⁹ McTamany's Est., 44 Supr. C. 484.

²⁰ Killen's Est., 223 Pa. 201.

²¹ Panezzi's Est., 40 Supr. C. 282.

²² Hickman's Est., 40 Supr. C. 244.

²³ Gardner's Est., 228 Pa. 282.

²⁴ Donnelly's Est., 57 Pitts. L. J. 169.

claim as a distributee of a fund produced by sale of a pauper's real estate.²⁵ The law gives the overseers a remedy which they must enforce during the pauper's lifetime.²⁶ They can take over his estate by acts of April 4, 1877, P. L. 51, and May 13, 1889, P. L. 201.²⁷ After statements have been rendered and acquiesced in for a long period, that a balance was struck, the acquiescence is an admission of the debt.²⁸ There is a presumption that services which are paid for periodically, as by the week or month, have been paid, and this must be rebutted. For cases pertaining to services see note.²⁹ Where a former servant claims for boarding decedent the presumption of payment must be overcome with evidence.³⁰ An attachment execution will not issue upon a judgment against decedent, to attach his estate.³¹ If an executor is by the testator directed to carry on his business and the widow and legatees acquiesce, they are estopped from challenging the claims of creditors in the course of such business.³² Claims for services which are fair and conscionable will be allowed.³³ If the allowance seems too large the appellate court will reduce it.³⁴

13. Notice of devises, etc., to bodies corporate.

Section 66 of the act of February 24, 1834, P. L. 70, provides:

"Whenever any devise or bequest shall be made to any public corporate body, by any last will and testament, the executors thereof shall, within six months after they undertake the execution of such will, make known, by letters addressed to such corporate body, the nature and amount of such devise and bequest, together with their names and places of residence."

14. Revival of judgment against executor who is debtor to the estate.

Section 2 of the act of April 3, 1829, P. L. 122, provides:

"That in all cases where a creditor hath appointed or shall appoint his judgment debtor his executor, and the said judgment is a lien on the real estate of such executor, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will, or where any testator, having a judgment situate as aforesaid, shall have creditors interested in preserving the lien of such judgment, that such legatee or creditor so interested in such judgment may suggest their interest in the same upon the record thereof, and

²⁵ Stewart's Est., 38 Supr. C. 177.

²⁶ Worthington's Est., 20 Phila. 78.

²⁷ Directors v. Nyce, 161 Pa. 82.

²⁸ Kisson's Est., 57 Pitts. L. J. 219.

²⁹ Yeager's Est., 18 D. R. 980; Haller's Est., 27 Lanc. L. R. 5; Bowers v. Reem, 26 Lanc. L. R. 213; Winfield v. Trust Co., 57 Pitts. L. J. 145; Boileau's Est., 18 D. R. 320; Kempel's Est., 27 Lanc. L. R. 5; Wise v. Martin, 42 Supr. C. 443; Eaby's Est., 42 Supr. C. 500.

³⁰ Cumisky's Est., 224 Pa. 509.

³¹ Beaton v. Gorman, 18 D. R. 257.

³² Levi's Est., 224 Pa. 253.

³³ Long's Est., 27 Lanc. L. R. 132; Breese's Est., 15 Luz. L. R. 71; Adolph's Est., 58 Pitts. L. J. 38; Byer's Est., 27 Lanc. L. R. 278; Baker's Est., 27 Lanc. L. R. 276.

³⁴ Carothers' Est., 41 Supr. C. 126.

issue a writ of *scire facias* against the defendant to revive the same and continue the lien thereof at any time when such proceedings shall be necessary under the laws of this commonwealth, which judgment so revived, shall remain for the use of all persons interested therein."

15. Executors, etc., may vote corporate stock.

The act of March 16, 1905, P. L. 42, provides:

"Executors, administrators, guardians and trustees, whether created by last will and testament or by decree of the proper court, shall have the same right and power, either in person or by proxy, at all corporate meetings, to vote any and all shares of stock, by them held in such fiduciary capacity, in any corporation in this commonwealth, or organized under the laws of the same, as the deceased, or legal owner thereof had in his lifetime or during his legal ownership thereof. And where such stock is certified, or stands on the books of such corporation in the name of, or has passed by operation of law or, by virtue of any last will and testament to, more than two such executors, administrators, guardians, or trustees, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such executors, administrators, guardians and trustees, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted."

CHAPTER XXXVII.

WIDOW'S ELECTION.

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| 1. Widow's right to elect. | 10. Property widow may take — effect. |
| 2. Right to take under the intestate laws. | 11. Devise to wife in lieu of dower. |
| 3. Share in lieu of dower at the common law. | 12. Rights of remaindermen — merger. |
| 4. Right to occupy mansion house. | 13. Compensation to disappointed beneficiaries. |
| 5. How her right may be lost. | 14. Fund out of which compensation may be allowed. |
| 6. Election by the widow. | 15. Abatement — effect on different classes. |
| 7. Form of petition for citation to elect. | 16. Recording elections. |
| 8. Form of answer to citation. | |
| 9. Form of notice of election. | |

1. Widow's election to take under or against the will.

It was provided by section 11 of the act of April 8, 1833, P. L. 250, *supra*, that nothing in that act contained should deprive the widow of her election to take against or under the will.

Section 11 of the act of April 11, 1848, P. L. 537, provided that said section "shall not be construed to deprive the widow of the testator in case she elects not to take under the last will and testament of her husband, of her share of the personal estate of her husband under the intestate laws of this commonwealth, but that the said widow may take her choice, either of the bequest or devise made to her under any last will and testament, or of her share of the personal estate under the intestate laws aforesaid."

2. Widow may take real estate under the intestate laws.

The act of April 20, 1869, P. L. 77, as if the widow had not been amply protected before, provided as follows:

"In case any person has died or shall hereafter die, leaving a widow and last will and testament, and such widow shall elect not to take under the will in lieu of dower at the common law, as heretofore, she shall be entitled to such interest in the real estate of her deceased husband as the widows of decedents dying intestate are entitled to under the existing laws of this commonwealth."

3. Share of widow in lieu of dower at common law.

Section 15 of the act of 1833, *supra*, provided:

"The shares of the estate directed by this act to be allotted to the widow, shall be in lieu and full satisfaction of her dower at common law."

This has been construed to apply only to lands of which the hus-

band died seised and not such as he aliened in his lifetime.¹ The widow who elects to take against her husband's will is entitled to her dower, notwithstanding.² (See chapter on Intestacy, *supra*.)

4. Right of widow to occupy mansion house.

Section 33 of the act of March 29, 1832, P. L. 190, contains a provision that when decedent's real estate is sold for the payment of debts "the mansion house or more profitable part of the estate shall be reserved to the last."

Section 1 of the act of April 8, 1833, P. L. 316, gives to the widow, when there are no children, "one-half part of the real estate, including the mansion house and buildings appurtenant thereto, for the term of her life, and to one-half part of the personal estate absolutely."

This tenancy is not a dower interest, but a tenancy in common, and the other heirs, in case of intestacy could not maintain ejectment against the widow to throw her out of possession.³ The widow's quarantine (forty days), in any event gave her the right of possession, at the common law, until her dower could be assigned to her.⁴ Where a man devised to his wife mortgaged lands for her life, and also gave specific pecuniary legacies as well as a residuary legacy, the widow had the right to insist that the mortgage debt be paid out of the residuary personal estate, in protection of her life tenancy, although as to the specific pecuniary legatees, she had not.⁵

5. How her right may be lost.

The statutes have so hedged about the widow's rights in her husband's estate that she cannot lose them except by her own voluntary act and deed. She may waive them by an ante-nuptial agreement, as already pointed out; or she may alienate by deed; she may take under the will; but she cannot forfeit by desertion;⁶ or where she was deserted, and, supposing her husband dead, remarried, such marriage being void.⁷ She may elect to take against her husband's will made before marriage as well as after, although he has provided for her by a codicil.⁸ This right, however, is purely personal and if she dies before election, her legal representatives cannot make it.⁹ Having once made her election, the rights of all parties are fixed under the law.¹⁰ If the widow be a lunatic her committee cannot elect for her, except by leave and direction of the court of Common Pleas which appointed him, and have it certified for record, to the Orphans' Court.¹¹ Where the rights of the wife are fixed by an ante-nuptial

¹ Galbraith v. Green, 13 S. & R. 85; Leinaweaver v. Stover, 1 W. & S. 160; Borland v. Nichols, 12 Pa. 38.

² Bradford v. Kent, 43 Pa. 474.

³ Huston, J., in Seider v. Seider, 5 Wharton, 208.

⁴ See "Dower," vol. 2. Johnson.

⁵ Hoff's Ap., 24 Pa. 200. (See also Ruston v. Ruston, 2 Yeates, 65.)

⁶ Holbrook's Est., 3 C. C. 265.

⁷ Johnson's Est., 20 Phila. 170.

⁸ McGarry's Est., 9 D. R. 172.

⁹ Anderson's Est., 185 Pa. 174.

¹⁰ Greiner's Ap., 103 Pa. 89.

¹¹ Kennedy v. Johnston, 65 Pa. 451.

agreement, she will not be bound by a will which seeks to reduce them, although she took out letters under the will.¹² An attempt of the husband to get rid of his wife's "dower" by confessing a covinous judgment and procuring the sale of his real estate is prohibited by the statute of Elizabeth against covin and fraud.¹³ The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower or the husband of his estate by the curtesy, and will open or stay proceedings upon a judgment confessed without a full *bona fide* consideration, to carry such a scheme into effect.¹⁴

6. Election by the widow.

Section 35 of the act of March 29, 1832, P. L. 190, provides:

"In every case of a devise or bequest to a widow, which by force of any last will and testament, or by operation of law, will bar such widow of dower, subject to her right of election of dower, or of the property devised or bequeathed, it shall be lawful for the Orphans' Court, on the application of any person interested in the estate of the decedent, to issue a citation, at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time, not less than one month thereafter, in the said court, to make her election either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower, of which election a record shall be made, which shall be conclusive on all parties. If the widow shall neglect or refuse to appear, upon such citation, then upon due proof to the court of the service thereof, the said neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower, of which a record shall be made, which record shall be conclusive on all parties concerned."

This act is brought into practice only where after the expiration of the year the widow has not notified the executor of her election. If she has notified him in writing it is sufficient and it is not necessary to record such notice.¹⁵ Where she accepts a devise and goes into possession the presumption is that she has accepted the terms of the will.¹⁶ A proceeding for a citation within the year will be premature; nor can the widow thus proceed to require the executor to present a schedule of debts, so that she may elect intelligently. She must wait until the year has expired.¹⁷ If it is sought to establish the election of the widow *in pais*, without resorting to citation, it must be shown by clear and satisfactory proof that she acted under a full understanding of all her rights in the premises.¹⁸ Her acceptance of some articles of personalty bequeathed to her is not sufficient to overthrow her right to tenancy by survivorship, of the entire estate.¹⁹ If she is misled by the executor, or has not a clear

¹² Bowman v. Knorr, No. 1, 206 Pa. 270.

¹³ See "Dower," vol. 2. Johnson. See also Partition and Dower, *supra*, this volume.

¹⁴ Wells v. Bunnell, 160 Pa. 460.

¹⁵ Greiner's Ap., 103 Pa. 89; Cunningham's Est., 137 Pa. 621.

¹⁶ Darlington v. Darlington, 160 Pa. 65.

¹⁷ Farrell's Est., 3 W. N. C. 243; Anderson's Ap., 36 Pa. 476.

¹⁸ Bierer's Ap., 92 Pa. 265; Capwell's Est., 26 C. C. 399; Koppenheffer's Est., 27 C. C. 101; White's Est., 23 Supr. C. 552.

¹⁹ M'Cullough v. Wiggins, 22 Pa. 288.

ELECTION AGAINST OR FOR WILL—RECORDING OF.

No. 75.

Approved—The 21st day of April, A. D. 1911.

AN ACT

Relating to elections by surviving husbands or wives to take under or against the wills of decedents; to the recording thereof, and of final decrees, where parties have failed or refused to elect when required so to do; and forbidding payments to such parties until they have made and filed their elections.

Section 1. Be it enacted, &c., That surviving husbands or wives electing to take under or against the wills of decedents shall, in all cases, manifest their election by a writing signed by them, duly acknowledged by them before an officer authorized by law to take the acknowledgment of deeds, and delivered to the executor or administrator of the estate of such decedent.

Section 2. No payment from the estate of such decedent shall be made to any husband or wife unless his or her election shall have been duly executed, acknowledged and delivered, as provided by the first section of this act.

Section 3. Such election, or a certified copy of the final decree of any orphans' court, in cases where there has been a neglect or refusal to elect within the time prescribed by the order of the said court, shall, at the cost of the estate, be recorded by the personal representative of the decedent, in the office for the recording of deeds of the county where the decedent's will is probated; and it or a certified copy of it may also be recorded in any other office for the recording of deeds within this Commonwealth, with the same effect as if a duly signed and acknowledged declaration to the effect stated therein had been made by the person authorized to elect, and at his or her request recorded in said office according to law. After the said election, or a certified copy of the final decree, shall have been recorded in the office or offices for the recording of deeds, as aforesaid, the said election or certified copy of decree, at the cost of the estate, shall be filed in the office of the register of wills with the probated will, and a record made of such filing by said register.

INSERT, P. 646, VOL. 3.

THE WIDOW'S RIGHTS.

conception of the estate and her rights therein, she may rescind election.²⁰ Every opportunity will be accorded her to understand fully the consequences of her election;²¹ but having had such opportunity and made her election, she cannot sleep on her rights for years and then claim to go back and elect against the will.²²

7. Form of petition for citation to widow to elect.

In the matter of the estate of James Wynne, deceased, in the Orphans' Court of Philadelphia.

To the Honorable ———, P. J., etc.

The petition of Jennie Wynne of the city and County of Philadelphia, respectfully represents that she is one of the legatees [devisees] under the will of James Wynne, deceased; that by said will certain personal estate was bequeathed [or real estate devised] to Esther Wynne, the now widow and relict of said decedent; that said decedent has been dead for upwards of twelve months, and as yet said Esther Wynne has not made her election to take or refuse the bequest [or devise], which, if accepted, leaves her right of dower by the act of assembly provided.

Your petitioner therefore prays the court to award a citation, directed to the said Esther Wynne, commanding her to be and appear at Orphans' Court, to be holden on the ——— day of ——— next, then and there to make her election, either to accept such bequest [or devise] in lieu of dower, or waive such bequest [or devise], and to take her dower as by act of assembly is provided, and she will ever pray,
Jennie Wynn

Sworn to the truth.

Thereupon the court will endorse an order for citation to issue returnable at a day fixed in the order, and the clerk will issue the citation in the usual form.

8. Form of answer to citation.

In the matter of the estate of James Wynne, deceased.

In re petition of Jennie Wynne and citation thereupon awarded in the County of Philadelphia, ss.

The answer of Esther Wynne to the petition and citation above mentioned respectfully shows that she has hitherto been unable to decide, under all the circumstances, whether it were best to accept or refuse the bequest [or devise] of her late husband, James Wynne, to her in his last will and testament made, in lieu of her right of dower, but she now makes answer that she does elect to refuse [or accept] the said bequest [or devise] and has hereof notified Karl R. ——— the executor, of said will accordingly, and further saith not.

Esther Wynn

Sworn to, etc.

²⁰ Koonce's Ap., 4 Walker, 235; Walter's Est., 24 Pitts. L. J. 49; Maffett's Est., 6 Kulp, 452; Barry's Est., 13 Phila. 310.

²¹ Louck's Est., 17 York, 160; Powell's Est., 2 Lehigh, 353.

²² Boileau's Est., 201 Pa. 493; Wessel's Est., 26 Pitts. L. J. 45; Younker's Est., 202 Pa. 431; Feeley's Pet., 7 Lack. Jur. 318.

9. Form of notice of election.

To Karl Reed, Esq., executor of the last will and testament of James Wynne, late of No. — North Perth street, city of Philadelphia, Pa.

You will please take notice that I, Esther Wynne, widow of said James Wynne, deceased, do hereby refuse to take under the will of my late husband, and insist upon my right to take as widow of said decedent, under the laws of the Commonwealth of Pennsylvania.

Esther Wynne,
Widow of James Wynne.

Phila., Pa., March 11, 1911.

10. Property widow may take, and effect.

If the widow elects to take under her husband's will it does not preclude her from her share of property as to which he died intestate,²³ as where a gift to charity fails;²⁴ nor does it prevent her claim of dower as to lands he alienated during his life without her joining.²⁵ It has been held that under the act of April 20, 1869, P. L. 77, the word "heirs" should be taken in its broad popular sense as meaning all who take under the laws, and therefore, where a husband willed all to strangers having no "known heirs or kindred," and she elects to take against the will she is not entitled to the whole of it, but only half the real estate for life and half the personalty absolutely.²⁶ But since the widow's inheritance act of April 1, 1909, P. L. 87, the widow is entitled to \$300 exemption, and \$5,000 besides absolutely as well as her dower rights, subordinate to the claims of creditors.²⁷ This act, it has been said, contains nothing that would indicate that the legislature intended it to be retroactive.²⁸ If the real estate is sold for the payment of debts, the balance is distributable as real estate and the widow is entitled to her dower interest, but can have the principal sum only on giving security to those entitled after her life estate ends.²⁹ Provisions for a widow, in a will, must give way for the payment of debts.³⁰ Where a man wills all his estate, real and personal, to his wife for life and makes her executrix she takes all the personal property absolutely as his widow and not as executrix.³¹ If there are no debts, the legatee of a life interest in bonds need not account to the executor.³² Where the testator creates a trust the income to be paid to his wife while she remains his widow and she accepts, but afterward marries, she is entitled to only one-third of the trust income.³³

²³ Carman's Ap., 2 Penny. 332; Hodges' Est., 5 C. C. 283; Hoffman's Est., 14 D. R. 279.

²⁴ Chahoon's Est., 12 D. R. 229.

²⁵ Borland v. Nichols, 12 Pa. 38.

²⁶ Petterson's Est., 195 Pa. 78.

²⁷ Whilt's Est., 19 D. R. 550.

²⁸ Carnell's Est., 26 Montg. 89.

²⁹ Wales' Est., 11 Phila. 156.

³⁰ Taylor's Est., 57 Pitts. L. J. 397.

³¹ Heppenstall's Est., 144 Pa. 259.

³² Marsden's Ap., 102 Pa. 199.

³³ Horn's Est., 223 Pa. 415.

11. Devise to the wife, in lieu of dower.

Section 11 of the act of 1833, *supra*, provides:

"That a devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise: *Provided*, That nothing herein contained shall deprive the widow of her choice either of dower, or of the estate or property so devised or bequeathed."

The law has leaned liberally towards the widow, even so much that where she was convicted of being accessory after the fact to the murder of her husband, she was still permitted to have her exemption;¹ although she may lose it by her laches in claiming it.² Where she takes against the will, it is also subject to the claims of creditors upon the estate;³ and she cannot have the executor surcharged with a note that was outlawed and not an available asset.⁴ Distribution must be made as if she were dead and provisions intended by the will to take effect on her death become operative at once as far as possible.⁵ But legacies or devises not depending for time of delivery upon such event will not be accelerated by her act.⁶ If the trust is for the benefit of others, also, it must be executed as near as can be, despite her election against the will.⁷ Of course, where the persons to take are not in being, or have not fulfilled the conditions upon which alone they are to take, acceleration cannot be permitted.⁸ This is particularly so where there is no present fund to distribute.⁹ The widow takes as if her husband had died intestate and with no higher rights as to actual assets;¹⁰ nor as to the claims of a child which he adopted legally as his heir.¹¹

12. Rights of remaindermen — Merger.

When the widow elects to take against the will, the heir may petition for partition of the land.¹² A life estate willed to her merges in the remainder, if the will shows a purpose of not dying intestate as to any part of his estate;¹³ and such merger may give the heir sufficient title to maintain partition.¹⁴

¹ Newman's Est., 19 D. R. 189.

² Deuel's Est., 19 D. R. 373.

³ Lennig's Est., 52 Pa. 135.

⁴ Carnahan's Est., 30 Pitts. L. J. 31.

⁵ Rogers' Est., 17 Phila. 478; Dickson's Est., 9 D. R. 431; Beebe's Est., 9 D. R. 296; Coover's Ap., 74 Pa. 143; Griffin's Est., 1 D. R. 316; Brennan's Est., 15 D. R. 231; 220 Pa. 232.

⁶ Moore's Est., 9 D. R. 58.

⁷ Portuondo's Est., 185 Pa. 472.

⁸ Penrose, J., in Keys' Est., 4 D. R. 134. (See this case for a qualification of the operation of the rule.)

⁹ Kerr's Est., 44 Pitts. L. J. 122; Knepley's Ap., 17 Pa. 19.

¹⁰ Sower's Est., 16 D. R. 224; Hawkins' Est., 1 Pearson, 444; Hoff's Est., 7 D. R. 93; Murray's Est., 28 Supr. C. 474.

¹¹ Rowan's Est., 132 Pa. 299.

¹² Birth's Est., 2 Luz. L. R. 237.

¹³ Brown's Ap., 27 Pa. 62.

¹⁴ Armstrong v. Smith, 2 Chester Co. 355. (See Batione's Est., 136 Pa. 307; Davis' Est., 35 Pitts. L. J. 317.)

13. Compensation to disappointed beneficiaries.

In its equitable powers the court may sequester the benefit intended for the widow to secure compensation to disappointed legatees and devisees, when she takes against the will.¹⁵ The same principle applies to the husband who takes against his wife's will.¹⁶ But courts must be fully satisfied of the equity of so doing before they lay a hand upon the disposition which the law makes.¹⁷ If the parties all come together and agree and the widow takes under such agreement there is no resulting trust in favor of a legatee.¹⁸

14. Fund out of which compensation may be allowed.

Compensation may be awarded to the disappointed annuitant out of the moiety of the real and personal property not taken by the widow.¹⁹ It will be a charge upon the general pecuniary legacies rather than upon the residue.²⁰ If there be any undisposed-of residue, not contemplated by the testator, it may be sequestered in aid of the disappointed.²¹ A disappointed daughter has been held to be entitled to maintenance out of the income as compensation out of the substituted bequest.²² Such compensation, however, should not be made at the expense of the residuary legatees.²³

15. Abatement — Effect on different classes.

Where a deficiency is caused by an election against the will all legacies abate proportionably, unless the will indicates a preference as to any class of beneficiaries.²⁴ So a specific devise is entitled to have the assets marshaled and a sufficient sum set aside from the residuary estate to relieve it.²⁵ Where lands are specifically devised and other lands directed to be sold and the proceeds divided they must abate in proportion.²⁶ But definite pecuniary legacies are preferred to residuary legacies.²⁷ The legacies are accelerated in the order of the testator's preference.²⁸ The Orphans' Court has power to sequester the benefit intended for the widow in real estate,²⁹ and to this end will appoint a sequestrator on petition of the parties interested, and consider all questions of priority, on the filing of his account.³⁰ Or

¹⁵ Sandoe's Ap., 65 Pa. 314; Young's Aps., 108 Pa. 17; Evans' Est., 150 Pa. 212; McIntosh's Est., 158 Pa. 528; Cummings' Est., 13 D. R. 462.

¹⁶ Lyons' Est., 3 D. R. 739.

¹⁷ Heineman's Ap., 92 Pa. 95.

¹⁸ Stewart's Ap., 110 Pa. 410; McComb's Est., 49 Pitts. L. J. 218.

¹⁹ Young's Aps., 108 Pa. 17.

²⁰ Bigham's Ap., 34 Pitts. L. J. 307.

²¹ Batione's Est., 136 Pa. 307.

²² Ballentine's Est., 42 Pitts. L. J. 416.

²³ Collins' Est., 10 D. R. 249. (See Sandoe's Ap., 65 Pa. 314, and Brubaker's Ap., 65 Pa. 317.)

²⁴ Bard's Est., 58 Pa. 393; Gallagher's Est., 76 Pa. 296; Taylor's Est., 5 Phila. 218; Cascaden's Est., 3 Phila. 582.

²⁵ Gallagher's Ap., 87 Pa. 200.

²⁶ Haddock's Est., 18 Phila. 77; Griffin's Est., 1 D. R. 316.

²⁷ Ferguson's Est., 138 Pa. 208; Coover's Ap., 74 Pa. 143.

²⁸ Vance's Est., 141 Pa. 201, discussed by Penrose, J., in Cummings' Est., 13 D. R. 462 *q. v.*

²⁹ Bigham's Ap., 34 Pitts. L. J. 304.

it will set aside a portion of the fund on the audit of a partial account of the executors, to await the marshaling of the assets.³¹ Where the widow elects to take against the will she must forego the special benefits which the testator had appointed for her. As far as she is concerned the will is a dead letter.³² She cannot accept one part of it and reject another.³³ There can be no conversion as to her, since she takes her share as realty,³⁴ which is a life estate created by law.³⁵

16. Recording of elections.

The act approved April 21, 1911, regulates elections by surviving husbands or wives to take under or against wills of decedents, the recording thereof and of final decrees where the parties have failed or refused to elect when required so to do, and forbidding payments to such parties until they have made and filed their election."

Among other provisions in this new law is this:

"After the said election or a certified copy of the final decree shall have been recorded in the office or offices for the recording of deeds as aforesaid, the said election or certified copy of decree, at the cost of the estate, shall be filed in the office of the register of wills with the probated will, and a record made of such filing by said register."

³⁰ Cummings' Est., 13 D. R. 462; Klenke's Est., 210 Pa. 575.

³¹ Evans' Est., 150 Pa. 212.

³² McClernan's Est., 11 D. R. 163; McCullough's Est., 3 C. C. 431.

³³ Hoover v. Landis, 76 Pa. 354; Petterson's Est., 195 Pa. 78; P. & L. Dig., vol. 23, col. 40361.

³⁴ Cunningham's Est., 137 Pa. 621.

³⁵ Sullivan v. Kieffer, 122 Pa. 135; P. & L. Dig., vol. 23, col. 40362.
(See also Donnelly's Est., 11 D. R. 279; Weyant's Est., 11 D. R. 177.)

CHAPTER XXXVIII.

TENANT BY THE CURTESY—RIGHT TO ELECT FOR OR AGAINST THE WILL.

1. Tenancy by the curtesy.
2. Nature of curtesy.
3. Curtesy initiate.
4. Husband's right to curtesy under the statutes.
5. Election by the husband.
6. Forfeiture by desertion.
7. Bar or loss of curtesy.

1. Tenancy by the curtesy.

"Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate."¹ "There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue and death of the wife. * * * The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law."² In Pennsylvania, issue is unnecessary to the tenancy,³ although it was at the common law.

But if the wife's estate of inheritance be not limited over and there is no executory devise or springing use taking effect at her death to carry it over to a substituted devisee, she has no descendible estate whereof her husband can have tenancy by the curtesy.⁴

The fact that an auditor has found that a husband forfeited his right to his wife's personalty, by non-support, does not bar his right to bring ejectment as tenant by the curtesy.⁵ Curtesy and dower stand on an equality as to any estate of inheritance.⁶ In Pennsylvania actual seisin seems not to be necessary. It is sufficient if the wife had title and the potential right of seisin; i. e., the right to demand and recover the immediate possession.⁷ Duncan, J., said: "The husband's interest in the wife's land is not the land itself. Even if he had issue by her, he has but a life estate, and that only, in strictness, where he reduces it to possession during the coverture. The actual seisin of the husband during the coverture is necessary to entitle him, as tenant by the curtesy, by the common law; though such actual seisin by the husband is not necessary by our law, if

¹ 2 Bl. Com. Lewis Ed., p. 586.

² 2 Blackstone's Com., Lewis Ed., p. 587.

³ *Masters v. Negley*, 152 Pa. 303, distinguishing *Thornton Exs. v. Krepps*, 57 Pa. 391.

⁴ *McMasters v. Negley*, 152 Pa. 304.

⁵ *Lease, Ex., v. Ensminger*, 5 Supr. C. 329.

⁶ *Evans v. Evans*, 9 Pa. 190; *Shoemaker v. Walker*, 2 S. & R. 554; *Reed v. Morrison*, 12 S. & R. 18.

⁷ *Stoolfoos v. Jenkins*, 8 S. & R. 175.

there be a potential seisin or right of seisin. * * * It is an excrescence of the wife's seisin. He is seised *in jure uxoris*. If it be a chattel of his wife's, it is his absolutely; if a *chose* in action, and he reduces it to possession, it is his." So, in partition, he cannot take at the appraised value in right of his wife, any greater interest than in any other part of her real estate.⁸ Where a woman held a ground rent in fee in trust for another during his life, and she afterwards married and died, and then the *cestuy que trust* died, the husband was held to be entitled to the rent as such tenant.⁹ But a husband is not entitled to an estate by the curtesy out of land devised to a trustee for the sole and separate use of the wife in fee simple.¹⁰ A husband who has conveyed land to another in trust for his wife, is not, on her death, entitled to tenancy by the curtesy therein.¹¹ A tenant by the curtesy cannot open new mines without the consent of the remaindermen.¹² By agreement, where the surface and subjacent estates are severed, he is entitled to his share of the income from the mines.¹³ He is entitled to his tenancy in an estate tail enlarged into a fee by the law and his estate is a bar to partition by the heirs of his deceased wife.¹⁴ An alien husband can claim it under the act of February 23, 1791, 3 Sm. L. 4, by descent, or if the estate was by purchase, then under act of May 1, 1861, P. L. 433.¹⁵

Where a married woman dies and her husband succeeds to the curtesy and subsequently a married daughter dies her husband is out of curtesy, for the curtesy is exhausted by the possession of the taker who survives.¹⁶ Where the wife's estate is not one of inheritance there can be no curtesy.¹⁷

2. Nature of curtesy.

If the husband conveys his interest to the only child his estate is merged and the inheritance is from the mother and not the father.¹ But the tenant by the curtesy does not hold under the heir and cannot be made garnishee in foreign attachment against him.² Where the tenant by the curtesy conveys the whole estate by warranty, and enters into an agreement with the heir, by which the latter receives more than his interest in the land he is estopped by the warranty and his agreement.³ Where real estate held by a tenant by the curtesy is sold, the rights of the heirs attach at the death of the tenant

⁸ *Stoolfoos v. Jenkins*, 8 S. & R. 167.

⁹ *Chew v. Southwark*, 5 Rawle, 160.

¹⁰ *Cochran v. O'Hern*, 4 W. & S. 95; *Stokes v. McKibbin*, 13 Pa. 267.

¹¹ *Rigler v. Cloud*, 14 Pa. 361.

¹² *Brandmeier v. Pond, Etc., Co.*, 219 Pa. 19; 13 Luz. L. R. 93.

¹³ *Deffenbaugh v. Hess*, 35 C. C. 7.

¹⁴ *Smith v. Lindsey*, 37 Supr. C. 171.

¹⁵ *Cooke v. Doron*, 215 Pa. 393, distinguishing *Reese v. Waters*, 4 W. & S. 145.

¹⁶ *Brandmeier v. Pond Creek Coal Co.*, 219 Pa. 19.

¹⁷ *Crosson v. O'Donnell*, 17 D. R. 97.

¹ *Lineberger v. Newkirk*, 179 Pa. 117.

² *Hayes v. Gillespie*, 35 Pa. 155.

³ *Carson v. New Bellevue, Etc., Co.*, 104 Pa. 575.

and interest begins to run at that time.⁴ Tenancy by the curtesy was held not to be a life estate within the meaning of the acts requiring leave of court and ten days' notice before a *vend. ex.* may issue.⁵ Legacies charged upon land have preference over the curtesy of a devisee's husband.⁶ A husband is entitled to curtesy in his wife's fee, required to remain equitable until the legal and equitable titles coalesce when a testamentary trust expires.⁷ The husband's right cannot be defeated in his wife's devise of coal lands, by the possession of the executors with a naked power to sell.⁸ There can be no tenancy by the curtesy in a wife's estate in reversion or remainder unless the particular estate shall end during coverture and be vested in possession.⁹

3. Curtesy initiate.

"Curtesy initiate," as qualified in England does not exist in Pennsylvania although our jurists term it so; for, as Blackstone says: "As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant."¹⁰ This feature being eliminated, upon legal marriage the husband becomes tenant by the curtesy in his wife's estate of inheritance which she cannot by will divest without his consent.¹¹ The tenancy is not affected by any act of assembly and by it he may gain a settlement as a pauper in the district where the land is.¹² It is an estate which is insurable.¹³ He is competent to take an allotment in partition for himself and his son in the estate of his deceased wife held by her as tenant in common with others.¹⁴ Although it requires a valid marriage to generate it, tenancy by the curtesy is not a part of the marriage contract but results by operation of law.¹⁵ Since the act of April 1, 1863, P. L. 212, tenancy by the curtesy is immune from execution¹⁶ during marriage. It is not a valid defense against a mechanic's lien, however.¹⁷ The right of curtesy has been held to extend to an estate of inheritance devised for the sole and separate use of a wife.¹⁸

⁴ Urian's Est., 30 W. N. C. 308.

⁵ Diller v. Groff, 11 Lanc. L. R. 73.

⁶ Wolfer's Est., 15 Lanc. L. R. 362; 192 Pa. 63.

⁷ Morton's Est., 24 Supr. C. 246; 201 Pa. 269.

⁸ Rankin's Ap., 1 Mona. 308.

⁹ Knox v. Rogers, 1 Montg. Co. 1; Keller v. Lamb, 10 Kulp, 246, 202 Pa. 412; Danner's Est., 19 Lanc. L. R. 239; Sproul's Est., 5 D. R. 447.

¹⁰ 2 Blackstone's Com., Lewis Ed., p. 587; Wheeler v. Hotchkiss, 10 Conn. 230.

¹¹ Clarke's Ap., 79 Pa. 376.

¹² Rouse, Est., Comr. v. McKean, Etc., 169 Pa. 116.

¹³ Harris v. York, Etc., Co., 50 Pa. 341.

¹⁴ Kelsey's Ap., 113 Pa. 119.

¹⁵ Moninger v. Ritner, 104 Pa. 298; Williams v. Baker, 71 Pa. 476.

¹⁶ Gamble's Est., 1 Parsons, 489; Curry v. Bott, 53 Pa. 400.

¹⁷ Woodward v. Wilson, 68 Pa. 208.

¹⁸ Dubs v. Dubs, 31 Pa. 149; Weyand v. Weyand, 1 Woodward, 1;

The tenant by the curtesy is entitled to possession of proceeds of his wife's lands sold in partition, on giving security for payment to the heirs at his death.¹⁹ Where the husbands accept in right of their wives, and give recognizances there is no such conversion as will deprive them of their right by curtesy.²⁰ Under proceedings to sell and distribute by the act of June 12, 1893, P. L. 461, where the heir dies after the purchase money is paid and the sale confirmed, and before deed delivered, there is no conversion and the husband's tenancy by the curtesy attaches.²¹ A power of sale in a deed of trust for the sole and separate use of a married woman does not extinguish the right of curtesy.²² But a devise of all the coal, which amounts to a sale of the coal in place does divest the right of the husband in the royalties.²³ Any estate of inheritance which the wife's issue, if she had any, might inherit, is such as the husband has a right to as tenant by the curtesy.²⁴ A potential seisin is enough.²⁵ If the estate is carried beyond her death in remainder there can be no tenancy by the curtesy.²⁶ But a wife may not on the day of her marriage covinously convey so as to defeat uncourtously the curtesy.²⁷

4. Husband's right to curtesy, under the statutes.

The statutes of inheritance have also preserved the rights of the husband in his wife's estate, especially tenancy by the curtesy which is equivalent to the widow's dower, with the additional right of possession of lands of which she died seised.

Section 9 of the act of April 11, 1848, provided: "If there be a child or children, the personal estate shall be divided among the husband and the child or children, share and share alike, issue of deceased children taking their parents' shares. If there be no issue, the husband takes all the personalty absolutely. The real estate shall be distributed under the intestate law, nothing in this act to be taken to deprive the husband of his tenancy by the curtesy." By section 10 of the act of April 8, 1833, P. L. 315, where there are no known heirs or kindred of the wife, the husband takes such estate as she had.

The equalization act of May 4, 1855, P. L. 430, provided that: A married woman's power to bequeath or devise property is restricted, as regards the husband, to the same extent as his power so to dispose of his property is restricted as to his wife; "so that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate as she can, when surviving, elect to

Johnson v. Fritz, 44 Pa. 449; Rank v. Rank, 120 Pa. 191; Carson v. Fuhs, 131 Pa. 256; Shalters v. Ladd, 141 Pa. 349; P. & L. Dig., vol. 4, col. 6137.

¹⁹ Clepper v. Livergood, 5 Watts, 113; Eberts v. Eberts, 55 Pa. 110.

²⁰ McMillan's Ap., 52 Pa. 434.

²¹ Schmid's Est., 182 Pa. 267.

²² Ege v. Medlar, 82 Pa. 86.

²³ Fairchild v. Fairchild, 9 Atl. 255.

²⁴ Buchanan v. Sheffer, 2 Yeates, 374; Thornton v. Krepps, 57 Pa. 391.

²⁵ Buchanan v. Duncan, 40 Pa. 82.

²⁶ Hitner v. Ege, 23 Pa. 305; P. & L. Dig., vol. 4, col. 6142; Pierce v. Hakes, 23 Pa. 231.

²⁷ Robinson v. Buck, 71 Pa. 386. *Courtoise*, French for politeness.

take against his will in his estate, or otherwise to take only her real estate as tenant by the curtesy: *Provided*, That nothing herein contained shall affect the right or power of the wife, by virtue of any authority or appointment contained in any deed or will, to grant, bequeath or devise as heretofore, any property held in trust for her sole and separate use."

The proviso in the act of June 8, 1893, P. L. 344, also preserves the husband's rights as tenant by the curtesy and to take against his wife's will as provided by existing laws.

5. Election by husband.

The same principles which govern the wife also govern the husband in making election to accept or refuse under a will. An election by him must be clear and positive¹ and made with a full understanding of his rights.² If so made he will not be permitted to rescind.³ Whether his election is made in time depends on the circumstances.⁴ His right to elect is a personal privilege and cannot be controlled by the court at the instance of creditors or the *cestuis que trustent*. He may assert his right against the remaindermen, after a life tenancy, if he has done nothing to prejudice or mislead them.⁵

Where the husband is a lunatic the proceedings by the committee to elect are the same as where the wife is a lunatic. The court will not consider the protests of residuary legatees, but the interests of the lunatic alone in the premises.⁶ The committee having obtained leave of court and elected to accept under the will, the lunatic, on becoming *sui juris*, cannot afterwards withdraw this acceptance.⁷ After a delay of seven years, a husband who fails to appear and elect will be held to have abandoned his right.⁸ By a post-nuptial release of his right to his interest in his wife's real estate, he relinquishes nothing as to her personal estate.⁹ When electing to take against his wife's will the husband takes in all the estate of which his wife was seized during coverture.¹⁰ His consent to her will divests his estate.¹¹ By becoming executor he does not forego his right to elect to take against the will.¹² He need not elect pending an action of ejectment.¹³ But he may lose his right by assent to its execution.¹⁴ A husband who agrees not to take against the will and for a valuable

¹ Dickinson v. Dickinson, 61 Pa. 401.

² McDonald's Est., 37 Pitts. L. J. 275.

³ Patterson's Est., 46 Pitts. L. J. 63; Scholl's Ap., 1 Mona. 572; Moore's Est., 23 C. C. 340; Grim's Est., 20 York, 147; 33 Supr. C. 587.

⁴ Nissley v. Heisey, 78 Pa. 418; McDonald's Est., 37 Pitts. L. J. 275; Fleming's Est., 217 Pa. 610; Melot's Est., 2 Berks, 271.

⁵ Davis v. Fenner, 30 Supr. C. 389.

⁶ Borden's Est., 13 D. R. 1.

⁷ Hope's Ap., 29 W. N. C. 365.

⁸ Dignal's Est., 50 Pitts. L. J. 311.

⁹ Rice v. Rice, 2 W. N. C. 672.

¹⁰ Clarke's Ap., 79 Pa. 376.

¹¹ McBride's Est., 81 Pa. 303. (See vol. 4, P. & L. Dig., col. 6152.)

¹² Logan v. Quigley, 11 Atl. 92.

¹³ Kocher's Est., 1 Northam. 295.

¹⁴ Wise v. Rhodes, 84 Pa. 402.

consideration assigns all his interest to the legatees, has no further claim upon his wife's estate.¹⁵

6. Husband forfeits his rights by desertion.

Section 5 of the act of May 4, 1855, P. L. 430, provides:

"No husband who shall have, as aforesaid, for one year or upwards, previous to the death of his wife willfully neglected or refused to provide for his wife, or shall have for that period or upwards, willfully and maliciously deserted her, shall have the right to claim any right or title in her real or personal estate, after her decease, as tenant by the curtesy, or under the intestate laws of this commonwealth."

Where the husband has forfeited his right under this section, but lays claim to it, the burden of proving his forfeiture is upon those who object to his claim.¹⁶ He can only justify his leaving, by showing such reasonable cause as would justify him in obtaining a divorce.¹⁷ If he by cruelty forces his wife to leave his abode, and contributes nothing to her support, it is cause to bar his claim.¹⁸ By proceedings under the *feme sole* trader act, the husband is cut out entirely (see volume 4, Johnson).

7. Bar or loss of curtesy.

The husband may lose his right by acquiescence in a distribution in which he participates with his children.¹ But a mere surrender of a note against the husband to the wife by the grantee is not enough.² A sheriff's sale divests it.³ He may lose it by accepting proceeds of a mortgage upon the land.⁴ It is barred by adverse possession by a stranger for twenty-one years and upwards.⁵ His leaving must be for causes grave enough to entitle him to a divorce, to excuse his desertion under the act of 1855.⁶ But living apart by agreement is no bar.⁷ The finding of an auditor that he has willfully and maliciously deserted his wife may be based on a bond in which the desertion is set forth and binding himself to pay a sum for her support.⁸ But the finding of an auditor does not become *res judicata* so as to preclude the right to a jury trial on the question of title.⁹

The right to curtesy is not barred by a separation in mutual disagreement and disgust, the wife preferring to live alone, this not being a willful desertion.¹⁰ If he has been absent for more than a year the burden is upon him to prove that it was not a willful and malicious desertion and to this end he may show attempts to become

¹⁵ Irwin's Est., 17 Lanc. L. R. 409.

¹⁶ Little's Est., 7 Phila. 495.

¹⁷ Hayes' Est., 23 Supr. C. 570; White's Est., 188 Pa. 633.

¹⁸ Kammerer's Est., 50 Pitts. L. J. 218; Kuffner's Est., 58 Pitts. L. J. 81.

¹ Johnson v. Fritz, 44 Pa. 449.

² Houck v. Ritter, 76 Pa. 280.

³ Wells v. Bunnell, 160 Pa. 460; Collins v. Large, 1 Central R. 634.

⁴ Shippen's Ap., 80 Pa. 391.

⁵ Crow v. Kightlinger, 25 Pa. 343.

⁶ Hahn v. Bealor, 132 Pa. 243; 117 Pa. 169.

⁷ McGrew v. Hart, 11 Atl. 617.

⁸ Birchard's Est., 154 Pa. 89.

⁹ Lease v. Ensminger, 5 Supr. C. 329.

¹⁰ Munson v. Crookston, 219 Pa. 419.

reconciled to his wife.¹¹ The same forms of election as given, *supra*, under widow's election, will answer, with a few changes, for a tenant by the curtesy.

¹¹ Weller v. Weller, 213 Pa. 265.

CHAPTER XXXIX.

INTERPRETATION OF WILLS.

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| 1. Time from which a will speaks or takes effect. | 11. Consideration of the entire will. |
| 2. After acquired property. | 12. The force of general intent. |
| 3. Intention of the testator. | 13. Express words yield not to doubtful implication. |
| 4. Effect given to words. | 14. Latest clause as final intent. |
| 5. Precedents in the construction of wills. | 15. Effect of reference clause. |
| 6. Literal meaning to give way to actual meaning. | 16. Repetition and exchange of words. |
| 7. The rule as to disinheritance. | 17. Correction of language. |
| 8. Construction favorable to the heir and widow. | 18. Parol evidence, when admissible. |
| 9. Favor to the first taker. | 19. The residuary clause. |
| 10. Equality of standing. | 20. Effect of codicils upon a will. |
| | 21. Revocation by codicil. |

1. Time from which a will speaks or takes effect.

It has been seen that the legality of the execution of a will is determinable by the law as it existed when the will was made, and also that under the act of June 4, 1879, P. L. 88, "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."¹ It has been said that whenever the time of execution of a will is of materiality in the determination of legal results, the actual time of making it will be considered.² It is to be interpreted according to the rules of property existing when it was made,³ but if the testator fixes a future time for distribution he will be presumed to have anticipated that the laws may change, and it will be held accordingly.⁴ Before the act of 1879, the rule was that as to the quantity of the estate the will spoke from the time when it was made;⁵ and this rule has been followed in a number of cases since.⁶ Where will and codicil are not dated, perforce they speak as if made immediately before the maker died;⁷ and so where it directs the payment of debts.⁸ It speaks from the

¹ See Pepper & Lewis' Dig., vol. 23, col. 40363, *et seq.*, and vols. 2 and

⁴ C. R. A. by marginal reference to the same column.

² Carl's Ap., 106 Pa. 635; Hitchcock v. Hitchcock, 35 Pa. 393.

³ Lisle's Est., 22 Supr. C. 262.

⁴ Kohler's Est., 199 Pa. 455; Mann v. Mullin, 84 Pa. 297.

⁵ Caldwell v. Ferguson, 2 Yeates, 380.

⁶ Neale's Ap., 104 Pa. 214; Quin's Est., 144 Pa. 444; P. & L. Dig., vol. 23, col. 40366.

⁷ Smith's Est., 7 D. R. 381.

⁸ Pillion's Est., 3 D. R. 383.

death of the testator only as to such real or personal estate as is comprised in it.⁹ It is held that the act of 1879 relates only to the subject and not the object of the gift,¹⁰ and the rule must yield to the expressed intention of the testator.¹¹

2. After-acquired property.

At the common law a will did not pass real estate acquired after it was made and this rule was followed in Pennsylvania.¹² But section 10 of the act of April 10, 1833, changed this.¹³ As to personal property the rule is that the will speaks from the death of the testator.¹⁴ After-acquired additions to realty will pass under the phrase "all the residue of my real estate";¹⁵ or "all my real estate";¹⁶ or estate whereof he is seized or possessed.¹⁷ But the will must be, by fair construction, intended to pass land, or it will not pass after-acquired land.¹⁸

3. Intention of the testator.

The construction of a will is for the court and not the jury;¹⁹ and the cardinal principle which governs the interpretation is the intention of the testator;²⁰ and this intention will be drawn from the four corners of the will itself.²¹ Oral declarations of a testator are not admissible to explain what a will means, so as to vary its language. They can only be considered when there are latent ambiguities.²² The intention must govern unless some plain rule of law would be violated.²³ One time-honored and rigorous rule which over-rides intent is that laid down in Shelley's case.²⁴ The intent which the court sets itself the task of seeking is the maker's own personal intent as near as can be found.²⁵ To do this, it will try to put itself in his place, as he was when he disposed,²⁶ and may consider the probabilities.²⁷

⁹ *Freas v. Yost*, 23 Montg. 85; *Forster's Est.*, 55 Pitts. L. J. 198.

¹⁰ *Kensel's Est.*, 21 Montg. 67; *Jones' Est.*, 211 Pa. 364.

¹¹ *Fidelity, Etc., Co.'s Ap.*, 108 Pa. 492; *Clarke's Est.*, 82 Pa. 523; *Benson's Est.*, 169 Pa. 602; *Busser v. Walter*, 14 York, 178; *Walls v. Walls*, 182 Pa. 226.

¹² *Girard v. Phila.*, 4 Rawle, 323; *Phila. v. Davis*, 1 Wharton, 490.

¹³ *Fidelity, Etc., Co.'s Ap.*, 108 Pa. 492; *Comth. v. Hackett*, 102 Pa. 505; *Alexander v. Paxson*, 47 Pa. 12.

¹⁴ *Donaugher's Est.*, 2 Parsons, 164; *Martindale v. Warner*, 15 Pa. 471.

¹⁵ *Williams v. Brice*, 201 Pa. 595.

¹⁶ *Wambold v. Scholl*, 12 Montg. 173.

¹⁷ *Roney v. Stiltz*, 5 Wharton, 381.

¹⁸ *Price's Ap.*, 169 Pa. 294.

¹⁹ *Curty v. Monnin*, 14 Supr. C. 102.

²⁰ *Rodgers v. Rodgers*, 7 Watts, 15; *Craige's Est.*, 12 Phila. 163; *Aubert's Ap.*, 119 Pa. 48; *Shubart's Est.*, 154 Pa. 230; *Mickley's Est.*, 4 Supr. C. 550; *Dalrymple's Est.*, 13 Supr. C. 289; *P. & L. Dig.*, vol. 23, col. 40378.

²¹ *Provenchere's Ap.*, 67 Pa. 463; *Chew's Ap.*, 37 Pa. 23; *Thomman's Est.*, 161 Pa. 444.

²² *Hunter v. Hunter*, 229 Pa. 349.

²³ *King v. Savage Brick Co.*, 30 Supr. C. 582.

²⁴ *Dull's Est.*, 217 Pa. 358.

²⁵ *Tyson's Est.*, 191 Pa. 218; *Thran v. Herzog*, 12 Supr. C. 551.

²⁶ *Hulton's Ap.*, 104 Pa. 359; *Findlay v. Riddle*, 3 Binney, 139.

²⁷ *Hart v. Stoyer*, 164 Pa. 523.

4. Effect given to words.

There being no ambiguity the intention must be gathered from the plain words and not *aliunde*.²⁸ There is a euphemism that "not what the testator meant but what his words mean shall control." But this is more of a legal oddity than actuality. If the intention can be gathered from his words the literal words yield to the intent.²⁹ If his words are meaningless, then indeed, the court cannot impart meaning into them from the air.³⁰ As to the rules of law, Coulter, J., said:³¹ "The first thing, therefore, is to ascertain what the object of the testator is; the next whether it is such as the rules of law and equity admit." And Mitchell, J., said:³² "All of these canons are subservient to the great rule as to intent, and are made to aid, not to over-ride it. As in all such cases, care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as a means of reaching it." So, after all, the common sense view is that technical rules must give way to intention.³³

5. Precedents in construction of wills.

Said Mitchell, J., in *Redding v. Rice*, 171 Pa., 301:

"Precedents are of little value in the construction of wills because when used under different circumstances and with different context, the same words may express different intentions. When the intent of the testator, and by that is meant his actual intent, can be fairly gathered from his words, the fact that another testator has used the same words with a different meaning, is of no avail. Neither precedents nor rules of construction can override the testator's expressed intent."

The rule as to parallel cases is: "*Similis casus et simile iudicium eodem tempore*." But, really, cases are but analogous and seldom parallel; hence the keen lawyer searches critically the facts of every case to discover the application of the rule of law. "Precedents" may aid but they should not control.¹ Every will is to be construed from its four corners, with reference to the circumstances of the testator when he made the disposition.² "So the laws of the realm and the judges who are the interpreters of the same, do favor wills, devises and testaments in yielding to them such a reasonable construction as they think might best agree with the minds of the dead."³

Every case has its individual features and precedents are only of

²⁸ *Russell v. Kennedy*, 66 Pa. 248; *Bartholomew's Ap.*, 75 Pa. 169; *Reagan v. Curran*, 226 Pa. 265; *Porter's Est.*, 57 Pitts. L. J. 690.

²⁹ *Woelpper's Ap.*, 126 Pa. 562; *Buehler's Ap.*, 100 Pa. 385.

³⁰ *Pearson's Est.*, 10 D. R. 189. (See P. & L. Dig., vol. 23, cols. 40382-3.)

³¹ *Hunter's Est.*, 6 Pa. 97.

³² *Woelpper's Ap.*, 126 Pa. 562; P. & L. Dig., vol. 23, col. 40394.

³³ *Todd v. Armstrong*, 213 Pa. 570; *Wood v. Schoen*, 216 Pa. 425; *Schoyer v. Kay*, 217 Pa. 32; *Freeman's Est.*, 220 Pa. 343; *Line's Est.*, 221 Pa. 374.

¹ *Zimmerman's Est.*, 23 Supr. C. 130; *Fox's Ap.*, 99 Pa. 382; *Huber's Ap.*, 80 Pa. 348; P. & L. Dig., vol. 23, col. 40390.

² *Weidman v. Marsh*, 16 Pa. 504.

³ Note to *Wentworth Exs.*, p. 6.

comparative and not positive value.⁴ What the testator might have said or intended to say but did not, is beyond the pale of inquiry.⁵

6. Literal meaning to give way to actual meaning.

Courts are not confined to the literal meaning of the words in every case. The maxim still applies: "*Id certum est quod certum reddi potest.*"⁶ So the intention manifest from the whole will is not to be defeated by the literal force of some words in it.⁷ "The law does not require a testator to be a writer of syllogisms."⁸ Neither does it expect him to be an expert in language. For various cases illustrating these propositions, see P. & L. Digest, Vol. XXIII, cols. 40403, *et seq.* The courts will presume that the ordinary meaning of the words used was intended.⁹ But where technical words are used they will be given the meaning which belongs to them in such use.¹⁰ Even then they must yield to manifest intention.¹¹ Words must be construed with reference to the context, to gather the meaning intended by the testator.¹² It will be presumed that he intended his will to comply with the law and the courts will so construe it as to give it legal effect if possible.¹³ The presumption that the testator knew the law is a violent one, and will not be too rigidly exacted.¹⁴ One of the great chancellors of England said that no one man can be presumed to know all the law. Various presumptions have been artificially constructed, which must yield to the inexorable facts, in a given case. They are but general rules arising from well-defined predicaments of facts. There is a presumption that when a man solemnly makes a gift he intended a benefit,¹⁵ and that he did not intend to die intestate as to any of his property.¹⁶ The residuary

⁴ Wallace v. Denig, 152 Pa. 251; Ihrie's Est., 162 Pa. 369; Roberjot v. Mazurie, 14 S. & R. 42; Line's Est., 221 Pa. 374; Hood v. Penna., Etc., 221 Pa. 474.

⁵ Norris' Est., 217 Pa. 548; Masseth v. Masseth, 213 Pa. 434; P. & L. Dig., vol. 23, col. 40394, *et seq.*

⁶ Detwiler v. Cox, 75 Pa. 200.

⁷ Rawle's Ap., 106 Pa. 193; Adams' Est., 17 Phila. 481, Penrose, J.; Nicholas' Est., 8 D. R. 725; Watts' Est., 202 Pa. 85; Mehaffey's Est., 139 Pa. 276; Wagner's Est., 18 Phila. 101.

⁸ Ashman, J., in Penna., Etc.'s, Ap., 20 W. N. C. 41 (18 Phila. 156).

⁹ Howe's Ap., 126 Pa. 233; P. & L. Dig., vol. 23, cols. 40412-3; Ihrie's Est., 162 Pa. 369; Priester's Est., 23 Supr. C. 386.

¹⁰ France's Est., 75 Pa. 220; Carroll v. Burns, 108 Pa. 386; Reinoehl v. Shirk, 19 Pa. 108; Ivins' Ap., 106 Pa. 176.

¹¹ Fetrow's Est., 58 Pa. 424; Schaeffer v. Messersmith, 10 C. C. 366; McMasters v. Shellito, 14 Supr. C. 303; Phillips' Est., 205 Pa. 504; P. & L. Dig., vol. 23, col. 40418.

¹² Rhein v. Miller, 8 Atl. 862; P. & L. Dig., vol. 23, col. 40424, for the interpretation of particular words and phrases; O'Malley v. Loftus, 220 Pa. 424; Crick's Est., 35 Supr. C. 39.

¹³ Seybert v. Hibbert, 5 Supr. C. 537. (See P. & L. Dig., vol. 23, col. 40426; McBride's Est., 152 Pa. 192; Thouron's Est., 15 Phila. 521; Keene's Est., 221 Pa. 201; Mayer v. Walker, 214 Pa. 440.)

¹⁴ Rodgers v. Rodgers, 7 Watts, 15.

¹⁵ Littell's Est., 50 Pitts. L. J. 168; Jackson's Est., 179 Pa. 77.

¹⁶ Keene's Est., 221 Pa. 201; Dobbins' Est., 221 Pa. 249, 259; Norris' Est. (No. 3), 217 Pa. 560; P. & L. Dig., 4 C. R. A. 2640; Long v. Hill, 29

clause will be construed with the whole will and the codicils to discover the intention.¹⁷ A construction which avoids intestacy will always be adopted in preference to one which does not, especially where the subject of the gift is a residue of personalty.¹⁸

The doctrine of an implied gift or cross-limitations will be invoked in the absence of express language, only when it can be determined from the meaning of the whole will that the testator intended a survivorship, and the presumptive intention to avoid an intestacy will not disclose such purpose. "If he sees fit for any reason not to dispose of any part of his estate, or such is the result of ignorance or oversight the courts cannot supply the gap or hiatus and reconstruct the will."¹⁹

A residuary clause in a will is intended to prevent intestacy as to anything.²⁰ A will which has no residuary clause and which does not dispose of all the estate does not create a presumption that testator intended to dispose of it all.²¹

If the will preserves the estate to the survivors or those who comply with it, there is a presumption against intestacy.²²

7. The rule as to disinheritance.

An heir can only be disinherited by express devise or necessary implication which must be such a strong probability that an intention to the contrary cannot be supported;²³ and this is true although there is a presumption against intestacy.²⁴ Notwithstanding the heir is disinherited by the will he is entitled to share in the undisposed of residue.²⁵

Merely negative words in a will are not sufficient to exclude the title of the heir and next of kin. There must be an actual gift to some other definite object; and this rule applies to personalty as well as realty. So while the testator had the power to exclude her nephew, from the estate she willed, as to that whereof she died intestate, he is not disinherited.²⁶ If the will cuts one out of the inheritance in the residuary clause it will be effective as to the whole.²⁷ If the testator dies intestate as to any property, however, as above stated, the heir is entitled to participate in the distribution of such property.²⁸ The heir cannot be excluded by doubtful words.²⁹ The

Supr. C. 606; Brown's Est., 54 Pitts. L. J. 101; P. & L. Dig., vol. 23, cols. 40430, *et seq.*

¹⁷ United, Etc., Aps., 91 Pa. 507; Patterson v. Swallow, 44 Pa. 487.

¹⁸ Penrose, J., in McAleer's Est., 4 D. R. 360; Jacob's Est., 140 Pa. 268; Miller's Ap., 113 Pa. 459.

¹⁹ Mestrezat, J., in Grothe's Est., 229 Pa. 186.

²⁰ Fuller's Est., 225 Pa. 626.

²¹ Habecker's Est., 26 Lanc. L. R. 100; 43 Supr. C. 86.

²² Lucas' Est., 56 Pitts. L. J. 185.

²³ Bortner's Est., 43 Supr. C. 429; Green's Ap., 42 Pa. 25; Bender v. Dietrick, 7 W. & S. 284.

²⁴ Watson v. Martin, 228 Pa. 248; Shaner v. Wilson, 207 Pa. 550.

²⁵ Habecker's Est., 26 Lanc. L. R. 100.

²⁶ Hitchcock v. Hitchcock, 35 Pa. 393; Habecker's Est., 43 Supr. C. 86.

²⁷ McGovern's Est., 190 Pa. 375.

²⁸ Weber's Ap., 17 Pa. 474; Will of Louisa Rorer, 7 Phila. 524; Hancock's Ap., 112 Pa. 532; Gorgas' Est., 166 Pa. 269; Kane's Est., 185 Pa. 544; Bruckman's Est., 195 Pa. 363.

²⁹ P. & L. Dig., vol. 23, col. 40451; Rupp v. Eberly, 79 Pa. 141; Faul-

presumption that the heir is not to be disinherited except by unequivocal words or necessary implication is stronger than the presumption that the testator did not intend to die intestate as to any part of his estate.³⁰ The right of inheritance is conferred by positive law and it takes something weightier than a constructive presumption to overthrow it.³¹ But if the testator has disposed of all his goods and estate, real, personal and mixed and has left out the heir, the disinheritance is as effective as if he had "cut him off with a shilling," or "one dollar," as is popularly supposed to be essential.³²

8. Construction favorable to heir and widow.

Wills are always construed most favorably for the widow and next of kin, where there is ambiguity.³³ Where a devisee died before the testator and by will gave his widow an absolute power of appointment with her life estate, the children of the devisee had no interest in the testator's estate and could not maintain partition.³⁴ As between voluntary beneficiaries or legatees and the widow and children a doubtful clause will be construed favorably to the latter.³⁵

9. Favor to the first taker.

The first taker is generally looked upon as the preferred one and all intendments will be in his favor, that can be reasonably drawn from the will.³⁶ When a testator stands *in loco parentis* to the objects of his bounty they are entitled to the same favor as heirs would be.³⁷

10. Equality of standing.

If the language of the will is doubtful it will be construed so as to produce equality among the donees or devisees.¹ There being no words expressing intention to exclude any of a class, all should be permitted to share.² There is a presumption from nature of an intention to distribute patrimony equally between the children by a

stich's Est., 154 Pa. 188; Gorgas' Est., 166 Pa. 269; Schmidt's Est., 183 Pa. 641.

³⁰ Espy's Est., 207 Pa. 459. Mestrezat, J.

³¹ Kane's Est., 185 Pa. 544; P. & L. Dig., vol. 23, col. 40457; Long v. Hill, 29 Supr. C. 606.

³² Norris's Est., No. 3, 217 Pa. 560; Dobbins' Est., 221 Pa. 249, 259; McClelland's Est., 17 D. R. 26.

³³ Varner's Ap., 87 Pa. 422; Nebinger's Est., 185 Pa. 399; Passmore's Ap., 23 Pa. 381; Park's Est., 4 C. C. 560; P. & L. Dig., vol. 23, col. 40466; Penrose's Ap., 102 Pa. 448; Finney's Ap., 113 Pa. 11; McCollum's Est., 211 Pa. 205; Clery's Ap., 35 Pa. 54; Strain's Est., 32 Pitts. L. J. 369; Watson v. Smith, 210 Pa. 190.

³⁴ Sturgis' Est., 205 Pa. 435.

³⁵ Markmann's Est., 16 D. R. 55. Penrose, J.

³⁶ Smith's Ap., 23 Pa. 9; Robinson's Est., 149 Pa. 418; Jackson's Est., 179 Pa. 77; Peter's Est., 7 D. R. 52; Watson v. Smith, 210 Pa. 190; Shubart's Est., 154 Pa. 230; Boies' Ap., 177 Pa. 190.

³⁷ Jacoby's Est., 204 Pa. 188.

¹ Lewis' Ap., 89 Pa. 509; Snyder's Est., 3 D. R. 382; Engle's Est., 12 Montg. 71; Hogan's Est., 12 D. R. 47.

² Hughes' Est., 16 Phila. 236.

parent.³ But if the will clearly marks a partiality it must stand.⁴ It is only where the expression of intent is not clear that courts will construe the doubt favorable to the benign policy of our intestate laws founded upon the justice and equality of the Roman laws.⁵ A postulate of the rule against disinheritance is that one who claims against the laws of descent must show a written title in himself.⁶ The court will incline against a construction which will produce inequality among the testator's children, especially where equality is contemplated by the will.⁷

11. Consideration of entire will.

In order to gather the testator's general as well as particular intent the entire will must be considered.⁸ This is termed reading it from the four corners.⁹ Thus alone can the modifications of different clauses and their effect upon each other be discerned.¹⁰ Having thus discovered the testator's intent, apparent inconsistencies may be reconciled and every part, if possible, be given a harmoniously adjusted effect.¹¹

12. The force of general intent.

In the interpretation of a will the rule is that the general intent governs;¹² and having ascertained this a particular intent inconsistent with it must yield,¹³ although the particular intent be con-

³ Weber's Ap., 17 Pa. 474; Malone v. Dobbins, 23 Pa. 296; Evans' Est., 11 Kulp, 212; Butz v. Butz, 2 Penny. 270; Bradley's Est., 17 Phila. 474; Vance's Est., 209 Pa. 561.

⁴ Horwitz v. Norris, 60 Pa. 261; Norris' Est., 217 Pa. 548.

⁵ Sipe's Est., 30 Supr. C. 145; Algaier's Est., 16 D. R. 913; P. & L. Dig., vol. 23, cols. 40474-7; Baskins' Ap., 3 Pa. 304; Lipman's Ap., 30 Pa. 180; Dunlap's Ap., 116 Pa. 500; Fahnestock's Est., 147 Pa. 327; Vogdes' Est., 16 D. R. 377; Hoch's Est., 154 Pa. 417; Miller's Est., 26 Supr. C. 443; Lehman v. Lehman, 29 Supr. C. 60; 215 Pa. 344.

⁶ Brendlinger v. Brendlinger, 26 Pa. 131; Lipman's Ap., 30 Pa. 180; Grim's Ap., 89 Pa. 333; Abel v. Abel, 201 Pa. 543; Woelpper's Ap., 126 Pa. 562.

⁷ Penrose, J., in Roats' Est., 14 D. R. 767, affirmed in 30 Supr. C. 521.

⁸ Johnson's Ap., 12 S. & R. 317; Clark v. Campbell, 2 Rawle, 215; Belshoover v. Brandt, 18 Pa. 473; Buchanan v. Duncan, 40 Pa. 82; Schott's Est., 78 Pa. 40; McDevitt's Ap., 113 Pa. 103; Miller's Ap., 113 Pa. 459; Dean v. Winton, 150 Pa. 227; Zimmerman's Est., 23 Supr. C. 130; Handley's Est., 212 Pa. 11; Wood v. Schoen, 216 Pa. 425; P. & L. Dig., vol. 23, cols. 40486-7.

⁹ Wright v. Brotherton, 2 Rawle, 133.

¹⁰ Fisher v. Wister, 154 Pa. 65.

¹¹ Jackson v. Robinson, 1 Yeates, 101; Ziegler v. Grim, 6 Watts, 106; Rodgers v. Rodgers, 7 Watts, 15; Edmonson v. Nichols, 22 Pa. 74; Stickles' Ap., 29 Pa. 234; Conrow's Ap., 3 Penny. 356; Finney's Ap., 113 Pa. 11; Scotts' Est., 163 Pa. 165; Boyd's Est., 199 Pa. 487; Patrick's Est., 162 Pa. 175; P. & L. Dig., vol. 23, cols. 40493-4.

¹² Boshart v. Evans, 5 Wharton, 551; Hart v. Stoyer, 164 Pa. 523; Lefevre's Est., 171 Pa. 404.

¹³ Roberjot v. Mazurie, 14 S. & R. 42; Musselman's Est., 5 Watts, 9; M'Cullough v. Gilmore, 11 Pa. 370; Hitchcock v. Hitchcock, 35 Pa. 393; Jaureche v. Proctor, 48 Pa. 466; Fitzwater's Ap., 94 Pa. 141; Ferry's

tained in the latter clauses.¹⁴ This is particularly so where the will was cloudily prepared "*inops consilii*," as Justice Williams termed the clumsiness of expression.¹⁵ An apparent repugnancy may be dissolved in the light of the general intent.¹⁶ But this rule will not be adopted in order to reduce a fee to a life estate.¹⁷

13. Express words yield not to doubtful implication.

The plain words of a will cannot be made to give way to doubtful ones or to mere implication.¹⁸ They will not yield to inconsistent and ambiguous directions or implications from another part of the will,¹⁹ although it produces inconvenience²⁰ and the ambiguity inheres in the latter clause of the writing.²¹ So a clear and direct bequest or devise will not be affected by a later clause of doubtful import.²²

14. Latest clause as final intent.

It has been said that in construing a deed the first clause governs; in a will the last. But the proposition as to wills is conditioned upon an irreconcilable repugnancy. If clauses of a will are so repugnant that one or the other must give way, the last will stand as the latest intent of the testator.²³ This rule applies only in the last resort, when it is impossible to reconcile and harmonize the clauses.²⁴

15. Effect of reference clause.

A reference clause in a will is one which refers to another portion either preceding or following, in accordance with which the direction is made, or the conditions and restrictions are to be determined. These will be given due effect if necessary to carry out the intention of the maker.²⁵

Ap., 102 Pa. 207; Throckmorton v. Thompson, 34 Supr. C. 214; Vogdes' Est., 16 D. R. 377; P. & L. Dig., vol. 23, col. 40500.

¹⁴ Jones' Ap., 3 Grant, 169.

¹⁵ Christy v. Christy, 162 Pa. 485; Thomas' Est., 5 Kulp, 166.

¹⁶ Wambold v. Scholl, 12 Montg. 73; Jones v. Strong, 5 Kulp, 7; P. & L. Dig., vol. 23, col. 40503.

¹⁷ Graham v. Abbott, 208 Pa. 98.

¹⁸ Sheetz's Ap., 82 Pa. 213.

¹⁹ Finney's Ap., 113 Pa. 11; McDonald v. Dunbar, 2 Mona. 483; Lare's Est., 3 D. R. 741; Walls v. Walls, 182 Pa. 226.

²⁰ Graham v. Flower, 13 S. & R. 439.

²¹ Cassey v. Smith, 38 Pa. 225.

²² Parker's Ap., 61 Pa. 478; Cheetham v. Muhlenberg, 133 Pa. 309.

²³ Robinson v. Martin, 2 Yeates, 525; Lewis' Est., 3 Wharton, 162; Drinker's Est., 13 Phila. 330; Kulp v. Bird, 8 Atl. 618; P. & L. Dig., vol. 23, col. 40508; Geiger's Ap., 1 Mona. 547; White's Est., 132 Pa. 17; Ruch's Est., 12 D. R. 519; Zimmerman's Est., 23 Supr. C. 130; Keisel's Est., 17 D. R. 476; Kelley's Est., 17 D. R. 456; Union Trust Co. v. Hopkins, 25 Lanc. L. R. 385.

²⁴ Mutter's Est., 38 Pa. 314; Newbold v. Boone, 52 Pa. 167; Shreiner's Ap., 53 Pa. 106; Snively v. Stover, 78 Pa. 484; Price's Est., 81 Pa. 263; Jones v. Strong, 142 Pa. 496; Doyle's Est., 28 Supr. C. 579; Hiestand v. Meyer, 150 Pa. 501; Hart v. Stoyer, 164 Pa. 523; Handley's Est., 212 Pa. 11; Eckert v. Penna. Trust Co., 212 Pa. 372; P. & L. Dig., vol. 23, cols. 40513-6; Phillips' Est., 205 Pa. 504.

²⁵ McDonald v. Dunbar, 2 Mona. 483; Keeley v. Rittenhouse, 3 Montg. 203; Keene's Est., 221 Pa. 201.

16. Repetition and exchange of words.

It is a general rule that when the testator uses the same word or phrase a number of times, or repeats it in the same sentence he intends it shall have the same meaning throughout unless he qualifies it.²⁶ But where the context gives it another meaning definitely, the rule does not apply.²⁷ Thus the word "then" was used in a will once as a conjunction and then as an adverb.²⁸ The word "legacy" was held to mean a specific bequest in one place and in another codicil to embrace both the bequest and the residuary estate.²⁹

17. Correction of language.

The transposition of words or sentences in a will by way of grammatical reconstruction and collocation is permissible only where otherwise the dislocation makes the will senseless and impossible of interpretation.³⁰ This work of reconstruction may become necessary where the will was written by the testator himself (called holographic when he wrote it all) or by a layman, unskilled in composition.³¹ This may be justified under some circumstances.³² Whilst the words "or" and "and" may sometime be interchanged, it is not the case when "or" makes a definite devise in the alternative;³³ nor will "have any" be read "leave any."³⁴ "And" may, in a proper connection carry with it the repetition of a phrase to which it relates.³⁵ A name may be supplied where it was omitted by mistake and where necessary to complete the meaning;³⁶ and so of other essential words.³⁷

But words cannot be changed or supplied unless there is a necessity to effectuate the general intent of the will.³⁸ They will not be supplied to change it³⁹ or where unnecessary.⁴⁰ "Or" may be substituted for "but" where the sense requires it;⁴¹ and "other" for "said."⁴² But "and" will not be construed to mean "or," unless

²⁶ *Schaeffer v. Messersmith*, 10 C. C. 366; *Klapp's Est.*, 19 Supr. C. 150; *Lawrence v. Lawrence*, 105 Pa. 335; *Phillips' Est.*, 10 C. C. 374; *Priester's Est.*, 23 Supr. C. 386; *Duckett's Est.*, 214 Pa. 362.

²⁷ *King v. Savage Brick Co.*, 30 Supr. C. 582.

²⁸ *Wood v. Schoen*, 216 Pa. 425.

²⁹ *Norris' Est.*, No. 3, 217 Pa. 560.

³⁰ *Nebinger's Est.*, 185 Pa. 399; *Gamble's Est.*, 8 York, 113.

³¹ *Hankin's Est.*, 4 W. & S. 300; *Kline's Ap.*, 86 Pa. 363; *Sullivan v. Straus*, 161 Pa. 145; *Alexander's Est.*, 45 Pitts. L. J. 465; *P. & L. Dig.*, vol. 23, col. 40524.

³² *Merkel's Ap.*, 109 Pa. 235; *Stevens' Est.*, 164 Pa. 209.

³³ *Mayer v. Walker*, 214 Pa. 440; *Carter's Est.*, 217 Pa. 542; *Hallowell's Est.*, 11 Phila. 55.

³⁴ *Wetherill's Est.*, 214 Pa. 150.

³⁵ *Stephenson's Est.*, 30 Supr. C. 97.

³⁶ *Shorb's Est.*, 8 York, 17.

³⁷ *Schott's Est.*, 78 Pa. 80; *Hellerman's Ap.*, 115 Pa. 120; *P. & L. Dig.*, vol. 23, cols. 40526-8.

³⁸ *Jones' Ap.*, 3 Grant, 169; *McKeehan v. Wilson*, 53 Pa. 74; *Miller's Est.*, 16 York, 119; *Zerbe v. Zerbe*, 84 Pa. 147.

³⁹ *Varner's Ap.*, 87 Pa. 422; *Craige's Ap.*, 126 Pa. 223.

⁴⁰ *Nebinger's Est.*, 185 Pa. 399.

⁴¹ *Cox's Est.*, 180 Pa. 139.

⁴² *Bahill's Est.*, 21 Lanc. L. R. 318.

that is the necessary intent of the language in the context;⁴³ and the same rule applies *vice versa*.⁴⁴ The controlling factor is the intention of the testator.⁴⁵

18. Parol evidence when admissible.

The rule is of long standing and well-established that parol evidence may not be admitted to vary or qualify the intent which can be drawn from the four corners of the will itself;⁴⁶ nor will declarations of the testator be competent for this purpose.⁴⁷ The scrivener cannot testify to his understanding of what the testator intended.⁴⁸ If the will contains no intelligible gift it is void and cannot be bolstered up, *aliunde*.⁴⁹ But if there is a devise or bequest the property and the beneficiaries mentioned may be identified by parol.⁵⁰ It is only where there is an ambiguity capable of being explained that outside facts may be proven.¹ Then all the surrounding circumstances may be invoked and considered and inapt language subordinated to the general intent.² A prior will revoked may, under the circumstances, become admissible as an aid to interpretation of a subsequent one.³ To remove a latent ambiguity the circumstances which surrounded the testator can alone supply the aid required in the construction of his will.⁴ Thus to identify a legatee named evidence dehors the will may be heard;⁵ or to identify the subject matter of a gift,⁶ by application of the words of the will to it;⁷ and to this end evidence will be received showing the property he had, his family and the objects of his bounty.⁸

⁴³ *Denn v. Woodward*, 1 Yeates, 316; *Foulke's Est.*, 52 Pa. 201; P. & L. Dig., vol. 23, col. 40534.

⁴⁴ *Gilmor's Est.*, 154 Pa. 523; *Edwards' Est.*, 18 D. R. 723.

⁴⁵ *Englefried v. Woelpart*, 1 Yeates, 41; *Esig's Est.*, 1 York, 27; *Tripp's Est.*, 202 Pa. 260, 266; *Mather's Est.*, 20 Montg. 186; *Holmes v. Holmes*, 5 Binney, 252; *Kelley v. Kelley*, 182 Pa. 131; P. & L. Dig., vol. 23, col. 40537.

⁴⁶ *Van Leer v. Van Leer*, 221 Pa. 195; *Beaumont's Est.*, 214 Pa. 445; P. & L. Dig., vol. 6, col. 10313; for other cases, *Reagan v. Curran*, 226 Pa. 265; *Porter's Est.*, 57 Pa. 690.

⁴⁷ *Gracie's Est.*, 53 Pitts. L. J. 300.

⁴⁸ *M'Cay v. Hugus*, 6 Watts, 345; *Kelley v. Kelley*, 25 Pa. 460; *Willard's Est.*, 68 Pa. 327. (For a fluke case see *McClellan v. Brownfield*, 142 Pa. 533.)

⁴⁹ *Kelley v. Kelley*, 25 Pa. 460; *Worley's Est.*, 7 York, 198.

⁵⁰ *Gaston's Est.*, 188 Pa. 374.

¹ *Kern's Est.*, 2 Woodward, 272.

² *Crick's Est.*, 35 Supr. C. 39; *Hermann's Est.*, 220 Pa. 52; *Schwartz's Est.*, 20 York, 149; P. & L. Dig., vol. 23, cols. 40542-4.

³ *Mumma's Est.*, 13 Lanc. L. R. 49; *Hirst's Ap.*, 92 Pa. 491; *Shorb's Est.*, 8 York, 17.

⁴ *MacConnell v. Lindsay*, 131 Pa. 436; *MacConnell v. Wright*, 150 Pa. 275.

⁵ *Connolly's Est.*, 50 Pitts. L. J. 188; P. & L. Dig., vol. 6, col. 10322.

⁶ *Hunt v. Devling*, 8 Watts, 403; *Strubing v. Wunder*, 2 Woodward, 474; *Coleman v. Eberley*, 76 Pa. 197.

⁷ *Green's Est.*, 140 Pa. 253; *Porter's Ap.*, 94 Pa. 332.

⁸ *Follweiler's Ap.*, 102 Pa. 581; *Pentz's Est.*, 200 Pa. 2; *Stambaugh's Est.*, 135 Pa. 585; P. & L. Dig., vol. 23, cols. 40543-4.

19. The residuary clause.

"The residue" or, as the forms have it, "the rest and residue of my estate" means all the property of the testator not specifically given.⁹ In order to give the residuary clause effect it need not be the last clause in the will,¹⁰ though that is the logical place, and immediately before the appointment of executors.¹¹ It is intended to carry all property not disposed of specifically and to prevent intestacy from any failure of beneficiaries or errors in the special bequests or devises made.¹² No particular words are necessary to carry the residue; whether the testator uses rest, remainder or "surplus," or all of them, there can be but one meaning.¹³ "The residue" includes everything not otherwise disposed of.¹⁴ A residuary clause carries a fund the income of which is given to the testator's wife for life, and takes effect on the testator's death, if the wife has predeceased him.¹⁵ When land is devised for life without any remainder over, the reversion, after the life estate, passes under a devise of the remaining lands of the testator, when there is no residuary clause.¹⁶ And a devise of the "residue" of lands, immediately following a devise of land for life without any remainder over, will pass the reversion after the life estate, although the will contains a general residuary clause.¹⁷ So a devise to one for life and at his death to his children or their heirs, on the failure of children at his death, carries the remainder into the disposition of the residue.¹⁸ The bequest of the residue of personalty does not carry the accrued rents before the sale of the real estate.¹⁹ In an obscure will the "remainder" will not be construed to refer to what has already been taken from testator's general estate.²⁰ A will containing two residuary clauses was held to be effective, each clause relating to a different property.²¹ The court will not predicate an intestacy as to any part of the estate, if the residuary clause is capable of carrying it all.²² "Cash" was held to pass as part of the remainder;²³ but "cash" in a will does not include real estate unless there was a manifest intention to do so.²⁴

⁹ Willard's Est., 68 Pa. 327; Hofius v. Hofius, 92 Pa. 305; Sunday v. Miller, 15 York, 177; Patterson's Est., 3 D. R. 796.

¹⁰ Marriner's Est., 16 D. R. 7; Willard's Est., *supra*.

¹¹ Hagan's Est., 50 Pitts. L. J. 49; McKee's Est., 17 C. C. 548; Wible's Est., 29 Pitts. L. J. 396.

¹² Wood's Est., 209 Pa. 16; P. & L. Dig., vol. 23, col. 40547.

¹³ Gallagher v. Gallagher, 16 D. R. 458; Brown's Est., 54 Pitts. L. J. 101; Lucas' Est., 53 Pitts. L. J. 164; Costello's Est., 16 D. R. 188.

¹⁴ Stout's Est., 16 D. R. 74.

¹⁵ Gross' Est., 20 York, 172.

¹⁶ M'Cay v. Hugus, 6 Watts, 345.

¹⁷ Brown v. Boyd, 9 W. & S. 123.

¹⁸ High's Est., 136 Pa. 222. (See Keim's Ap., 125 Pa. 480.)

¹⁹ Hollowell's Est., 9 D. R. 90; McMonagle's Est., 13 D. R. 62.

²⁰ Lloyd's Est., 188 Pa. 451; 174 Pa. 184; Hunter's Est., 9 Pa. 97.

²¹ Postlethwaite's Ap., 68 Pa. 477.

²² Dull's Est., No. 1, 137 Pa. 112; Underwood's Ap., 85 Pa. 227; Mulligan's Est., 157 Pa. 98.

²³ Gibbon's Est., 17 D. R. 627.

²⁴ Watson v. Martin, 228 Pa. 248.

20. Effect of codicils upon a will.

It has already been seen that a codicil to a will is a part of it and the two are entitled to be probated as one. It yet remains to be considered how they are to be construed. A letter written to his wife by a husband explaining his will and referring to provision as to an after-born child should be probated as a codicil; and if the original will has been probated the probate should be opened and the will and codicil be probated together.¹ A codicil will be construed so as to give effect to the provisions of the will as far as possible;² but it, nevertheless governs as the latest intent and disposition.³ An absolute gift in a will may be reduced to a gift of the income only for life, by the codicil.⁴ When the codicil changes the will the devise must abate *pro rata*, for the payment of debts.⁵ A gift by codicil is to be read as if it were in the will.⁶ The effect of a codicil is limited by its purpose.⁷ The general effect of the will is modified only so far as the codicil changes it.⁸ A clear gift in the will can not be cut down except by equally clear language in the codicil.⁹

21. Revocation by codicil.

The codicil to a will unless it expressly revokes the will, is but an amendment or addition to it, and not being inconsistent with it does not revoke it.¹⁰ It only revokes so much as it negatives¹¹ or supplies. This is so although it uses the word "revoke."¹² It will be held to revoke only so far as the effect of its words in making a disposition revoke the will.¹³ The English rule is that where a codicil revokes a devise or bequest for a reason given that turns out to be false, it will not be effective; but this rule does not apply where the fact is within the knowledge of the testator himself.¹⁴ A second codicil which revokes all legacies given to all persons mentioned in the will also revokes such legacies given to such persons by the first codicil.¹⁵ A revocation of a direct benefit will not exclude an in-

¹ Zug's Est., 57 Pitts. L. J. 176. (See previous chapter.)

² McEwen's Est., 18 D. R. 534; Shalters v. Ladd, 163 Pa. 509; Kennedy v. Cowden, 6 Dauphin Co. 159; Hamilton's Est., 74 Pa. 69; Wetter's Ap., 20 W. N. C. 499; Phillips' Est., 1 D. R. 311; P. & L. Dig., vol. 23, col. 40555; Roats' Est., 30 Supr. C. 521; Dobbins' Est., 221 Pa. 249, 259.

³ Baringer's Est., 3 Lehigh, 327; Davis' Est., 6 D. R. 45.

⁴ Cassidy's Est., 224 Pa. 199.

⁵ McNamara's Est., 18 D. R. 46.

⁶ Bullock's Est., 7 C. C. 439.

⁷ King's Est., 210 Pa. 435.

⁸ Martin's Est., 1 D. R. 167; P. & L. Dig., vol. 23, col. 40559, *et seq.*; Whelen's Est., 175 Pa. 23; Padelford's Est., 190 Pa. 35; Line's Est., 221 Pa. 374; Hoffman's Est., 15 D. R. 524.

⁹ Wetter's Ap., 20 W. N. C. 499; Sigel's Est. (No. 1), 213 Pa. 14; Lutz's Est., 9 C. C. 294; Whelan's Est., 175 Pa. 23; P. & L. Dig., vol. 23, cols. 40561-4; Roats' Est., 30 Supr. C. 521; Leonard's Est., 10 C. C. 437.

¹⁰ Sharp's Est., 6 Kulp, 467; 155 Pa. 289.

¹¹ Lutton's Est., 43 Pitts. L. J. 255, 413; Jones' Est., 18 Phila. 58.

¹² Cousinery's Est., 13 D. R. 224.

¹³ Reichard's Ap., 116 Pa. 232; Kline's Ap., 86 Pa. 363.

¹⁴ Mendinhall's Ap., 124 Pa. 387.

¹⁵ Richards' Est., 4 D. R. 264.

direct one under the same will.¹⁶ The bare revocation of a legacy does not affect the residue.¹⁷ The effect upon the will and successive codicils by the last codicil is a matter for the courts to harmonize with the disposing intent as reasonably as they can.¹⁸ The law will regard as much what the testator did as what he said.¹⁹ A residuary gift in the codicil revokes the residuary gift in the will, as there cannot be two different dispositions of the same thing.²⁰ An intention to substitute a gift in the codicil for one in the will may be fairly inferred from the language.²¹ Added or substituted legacies, *prima facie*, are subject to the same incidents and conditions as the original.²² But this is not an inflexible rule. It must yield to the nature of the case;²³ and if the codicil enlarges the gift or devise, it governs.²⁴ For other effects of codicils see note.²⁵ Where the testator by the codicil takes away from persons named in the will what he had given them and gives it to others, every possible interest passes.²⁶

¹⁶ King's Est., 210 Pa. 435.

¹⁷ Snodgrass' Est., 24 Pitts. L. J. 37.

¹⁸ Tibby's Est., 207 Pa. 643; P. & L. Dig., vol. 23, col. 40571.

¹⁹ Davis' Est., 6 D. R. 45.

²⁰ Richards' Est., 4 D. R. 264.

²¹ Benson's Est., 209 Pa. 108.

²² Hollowbush's Est., 5 Montg. Co. 22; Phillips' Est., 1 D. R. 311.

²³ Reilly's Est., 190 Pa. 509; Lejee's Est., 181 Pa. 416.

²⁴ Dougherty v. Wellinger, 207 Pa. 601.

²⁵ Fry's Est., 163 Pa. 30; Edwards' Est., 209 Pa. 19.

²⁶ Eisiminger v. Eisiminger, 129 Pa. 564. (But see Pearson's Est., 211 Pa. 183; P. & L. Dig., vol. 23, col. 40583.)

CHAPTER XL

LEGACIES, CHARACTER, KINDS, ADEMPATION AND PREFERENCE.

1. Nature of a legacy.
2. How legacies may be left.
3. Two bequests of the same thing.
4. Who may be legatees.
5. Alienation of thing given.
6. *De dote uxori legata*.
7. Bequest of flock.
8. Bequest of house.
9. Error in name of legatee.
10. *De falsa demonstratione*.
11. *De falsa causa adjecta*.
12. Legacy after the death of the heir.
13. Revocation or transfer of legacy.
14. Distinction between vested and contingent legacy.
15. Condition with a limitation.
16. Executory devise.
17. Defeat of bequest conditional.
18. Specific legacy defined.
19. Courts averse to specific legacies.
20. Specific legacies of money.
21. Legacies, when specific or otherwise.
22. Demonstrative legacies.
23. General legacies.
24. Cumulative legacies.
25. Bequest of pledged goods.
26. Discharge of debtor by will.
27. Legacy to debtor.
28. Legacy to a creditor.
29. Void and lapsed legacies.
30. Extension to collateral heirs.
31. Gift to classes—act of 1897.
32. Substituted legatees.
33. Gifts to “heirs,” “legal representatives,” etc.
34. Provision for children dead when the will is made.
35. Disposition of the lapsed fund.
36. Ademption of a legacy.
37. Ademption of legacy charged on land.
38. Ademption, when not wrought.
39. Abatement of general legacies.
40. Abatement of residuary legacies.
41. Abatement of specific and demonstrative legacies, etc.
42. Exemptions from abatement.
43. Priority of widow.

I. Nature of a legacy.

A legacy is a gift directed by the deceased and to be fulfilled by the heir.¹ “Legacies are either general or specific and of these latter there are, first, such as are particularly described and which can only be satisfied by delivery of the very subject, and if not found among the testator’s property, fail altogether; and, secondly, such as describe a chattel of a particular species only, and may be satisfied by delivery of any one of the same kind.”² A bequest of a sum of money for a specific article, as a ring, is a general pecuniary legacy and not specific.³

“A legacy is a gift left by the deceased to be paid or performed by the executor or administrator, after the death of the giver; and it is called a gift, for that it proceedeth of the mere liberality and free good will of the deceased. And that it is left, it differeth from

¹ Justinian, Lib. 2, Tit. 20, section 1.

² 1 Bacon’s Abr. 337, 355, 425.

³ Apreece v. Apreece, 1 Vesey and Beames, 364.

other gifts, not only those which are called deeds of gift, executed in the life of the donor, but also from those gifts which be made in consideration of death, wherein the things given are delivered by the testator in his lifetime, to become their own to whom they are delivered in case the testator die; for legacies are not delivered by the testator, but are left to be paid or delivered by his executor or administrator.”⁴

2. How legacies may be left.

“Legacies may be given divers ways, either simply or conditionally; that legacy is said to be simple which is given without a condition annexed to it; and as in appointing an executor, it matters not after what form of words it be; so it is in the bequeathing of a legacy; for it signifies not after what form it be given, so that the testator’s meaning do but appear, whether it be in goods and chattels, or lands and tenements.”⁵

3. Two bequests of the same thing.

“It is a maxim that two lucrative causes can never concur in the same person and thing. And therefore, if the same specific thing be left by two testaments to the same person, the question will be, when the legatee sues under one of them, whether he hath obtained the thing itself, or the value of it, by virtue of the other: For, if he be already possessed of the thing itself, the suit is at an end, because he hath received it on a lucrative account; but if he hath already obtained the value of it only, he may still sue for the thing itself.”⁶

4. Who may be legatees.

A legacy is sufficiently certain if the legatee can be identified, though a mistake be made in his Christian name;⁷ and if grandchildren are designated, the great-grandchildren may take unless a contrary intention appear.⁸ It may be shown by parol that under a gift to children, what kind of children were meant.⁹ If a bequest be to a child in *ventre sa mere*, and there be more than one born, the legacy will be divided equally; but if the will says: “If my wife shall bring forth a child, I give to the same £100,” and she bring forth three, it will mean £100 to each.¹⁰ Where a termor of a house for forty years devises it, without limitation, the whole term passes, “for the devisee may not have an estate in the house at will, nor for term of life, nor for the term of any years or a year.”¹¹

A will by parol in Newcastle-upon-Tyne, where parol wills were lawful, in which the words were, “I give all to my mother,” was held not to disinherit the heir because “all” is uncertain, whether

⁴ Coke on Litt. 111.

⁵ Swinburne, 4, section 4, n. 18; Coke on Litt. 111.

⁶ Section 6, Lib. 2, Tit. 20. Justinian.

⁷ Powell v. Biddle, 2 Dallas, 70.

⁸ Hussey v. Berkeley, 2 Eden, 194; Pemberton v. Parke, 5 Binney, 601.

⁹ Lord Woodhouselee v. Dalrymple, 2 Merivale, 419.

¹⁰ P. Swinburne, 4, section 20.

¹¹ Fenton v. Foster, Dyer, 307, pl. 69.

intended to refer to lands or goods.¹² If one bequeath his indenture of lease, his whole estate in that lease passes. So of his obligation or specialty.¹³ By devise of messuages, with all houses, barns that stand upon the land, all the land belonging to the messuages passes.¹⁴ If one bequeath all his movables, debts due to him are not bequeathed, nor corn, nor fruit growing in the ground, nor stone, nor timber prepared for building, as the commonists and civilians hold."¹⁵ But this is not now the law.

A bequest of half a man's goods means the half after payment of debts, "what he hath *ultra aes alienum*."¹⁶ A bequest of utensils does not cover plate or jewels.¹⁷ "If a bed be given, *venit ornamentum ejus*, saith the civilian, that is, the furniture thereof passeth: viz.: not only the bed, bedstead, bed clothes, but also the curtains and valance."¹⁸ If the bequest be of £10 remaining in a chest and there be but £5 remaining, the legatee can take no more.¹⁹

5. Alienation of thing given as a legacy.

By rescript of Emperors Severus and Antoninus, "a legacy afterwards pawned or mortgaged shall not be considered as retracted; and that the legatee may bring suit against the heir and oblige him to redeem. And if but a part of the thing bequeathed be aliened, that part which remains unaliened, is still due; and that which is aliened, is only due, if it appear not to have been aliened by the testator with a design to retract the legacy."²⁰

6. De dote uxori legata.

"If a man bequeath to his wife her marriage portion, it is valid; for the legacy is more beneficial than the action she might maintain for the recovery of her portion."²¹

7. Bequest of flock carries increase, or decrease.

"If a flock is bequeathed, and afterwards reduced to a single sheep, that sheep is claimable; and if a flock receive an addition, after it hath been bequeathed, this addition will also, according to Julian, enure to the legatee. For a flock is deemed one body, consisting of separate members, as a house is reckoned one body, composed of materials joined together and adhering."²²

8. Bequest of house carries additions.

"And lastly, when a house is bequeathed, the marble or pillars, which are added after the bequest is made, will pass under the general legacy."²³

¹² Boman v. Mibank, 1 Levinz, 130. (See Dyer, 261, pl. 27.)

¹³ Wentworth on Ex. 450. P. Swinburne, 4, s. 2, n. 14.

¹⁴ Gulliver v. Poyntz, 3 Wilson, 141. Messuage from French *Meson*; now *Maison*, a house.

¹⁵ Wentworth on Ex. 451.

¹⁶ Note, Dyer, 164, pl. 57, citing Plowden, 544, b.

¹⁷ Dame Latimer's Case, Dyer, 59.

¹⁸ Wentworth on Ex., p. 451-2.

¹⁹ Executors by Swinburne, p. 7, section 15, n. 15.

²⁰ Section 12, Lib. 2, Tit. 20. Justinian.

²¹ Section 15, Lib. 2, Tit. 20.

²² Section 18, Lib. 2, Tit. 20. Justinian.

²³ Section 19, Lib. 2, Tit. 20. Justinian.

9. Error in name of legatee.

"Although a testator may have mistaken the *nomen*, *cognomen*, *prænomen* or *agnomen* of a legatee, yet if his person be certain, the legacy is good. The same rule is observed as to heirs, and with reason: For the use of names is but to point out persons; and if they can be denoted by any other method, *nihil interest*." ²⁴

10. De falsa demonstratione.

"The rule of law, which comes nearest to the foregoing is that a legacy is not rendered null by a false description." ²⁵

11. De falsa causa adjecta.

"*A fortiori*, a legacy is not rendered less valid although a false reason be assigned for bequeathing it." ²⁶

12. Legacy after the death of the heir.

"A bequest made to take place after the death of an heir or legatee was also ineffectual. * * * But we have corrected the ancient rule in this respect, by giving all such legacies the same validity, as gifts in trust; lest trusts should be found to be more favored than legacies." ²⁷

13. Revocation or transfer of legacy.

"A revocation of a legacy is valid, although inserted in the same testament or codicil. And it is immaterial whether the revocation be made in some form of words contrary to the bequest, as, when a testator bequeaths in these terms: 'I give and bequeath to Titius,' and revokes it by adding, 'I do not give and bequeath to Titius,' or in any other form." ²⁸

14. Distinction between vested and contingent legacy.

As to legacies, the distinction between a vested and contingent one, the former going to the personal representative and the latter lapsing at death of the legatee, may be illustrated thus: I bequeath to A the sum of one hundred dollars to be paid to him when he arrives at the age of twenty-one. A dies at twenty, and the legacy goes to his legal representative. Again, I bequeath to A when he shall become twenty-one years of age, one hundred dollars, and A dies at twenty, the legacy is contingent and lapses. ²⁹

15. Condition with a limitation.

In a will, if there be a condition and after that a limitation, the condition must be limited accordingly. ³⁰

²⁴ Section 29, Lib. 2, Tit. 20. Justinian.

²⁵ Section 30, Lib. 2, Tit. 20. Justinian.

²⁶ Section 31, Lib. 2, Tit. 20. Justinian.

²⁷ Section 35, Lib. 2, Tit. 20. Justinian.

²⁸ *De Ademptione*, Lib. 2, Tit. 21. Justinian.

²⁹ 11 Viner's Abr. 160; 8 Ch. R. 112.

³⁰ *Davies v. Kemp*, Calthrop, 3, cited in *Wentworth on Executors*.

16. Executory devise.

If I devise rent to a man and the heirs of his body, and then devise it to another to begin after that, this is an executory devise and not a remainder and cannot be cut off by a common recovery.³¹ Where the remainderman grants or sells his interest to another while the first taker lives, the grant is void, because a possibility cannot be granted, was decided in Old England.³² (See *infra*.)

17. Defeat of bequest conditional.

A conditional bequest may be defeated by the act of the legatee in refusing to perform the condition, or by failure to perform.³³ A devise may be lost by the death of the devisee before that of the devisor.³⁴ The reason is that the testator has the supreme right to alter or revoke his will up to his own death.³⁵

18. Specific legacy defined.

King, P. J., said:¹ "A specific legacy has been defined to be 'the bequest of a particular thing, or money, specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in public funds, a security for money, which would immediately vest without the assent of the executor.' It differs from a general or pecuniary legacy, in this respect, that if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; and on the other hand, if such specific legatee be disappointed, as by failure of the specific fund, the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator."

It must be some specific property apart from testator's general estate, which testator bequeaths to the legatee;² although he may not then be in possession, it is enough if he is at his death.³ It may consist of furniture;⁴ farming utensils and stock on the farm;⁵ a specific promissory note;⁶ particular ground rent;⁷ the amount of a note owing by a legatee;⁸ amount of a bond;⁹ or interest of a mortgage;¹⁰ a sum deposited or made available by a life insurance policy with a company named;¹¹ a piano or all the rest of testator's house-

³¹ Smith v. Farnaby, Calthorp, 53, cited in Wentworth on Executors.

³² Dr. Berry's Will, Bishop v. Fountaine, 3 Levinz, 427; Lampet's Case, 10 Coke, 48, cited in Wentworth on Executors.

³³ Tulk v. Houlditch, 1 Vesey and Beame, 248; Swinburne, 352-3.

³⁴ Rector of Chedington's Case, 1 Coke, 156; Davies v. Kemp, Calthorp, 3, 4, 5; Swinburne, 4, section 6, n. 7, cited in Wentworth on Executors.

³⁵ Lyte v. Perry, Dyer, 49, pl. 12.

¹ Ludlam's Est., 1 Parsons, 116 (13 Pa. 188).

² Blackstone v. Blackstone, 3 Watts, 335.

³ Fidelity, Etc., Co.'s Ap., 108 Pa. 492.

⁴ McGlaughlin v. McGlaughlin, 24 Pa. 20.

⁵ Payne's Est., 50 Pitts. L. J. 392.

⁶ Robinson's Est., 24 C. C. 588.

⁷ Harshaw v. Harshaw, 184 Pa. 401.

⁸ Wedekind's Est., 13 Lanc. L. R. 175; Jervis v. Ferris, 23 C. C. 142.

⁹ Sponsler's Ap., 107 Pa. 95.

¹⁰ Gallagher's Est., 76 Pa. 296.

¹¹ Boehrig's Est., 17 D. R. 46.

hold goods;¹² a mortgage excluded from the rest of the estate;¹³ one-half of a mortgage;¹⁴ the mansion house after a life estate to the same person who took the residuary estate;¹⁵ proceeds of movable property and stock;¹⁶ a bequest of money to be paid out of the proceeds of certain real estate directed to be sold.¹⁷ Specific bequests may be set aside from the general distribution in the will.¹⁸ If the legacy is so connected with the fund out of which it is payable that the legacy and fund are virtually the same it is specific.¹⁹

19. Courts averse to specific legacies.

The courts are averse to construing legacies to be specific and a doubtful gift will be resolved against its being specific.²⁰ But although the law leans against specific legacies and to general ones,²¹ it will not allow this inclination to negate the plain import of the will and lead the court to hold a specific gift to be demonstrative.²² A legacy of clothing and a trunk does not carry the jewelry in the trunk with it.^{22a}

20. Specific legacies of money.

There may be a specific legacy of money if it is separated by the testator in his gift of it, from other money and the general estate so that it may be identified.²³ Such a bequest is all uninvested moneys in bank or in the hands of his agents;²⁴ one-half of the money deposited in a certain bank.²⁵ But part of a trust fund, after the termination of the trust has been held not to be specific.²⁶

21. Legacies when specific or otherwise.

When the testator indicates the identity and ownership of the stock the legacy of it is specific;²⁷ but if he does not so sever and particular-

¹² Ruddy's Est., 8 Lack. Jur. 12.

¹³ Ash's Est., 8 W. N. C. 28.

¹⁴ McGarry's Est., 12 D. R. 371; the other half being held to be residuary.

¹⁵ Hoover's Est., 15 Montg. 200.

¹⁶ Wible's Est., 29 Pitts. L. J. 396.

¹⁷ Cryder's Ap., 11 Pa. 72; Haddock's Est., 18 Phila. 77; Devine's Est., 10 D. R. 273; Cunningham's Est., 51 Pitts. L. J. 363.

¹⁸ Rodgers v. Rodgers, 7 Watts, 15.

¹⁹ Smith's Ap., 103 Pa. 559; Souder's Est., 169 Pa. 239; Dimond v. McDowell, 7 Watts, 510.

²⁰ Eckfeldt's Est., 13 Phila. 202; Welch's Ap., 28 Pa. 363; Cummings' Est., 1 D. R. 485; Fleming's Est., 10 D. R. 259; Nolen's Est., 19 D. R. 660.

²¹ Snyder's Est., 217 Pa. 71.

²² Pruner's Est., 222 Pa. 179.

^{22a} Krause's Est., 19 D. R. 751.

²³ Gilchrist's Est., 9 D. R. 249; Barrett's Est., 22 Supr. C. 74; Welch's Ap., 28 Pa. 363.

²⁴ Fow's Est., 1 D. R. 483.

²⁵ Bell's Est., 8 C. C. 454.

²⁶ Crawford's Est., 9 D. R. 378. Penrose, J.

²⁷ Blackstone v. Blackstone, 3 Watts, 335; Ludlam's Est., 13 Pa. 188; Queen's Est., 11 D. R. 301; Egan's Est., 52 Pitts. L. J. 165; Cuthbert v. Cuthbert, 3 Yeates, 486; Hoff's Ap., 24 Pa. 200; Johnson's Est., 170 Pa. 177; Clarke's Est., 82 Pa. 528; Black's Est., 223 Pa. 382.

ize it, otherwise.²⁸ It is well settled that a gift of a part of a specific fund is specific; and while a gift of money 'out of' stock, etc., is not, a gift of money out of specific money, or of stock out of specific stock, is specific."²⁹ Where a legacy is directly charged on land devised, and by the testator deemed the sole source of payment, it is specific.³⁰ Legacies charged on land must be regarded as demonstrative and in some sort partaking of the nature of specific legacies, as charged upon a particular fund specially appropriated to their payment.³¹

22. Demonstrative legacies.

The distinction between a specific and a demonstrative legacy, was thus stated by Bell, J.:³² "If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail. But where the gift is of the fund itself, in whole or part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently, liable to be adeemed by the alienation or destruction of the object." The giving of an annuity out of the annual rents of a particular coal lease, has been held to be a specific bequest.³³ A demonstrative legacy is the absolute gift of a certain sum with a direction to pay it out of a certain fund; so that if the fund fails, as a means of paying it, the legacy will not fail, if there are other funds of the testator out of which it can be paid.³⁴ It differs from a general legacy in that it does not abate in that class.³⁵ To make a legacy demonstrative there must be a manifest intention to give the legacy in any event, though there be a direction that it be paid out of a certain fund.³⁶

23. General legacies.

If a legacy is neither specific nor demonstrative, it must necessarily be general.¹ Where legacies in specific amounts are payable out of a deposit in bank and the residue is given to another, the residuary gift is general.² The bequest of one-half of an unascertained estate

²⁸ Eckfeldt's Est., 13 Phila. 202; Spousler's Ap., 107 Pa. 95; Dunleavy's Est., 51 Pitts. L. J. 331; Yerkes' Est., 8 D. R. 83.

²⁹ Penrose, J., in Keates' Est., 16 Phila. 257.

³⁰ Walls v. Stewart, 16 Pa. 275; Lefevre's Est., 171 Pa. 404.

³¹ Bell, J., in Hoover v. Hoover, 5 Pa. 351. (See Weaver's Est., 39 Supr. C. 419.)

³² Walls v. Stewart, 16 Pa. 275.

³³ Shupp v. Gaylord, 103 Pa. 319; Danforth's Ap., 121 Pa. 359.

³⁴ Armstrong's Ap., 63 Pa. 312; Lewis' Est., 52 Pitts. L. J. 367.

³⁵ Hallowell's Est., 23 Pa. 223; Griffin's Est., 1 D. R. 316; Culbertson's Est., 42 Pitts. L. J. 368.

³⁶ Gallagher v. Gallagher, 6 Watts, 473; Hoppel's Est., 5 Phila. 216; Rilling's Est., 50 Pitts. L. J. 77; Welch's Ap., 28 Pa. 363; Knecht's Ap., 71 Pa. 333; Hammer's Est., 158 Pa. 632; Huey's Est., 17 D. R. 1030; Forster's Est., 55 Pitts. L. J. 198.

¹ Walker's Est., 3 Rawle, 229.

² Barrett's Est., 22 Supr. C. 74.

is general.³ A gift of bank stock without individuating it is general;⁴ so of money.⁵

24. Cumulative legacies.

Where a gift is given to the same person in a will and another in the codicil, the legatee is entitled to both unless it is manifest that the latter is a substitution.⁶ The same principle applies when the testator seeks to equalize his bounties in the same writing;⁷ or divides his bequests into different items;⁸ or makes an additional gift in an envelope.⁹

25. Bequest of pledged goods.

"If a man bequeath that which he hath pledged to a creditor, the heir is under a necessity of redeeming it: But in this, as in the former case, concerning the goods of another, the heir cannot be obliged to redeem, unless the deceased knew that the thing was pledged. * * * But when it appears to have been the express will of the deceased that the legatee should redeem the thing bequeathed, the heir ought not to redeem it."¹⁰

26. Discharge of debtor by will.

"If a man by will discharge his debtor, the bequest is effectual; and the heir can bring no suit against the debtor, his heir, or any representative. On the contrary, the heir of the testator may be convened by the debtor and obliged to give him his discharge. A man may also forbid his heir to sue a debtor within a time limited."¹¹

27. Legacy to debtor.

A legacy by a testator to his debtor of an amount less than the debt may be by the debtor set off against the claim of the estate and an attachment execution will take nothing.¹² The legacy thus given is not a discharge of the debt, unless it says so. The estate has a prior right to hold the legacy for the legatee's debt as against him or his creditors.¹³ It may be shown, *aliunde*, that the legacy was intended to discharge the debt.¹⁴ A debt created after the will, however, must be paid out of the bequest.¹⁵

³ Griffin's Est., 1 D. R. 316.

⁴ Snyder's Est., 217 Pa. 71.

⁵ Ruddy's Est., 8 Lack. Jur. 12.

⁶ Sponsler's Ap., 107 Pa. 95; Manifold's Ap., 126 Pa. 508; Brisben's Ap., 1 Lanc. Bar, No. 19; Alsop's Est., 9 Pa. 374.

⁷ McIntosh's Est., 158 Pa. 523.

⁸ Handley's Est., 212 Pa. 11.

⁹ Harrison's Est., 196 Pa. 576; McKibbin's Est., 21 Supr. C. 578.

¹⁰ Section 5, Lib. 2, Tit. 20. Justinian.

¹¹ Section 13, Lib. 2, Tit. 20. Justinian.

¹² Strong v. Bass, 35 Pa. 333; Peters' Ap., 4 Atl. 727; Bailey's Est., 153 Pa. 402; Shearer's Est., 13 Montg. 98; Zeigler v. Eckert, 6 Pa. 13.

¹³ Bredin v. Neal, 3 P. & W. 190; Keim v. Muhlenberg, 7 Watts, 79; Harman's Est., 135 Pa. 441; Schue's Est., 7 York, 178; Fogg v. Carroll, 18 C. C. 434.

¹⁴ Negley's Appln., 25 Pitts. L. J. 99; Sharp v. Wightman, 205 Pa. 285; Weston's Est., 43 Pitts. L. J. 356; Simpson v. Fidelity, Etc., Co., 15 D. R. 785; Coale v. Smith, 4 Pa. 376; Fox's Est., 14 D. R. 78.

¹⁵ Neel's Est., 207 Pa. 443.

28. Legacy to a creditor.

A legacy to a creditor of a larger sum than the debt will not be held to cancel the claim, unless the intention so appears by the will.¹⁶ But if the testator expressly provides that the sum so bequeathed shall be in full for the debt he owes, if the legacy is accepted on that condition, it is a bar to any further claim on the estate.¹⁷ A married woman's will bequeathing sums to her husband's creditors is binding.¹⁸ A legacy to a firm's creditors is not void for uncertainty, because who they are and what their claims are, can be easily ascertained.¹⁹ A testator may validly direct the payment of debts barred by the statute.²⁰ A mother may by her will direct her son's debts to be paid.²¹ Where a testator orders the debts due his old creditors paid in full, they are entitled to interest.²² A legacy to a creditor equal to or greater than the debt, without more, will be presumed to have been given to wipe out the debt.²³ But where the account ran after the will was made, it was held the presumption was rebutted;²⁴ and also where the legacy was not of the same kind as the debt.²⁵

29. Void and lapsed legacies.

A legacy is void when the legatee was dead at the time the will was made.²⁶ It is also void when made contrary to law, as in case of gifts to charities within one calendar month of the testator's death.²⁷ A lapsed legacy occurs when the beneficiary being a relative who was living when the will was made dies without issue before the death of the testator, and the will substitutes no one to take in such event.²⁸ The amount or thing given then lapses into the residue.²⁹ Said Sergeant, J.: "Every legacy implies a condition that the legatee shall survive the testator, and where the legatee dies in the lifetime of the testator the legacy lapses."³⁰ The law as here stated was modified by the act of March 19, 1810, 5 Sm. L. 112, which was supplied by section 12 of the act of April 8, 1833, P. L. 249, providing that no devise or legacy in favor of a child or other lineal descendant of any testator shall lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall

¹⁶ Pott's Est., 23 Lanc. L. R. 255.

¹⁷ Ervin's Est., 7 D. R. 486. (See Nathan's Est., 10 D. R. 205.)

¹⁸ Heagy's Est., 4 Supr. C. 493.

¹⁹ Burt v. Herron, 66 Pa. 400.

²⁰ De Silver's Est., 14 D. R. 65.

²¹ Duffy's Est., 49 Pitts. L. J. 97.

²² Sinclair's Ap., 116 Pa. 316.

²³ Wesco's Ap., 52 Pa. 195; Thompson's Est., 42 Pitts. L. J. 120.

²⁴ Horner v. McGaughey, 62 Pa. 189.

²⁵ Byrne v. Byrne, 3 S. & R. 54; P. & L. Dig., vol. 23, col. 40987.

²⁶ Cunkle's Est., 1 Pearson, 436.

²⁷ Section 11, act of April 26, 1855, P. L. 328; Gray's Est., 147 Pa. 67; Lynch v. Lynch, 132 Pa. 422; Moore v. Deyo, 212 Pa. 102; Conley's Est., 197 Pa. 291. (See *supra*.)

²⁸ Coates Street, 2 Ashmead, 12; Markey's Est., 8 York, 95; Kraan's Est., 31 C. C. 93.

²⁹ Sinn's Est., 18 D. R. 887.

³⁰ Comfort v. Mather, 2 W. & S. 450; Craighead v. Given, 10 S. & R. 351.

leave issue surviving the testator, but such devise or legacy shall be good and available in favor of such surviving issue, with like effect, as if such devisee or legatee had survived the testator." This act was not designed to defeat the expressed intention of the testator and it was construed to apply only to lineal descendants. An adopted child, whether adopted by deed under the act of April 2, 1872, P. L. 31, or by proceedings under act of May 19, 1887, P. L. 125, was held not to be within its scope;¹ so of a son-in-law.² The act carries the devise to the grandson when the son dies before the testator, although there is a substitution, on the election of the son not to take. Death makes the election for his heir.³ The legatee cannot control the descent by his will.⁴ "The issue of a devisee or legatee take in severalty by substitution, not under or through him, but directly from the testator, subject to their ancestor's or their own obligations to the testator. The 'like effect,' or point of resemblance in the conditions following the death of a legatee before and after that of the testator is that, while the legatee is not the *propositus* from which the issue inherit, he is the genealogical stock by and from whom the relative interests are fixed."⁵

A legacy to the wife by her husband does not lapse although she obtains a divorce *a. v. m.* after the will.⁶ But a legacy to churches may lapse by their consolidation;⁷ and where corporations merge, it will be held adeemed.⁸ However, a forfeiture of a legacy may be waived by the testator's acceding to the act which would cause it.⁹

A legacy to husband and wife gives them an estate by entireties, but if the donor uses distinct words which sever the gift or devise, and one of them dies in the lifetime of the testator, his moiety lapses.¹⁰

30. Extension to collateral heirs.

Section 2 of the act of May 6, 1844, P. L. 564, extended the provision against lapse of a legacy or devise "in favor of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants." This provision extends to a grandchild of a deceased brother.¹¹ But an illegitimate child was not included in the act;¹² nor by construction under the act of April 27, 1855, P. L. 368, enabling it to inherit from its mother.¹³ A grandchild in the direct line of descent excludes the issue of a sister who died before the testator;¹⁴ and so where there are lineal descendants of

¹ Phillips' Est., 17 Supr. C. 103.

² Comth. v. Nase, 1 Ashmead, 242.

³ Blackwell v. Scouton, 199 Pa. 446.

⁴ Newbold v. Pritchett, 2 Wharton, 46.

⁵ Smith, P. J., in Kinzler's Est., 22 L. R. 3; Spencer's Est., 37 Supr. C. 67; a case where the daughter was dead when the will was made:

⁶ Jones' Est., 211 Pa. 364.

⁷ Campbell's Est., 58 Pitts. L. J. 167.

⁸ Kepple's Est., 19 D. R. 627.

⁹ Whitehill's Est., 27 Lanc. L. R. 303.

¹⁰ Mitchell's Est., 15 Phila. 597. Ashman, J.

¹¹ Walton's Est., 2 Montg. 189; McGlathery's Est., 7 C. C. 61.

¹² Wettach v. Horn, 201 Pa. 201.

¹³ Myers' Est., 1 Del. Co. 304; Livingston's Est., 5 Lanc. L. R. 25.

¹⁴ Barnett's Ap., 104 Pa. 342.

the testator, an executory devise in favor of a niece lapses by her death before the testator.¹⁵ It is otherwise where testator leaves no lineal heirs.¹⁶ This act does not include gifts predicated upon a condition precedent.¹⁷ It was intended to prevent a vested legacy from lapsing by the death of the donee,¹⁸ and has been held to apply where the sister donee was dead when the will was made, but left children surviving the donor.¹⁹

31. Gifts to classes — Act of 1897.

The act of July 12, 1897 (section 2), P. L. 256, further enlarges the persons by including "the brothers or sisters of any testator or in favor of the children of a brother or sister of any testator, whether such brothers or sisters or children of brothers or sisters be designated by name or as a class, such testator not leaving any lineal descendants, * * * but such devise or legacy shall be good and available in favor of such surviving issue, etc."

The word issue in this act and the act of 1844, *supra*, does not include an adopted child or person.²⁰ Under the act of 1844, which this amends, omitting the word "deceased" before "brother or sister" in the clause relating to "children of a brother or sister," where the legacy was to a class and a member died before the donor, his share lapsed.²¹ The act of 1897 was passed to save the share of such member of a class dying between the making of the will and the death of testator, from lapsing.²² The act of 1833 was held to be sufficiently broad to cover cases of legacies to a class of lineals.²³ Whether the legatees are to take as a class or as individuals does not depend on whether they are individualized by name; it must be discerned from the whole will and the surrounding circumstances.²⁴

32. Substituted legatees.

The far-seeing man who aspires to direct his estate *post-mortem*, does not overlook the common fate of all, and when he attempts to provide against probable death of his beneficiaries or his trustees, he

¹⁵ Lovett v. Lovett, 10 Phila. 537.

¹⁶ Harley's Est., 21 Montg. 97.

¹⁷ Fairfax's Ap., 103 Pa. 166.

¹⁸ Gross' Est., 10 Pa. 360.

¹⁹ Minter's Ap., 40 Pa. 111; Hook's Est., 10 W. N. C. 140; United Presb., Etc., Ap., 91 Pa. 507. (See Bentz's Est., 221 Pa. 380; Simmons' Est., 17 D. R. 629.)

²⁰ Wambold's Est., 17 D. R. 330. Solly, P. J.

²¹ Gross' Est., 10 Pa. 360; Guenther's Ap., 4 W. N. C. 41; Moses' Est., 3 Supr. C. 93; Allen v. Brown, 47 Pitts. L. J. 409.

²² Fossbenner's Est., 26 C. C. 56; Harison's Est., 202 Pa. 331; 18 Supr. C. 588; Massey's Est., 19 Lanc. L. R. 342; Kensel's Est., 21 Montg. 67; Harley's Est., 21 Montg. 97; Todd's Est., 33 Supr. C. 117; Hoover's Est., 9 Dauphin Co. 258. Kunkel, P. J.

²³ Bradley's Est., 166 Pa. 300, distinguishing Gross' Est., *supra*; Shetter's Est., 2 D. R. 284.

²⁴ Reynold's Est., 11 D. R. 387; Wenzel's Est., 12 D. R. 63. (See discussion of these acts by Penrose, J., in the latter cases and also in Cooper's Est., 13 D. R. 127. See also Evans' Est., 40 Pitts. L. J. 140; Kensel's Est., 21 Montg. 67; Page's Est., 227 Pa. 288.)

does so in clear and precise terms, disconnected from other clauses; for, unless he makes his intention clear, his substitution will fail.¹ Where the gift is to a class, and one of them dies in the lifetime of the testator, his share will not lapse.² Where there are equitable life estates given and one dies, the remainder will be accelerated.³ A devise to a son, "or his lawful heirs, if he should die without any lawful heirs," will not be so construed as to change "or" to "and." The devise over is predicated upon the death of the son and failure of heirs of his body.⁴

33. Gifts to "heirs," "legal representatives," etc.

The proper use of words in a will is of greater importance than many seem to think, from the large number of cases in which courts of higher or lower power, are called upon to define what they were intended to mean. This is not a lexicography, but in so far as its purview extends, it will set forth in concise terms the rules of interpretation and give forms, *infra*, adapted to different kinds of disposition.

It is an old rule of law that "all my estate," in a will, passes a fee.⁵ "Heirs" when used in a will is technical and does not always mean "children."⁶ It is construed as a word of limitation unless it appears by the context that the testator used it as a word of purchase or substitution.⁷ "Children" does not include grandchildren, unless by apparent intention of the testator.⁸ A child cannot be adopted by a will;⁹ nor can an heir be adopted by parol, in Pennsylvania.¹⁰ One, who in his will refers to his "adopted daughter," does not thereby let her in to share as a child under the term "children."¹¹ "Nearest relatives" of a wife place her sister before nephews and nieces, children of a deceased sister.¹² "Now living" means those living at the date of the making of the will;¹³ "then living," as a rule, when the will or the provision is directed to go into effect.¹⁴ A gift to grandchildren living at the death of the last child gives a contingent interest.¹⁵ "Legal representatives," in

¹ University of Penna.'s Ap., 97 Pa. 187; Ryan's Est., 2 Chester Co. 225; Snyder's Est., 3 D. R. 382; Elmslie's Est., 11 D. R. 246.

² May's Ap., 41 Pa. 512; Fahnestock's Est., 147 Pa. 327; Horner's Est., 41 Pitts. L. J. 386.

³ Bruner's Est., 14 D. R. 124.

⁴ Mayer v. Walker, 214 Pa. 440. Heir from French.

⁵ Tirrel v. Page, Cas. in Chan. 262.

⁶ Beck's Est., 225 Pa. 578.

⁷ Campbell v. Jamison, 8 Pa. 498; Barnett's Ap., 104 Pa. 342; Smith v. Folwell, 1 Binney, 546.

⁸ Hunt's Est., 133 Pa. 260; Hughes' Est., 225 Pa. 79; McGlensey's Est., 37 Supr. C. 514; Long's Est., 39 Supr. C. 323.

⁹ Lines' Est., 221 Pa. 374.

¹⁰ Carroll's Est., 219 Pa. 440.

¹¹ Hughes' Est., 225 Pa. 79.

¹² Altdorfer's Est., 225 Pa. 136.

¹³ Ellmaker's Est., 26 Lanc. L. R. 81.

¹⁴ Green's Est., 227 Pa. 188.

¹⁵ Rosengarten v. Ashton, 228 Pa. 389.

common use means executors or administrators,¹⁶ but it also means "heirs," under the inheritance laws, according to the connection in which the phrase is used.¹⁷ The masculine pronouns "he," "his" and "him" stand for females as well as males in all cases where *homo*, the generic word, would apply.¹⁸ Section 15 of the act of April 8, 1833, P. L. 249, in regard to provision in a will for an after-born child, applies to a testatrix as well as a testator.¹⁹ A legacy to one "and her heirs" was held to lapse when the legatee died without heirs in the lifetime of the testator.²⁰ "But where the context shows gifts to "heirs at law," these words were held to be words of purchase and not of limitation.²¹ "Or his heirs" have been held to be substituting words, in a certain connection.²² "Children or legal heirs" let in a grandchild.²³ "Heirs and assigns" have been held to be words of limitation.²⁴ These words do not protect a legacy from lapsing;²⁵ nor if "executors and administrators" be euphoniously added.²⁶ "Legal representatives" take as purchasers in a devise over, on the death of the remainderman after a life-estate when they are used as equivalent to children, heirs of the body then living, or then begotten, or next of kin.²⁷ Where a will provides that on failure of issue, the gift shall revert, the children of one who was made a legatee, but died in the lifetime of the testator, have no vested interest to entitle their guardian to contest the will.²⁸

34. Provision for children dead when the will is made.

Under the old rules of construction a devise to a child or "heirs," which was dead when the will was made, lapsed.²⁹ "Heirs," technically being a word of limitation, in such case, was held not to mean "children," although "children" are "heirs." If not, what are they?³⁰ Nor can it be shown, in such cases, *aliunde*, that the "heirs" meant were the "children" of the deceased devisee; and that testator knew the devisee was dead and that he could have had no refer-

¹⁶ Fleck's Est., 1 Parsons, 126; Ralston v. Waln, 44 Pa. 279; Kennedy's Est., 2 W. N. C. 492.

¹⁷ Harton's Est., No. 1, 213 Pa. 499; Foster's Est., 55 Pitts. L. J. 65.

¹⁸ Yeates, J., in Dinah Duncan's Est., 3 Sm. L. 164; Eshelman v. Hoke, 2 Yeates, 509; Wagner v. Ellis, 7 Pa. 411; Kurtz v. Saylor, 20 Pa. 205; Vernon v. Kirk, 30 Pa. 218; Fosselman v. Elder, 98 Pa. 159; Knox's Est., 131 Pa. 220; Teach's Est., 153 Pa. 219; Owens v. Haines, 199 Pa. 137.

¹⁹ Owens v. Haines, 199 Pa. 137.

²⁰ Dickinson v. Purvis, 8 S. & R. 71; Worsley's Est., 4 D. R. 177.

²¹ Wettach v. Horn, 201 Pa. 201.

²² Snyder's Est., 3 D. R. 382; Horner's Est., 41 Pitts. L. J. 386.

²³ Sarver v. Berndt, 10 Pa. 213. (See Worsley's Est., 4 D. R. 177.)

²⁴ Dickinson v. Lee, 4 Watts, 82.

²⁵ Elmslie's Est., 11 D. R. 246; Campbell v. Jamison, 8 Pa. 498.

²⁶ Niblock's Est., 27 C. C. 193; Clark v. Scott, 67 Pa. 446.

²⁷ Ware v. Fisher, 2 Yeates, 578. Yeates, J., saying these words were never used as a limitation; Stook's Ap., 20 Pa. 349; Hawthorne's Est., 11 Lanc. L. R. 52.

²⁸ Hoopes' Est., 185 Pa. 172.

²⁹ Sloan v. Hause, 2 Rawle, 28.

³⁰ Barnett's Ap., 104 Pa. 342.

ence to any one in being but the "children."³¹ In a bequest to the children of testator's brother, if any child happened to be dead at the time of making the will, the children of such deceased child are cut out by this hoary old English rule.³² Of course, the testator has a simple remedy. It is to name all his beneficiaries and label them by their habitation and be sure they are not dead and entombed. A will which includes testator's "present surviving children and the representatives of those of them that shall be then deceased" clearly excludes all children deceased at the time of making the will.³³ The clause directing a division "Among my children who shall be living at the time of such distribution and in case any of them should be deceased, their heirs to receive in equal parts such shares as their parents would be entitled to receive were they living," was held by Chief Justice Gibson not to exclude the children of a child deceased when the will was made.³⁴ A gift to nephews and nieces "living in different parts of the country" excludes those dead at the making of the will.³⁵ For a limitation upon "surviving brothers and sisters, their heirs or legal representatives," see note.³⁶ A bequest of the residuary estate, "the money to be distributed amongst my brothers and sisters, share and share alike, according to the intestate laws," excludes the children of brothers and sisters deceased when the will was made,³⁷ other provision having been made in the will for the nephews and nieces severally.

35. Disposition of the lapsed fund.

The general rule is that void and lapsed legacies fall into the residue and go to the residuary legatees.¹ Prior to the act of June 4, 1879, P. L. 88, it was held that a lapsed or void devise descended to the heirs at law, unless the testator clearly indicated otherwise;² but said act does not apply to a lapsed share of a residuary devise.³ A lapsed devise will fall into the residue, unless there is an

³¹ Barr's Est., 2 Pa. 428; Kellerman's Est., 18 Supr. C. 530. Heire — Norman-French *haeres*, from which hereditaments — German *Erbe*, *Erb-schaft*, *Haeris sanguinis haereditatis* — heir of the blood and inheritance.

³² Moses' Est., 3 Supr. C. 93; Fisher's Est., 13 Phila. 401; Wampler's Est., 40 Pitts. L. J. 451; Weaver's Est., 13 Lanc. L. R. 153.

³³ Hough v. Hough, 4 Rawle, 363.

³⁴ Long v. Labor, 8 Pa. 229. This decision based on common sense is said to have been fulcrumed upon the "stirpetal" force of the Saxon word "shares," so as to involve an inclusion under it. (See comments of Penrose, J., upon this case in Park's Est., 4 C. C. 560, quoting Theobald on Wills, p. 338.) (Share from *scaeran*, part, portion.)

³⁵ Morrison's Est., 139 Pa. 306. As to "shares" see Myers' Est., 8 Lanc. L. R. 347.

³⁶ Hauer's Est., 16 Supr. C. 257.

³⁷ Kellerman's Est., 18 Supr. C. 530. (See Clement's Est., 1 Del. Co. 167, as to one absent and presumed to be dead.)

¹ Woolmer's Est., 3 Wharton, 477; Massey's Ap., 88 Pa. 470; Harland's Est., 13 Phila. 229; Powell's Est., 138 Pa. 322; Murphy's Est., 184 Pa. 310; Wood's Est., 19 Montg. 19; Wilkin's Est., 49 Pitts. L. J. 55; Moore's Est., 22 Lanc. L. R. 332.

² Yard v. Murray, 86 Pa. 113; Gray's Est., 147 Pa. 67; P. & L. Dig., vol. 23, col. 41027.

³ Everman v. Everman, 15 W. N. C. 417.

express direction or disposition otherwise.⁴ When a devise or bequest in the residuary clause itself is void or lapses, the testator is held to have died intestate as to so much and it goes to the heirs or next of kin.⁵ The same result follows a revocation of a bequest of part of the residue;⁶ nor is it affected by a republication of the will subsequently by a codicil,⁷ unless the testator provides that an excluded heir shall receive nothing in any event.⁸ Where an accumulation for two grandchildren under a trust was held void, it was also held that the accumulation would not fall into the residue, but go to the grandchildren, notwithstanding.⁹ Where there is no residuary legatee, a lapsed legacy passes under the intestate laws,¹⁰ and an excluded heir will take his share in it.¹¹

36. Ademption of legacy.

An ademption can only take place in the lifetime of the testator;¹² and it may be *pro tanto*.¹³ A specific legacy is adeemed by any change in the state or form of the subject which makes it different from that described.¹⁴ Ademption takes place when the thing given is consumed, sold or taken from the testator.¹⁵ The same is true of a devise of real estate, if testator disposes of it in his lifetime.¹⁶ If a legacy be given for some purpose and the testator accomplishes that purpose otherwise, the legacy is adeemed.¹⁷ A legacy for the erection of a church will not be adeemed by contributions for its erection volunteered.¹⁸ A legacy to a child as a portion is adeemed by advancements to it in the lifetime of testator,¹⁹ but after the will is made;²⁰ and is so, too, where the tes-

⁴ Gregg v. Keenan, 9 D. R. 262.

⁵ Williams v. Neff, 52 Pa. 326; Reed's Est., 82 Pa. 428; Gray's Est., 147 Pa. 67; Gorgas' Est., 166 Pa. 269; Jones' Est., 6 D. R. 783; Houston's Est., 12 D. R. 121; Reichard's Ap., 116 Pa. 232; Steenson's Est., 5 Lack. L. N. 163; P. & L. Dig., vol. 23, col. 41028.

⁶ Harris' Est., 2 C. P. R. 17; Waln's Est., 156 Pa. 194; Riley's Est., 6 D. R. 691.

⁷ Williams v. Neff, 52 Pa. 326.

⁸ Evans' Est., 15 D. R. 203.

⁹ Young's Est., 16 D. R. 541.

¹⁰ Joyce's Est., 16 Phil. 293, Penrose, J. Lovett v. Lovett, 10 Phila. 537; Getz's Ap., 125 Pa. 611; De Silver's Est., 142 Pa. 74; Aubert's Ap., 119 Pa. 48; Wood's Est., 19 Montg. 19.

¹¹ Gorgas' Est., 166 Pa. 269; P. & L. Dig., vol. 23, cols. 41030-2.

¹² Maynard v. Mechanics' Bank, 7 Phila. 6; Young's Est., 32 Pitts. L. J. 403.

¹³ Stine's Est., 16 Supr. C. 12; Hoke v. Herman, 21 Pa. 301.

¹⁴ Blackstone v. Blackstone, 3 Watts, 335; Alsop's Ap., 9 Pa. 374.

¹⁵ Smith's Ap., 103 Pa. 559; Ludlam's Est., 13 Pa. 188; Wedekind's Est., 13 Lanc. L. R. 175; Bell's Est., 8 C. C. 454; Stine's Est., 16 Supr. C. 12.

¹⁶ Manville's Est., 8 Kulp, 407; Donaldson's Est., 1 D. R. 235; Harshaw v. Harshaw, 184 Pa. 401.

¹⁷ Ursinus' Ap., 1 Mona. 196; Johnson's Est., 201 Pa. 513; Hershey's Est., 17 Lanc. L. R. 389.

¹⁸ Keiper's Ap., 124 Pa. 193.

¹⁹ Hauberger v. Root, 5 Pa. 108; Garrett's Ap., 15 Pa. 212; Miner v. Atherton, 35 Pa. 528; Bender's Est., 10 Lanc. L. R. 157.

²⁰ Reinbold's Est., 8 Lanc. L. R. 217; Kreider v. Boyer, 10 Watts, 54.

tator stands *in loco parentis* to the donee.²¹ To operate as an ademption the gift must be of the same class.²² It may be shown by parol that after the will was made the legacy was adeemed,²³ but not before.²⁴ The ademption must operate as to the legatee and not her husband.²⁵ An ademption may be shown by declarations in the will and evidence in support thereof.²⁶ But a codicil republishing the will and reaffirming the legacy negatives ademption prior;²⁷ nor will a legacy be held adeemed when the donor expends something for the education of his children, a duty he owes independently.²⁸

A legacy of life insurance policies on the life of another is adeemed by the death of the insured and investment by the testator in bonds.²⁹ A legacy of a certain sum deposited is not adeemed by drawing out a portion and investing it.³⁰ A legacy to a daughter is not adeemed by deeding her the home for taking care of testator and for one dollar, love and esteem.³¹

37. Ademption of legacy charged on land.

When a legacy is charged upon land specifically and the testator has kept his real and personal estates separate and distinct, a sale of the land by the testator adeems and discharges the legacy.¹ If payable out of the profits of real estate devised it is demonstrative and not adeemed by the sale.² So also where it is payable out of the proceeds of the land.³ But where the land itself is purchased by the legatee and the will itself provides an ademption it must stand perforce.⁴ An ademption may be shown to have been wrought by the testator's making other provisions for the legatee.⁵

38. Ademption when not wrought.

A mere change of form as to the securities does not adeem the legacy.⁶ If payable out of a debt due the testator, the legacy is payable out of the estate, if the debt does not exist at the death of the testator.⁷ But it is different as to a gift of stock.⁸ A charge upon the rents of a coal lease continues and is not adeemed by for-

²¹ Gill's Est., 1 Parsons, 139; Sprenkle's Ap., 1 Mona. 402.

²² Swoope's Ap., 27 Pa. 58; Monestier's Est., 16 Phila. 332.

²³ Bailey v. Herkes, 1 P. & W. 126; Ritter's Est., 10 Supr. C. 352.

²⁴ Zeiter v. Zeiter, 4 Watts, 312.

²⁵ Yundt's Ap., 13 Pa. 575.

²⁶ Brunot's Est., 49 Pitts. L. J. 180; Turner's Est., 167 Pa. 609.

²⁷ Adams' Est., 35 Pitts. L. J. 285.

²⁸ Bird's Est., 132 Pa. 164.

²⁹ Pruner's Est., 222 Pa. 179.

³⁰ Forster's Est., 55 Pitts. L. J. 198.

³¹ Thompson's Est., 15 D. R. 29.

¹ Balliet's Ap., 14 Pa. 451; Walls v. Stewart, 16 Pa. 275.

² Welch's Ap., 28 Pa. 363.

³ Hammer's Est., 158 Pa. 632.

⁴ Bomberger's Est., 21 Lanc. L. R. 153.

⁵ Spier's Ap., 6 Atl. 692.

⁶ Reynold's Est., 11 D. R. 387; Coale v. Smith, 4 Pa. 376.

⁷ Gallagher v. Gallagher, 6 Watts, 473; Hoppel's Est., 5 Phila. 216.

⁸ Dunlevy's Est., 51 Pitts. L. J. 331.

feiture of the lease and a re-leasing.⁹ A request subsequently that a legacy be paid out of an insurance policy which cannot be found does not affect the legacy.¹⁰

39. Abatement of general legacies.

The rule is that where a deficiency arises after payment of debts, specific legacies and expenses of administration, general pecuniary legacies must abate proportionally.¹¹ Section 48 of the act of February 24, 1834, P. L. 70, is simply declaratory of this long-established rule.¹² On the failure of personal assets a specific legacy will not abate.¹³ The same rule applies to a specific devise.¹⁴ Where two general legacies are payable out of the same fund, at the same time, they must abate equally.¹⁵ Where a bequest is made charged with payment of the debts and funeral expenses, the expenses of administration must be paid out of the residuary estate.¹⁶ An annuity, payable out of personalty, stands on the same footing as a general legacy, in respect to abatement.¹⁷ Where the will so blends personalty and realty that the attempt to charge legacies on land makes them general they abate proportionally.¹⁸ A bequest charged with the payment of debts, in the nature of a trust, is none the less a general legacy and subject to the rule.¹⁹

40. Abatement of residuary legacies.

Residuary legacies stand second to general pecuniary legacies and abate before them. They take the fragments after all else are served.²⁰ Where, after payment of debts, the residue was given by various bequests, all abated proportionally.²¹ There can be no equalization of abatement except where the executor has wasted the estate.²² The balance of unpaid purchase money may be a charge upon the residue.²³

41. Abatement of specific and demonstrative legacies, etc.

Specific legacies and real estate specifically devised cannot be re-

⁹ *Shupp v. Gaylord*, 103 Pa. 319; *Danforth's Ap.*, 121 Pa. 359.

¹⁰ *Cascaden's Est.*, 8 Phila. 582.

¹¹ *McKnight v. Reed*, 1 Wharton, 213; *University's Ap.*, 97 P. 187; *Penna. Co., Etc., Ap.*, 109 Pa. 479; *McTighe's Est.*, 51 Pitts. L. J. 38.

¹² *Penna. Co., Etc., Ap.*, 109 Pa. 479.

¹³ *McMahon's Est.*, 132 Pa. 175; *Moore's Est.*, 6 D. R. 245; *Ash's Est.*, 8 W. N. C. 28; *Lynch's Est.*, 13 Phila. 322; *Jervis v. Ferris*, 23 C. C. 142.

¹⁴ *Martin's Est.*, 12 Lanc. L. R. 359; *Wilson's Est.*, 15 Phila. 528; *Kreitz v. Raub*, 3 Lanc. L. R. 196; *Payne's Est.*, 50 Pitts. L. J. 392.

¹⁵ *Schmoyer's Est.*, 2 Lehigh Co. 108.

¹⁶ *Borland's Est.*, 51 Pitts. L. J. 227.

¹⁷ *Baum's Est.*, 15 Montg. 58; *Barry's Est.*, 13 Phila. 310; *University's Ap.*, 97 Pa. 187; *Gamble's Est.*, 8 York, 113; *Snyder's Ap.*, 75 Pa. 191.

¹⁸ *Lloyd's Est.*, 188 Pa. 451.

¹⁹ *Ingersoll's Est.*, 3 D. R. 399.

²⁰ *Bentz v. Nieman*, 6 Watts, 85; *Howell's Est.*, 16 Montg. 89; *McGlaughlin v. McGlaughlin*, 24 Pa. 20; *Baugh's Est.*, 12 D. R. 303.

²¹ *Herron's Est.*, 49 Pitts. L. J. 153.

²² *Strohm's Ap.*, 23 Pa. 351; *Shimp's Ap.*, 1 W. N. C. 521.

²³ *McCracken's Est.*, 29 Pa. 426.

sorted to for the payment of a general money legacy, and if there is a deficiency of assets, the latter must abate.²⁴ But where there is a deficiency to pay debts and legacies, specific devises of land and specific and demonstrative legacies abate in the same class.²⁵ The payment of debts takes precedence of all gifts or devises in whatever form,²⁶ because it is the act of the law that limits the testator's will. In such case of abatement, the value of the devise will be ascertained as at the date of testator's death.²⁷ But the rule is different where the devisee takes subject to a life estate, and legacies payable after the death of the life tenant.²⁸ If the testator indicates his will that the distribution shall be equalized the devise and legacies abate proportionally.²⁹ Where the legacies are given out of the proceeds of the sale of land, and the remainder to others the first do not abate, except for the payment of debts.³⁰ A devisee of land is not a purchaser in such a sense as to relieve him from contribution to a deficiency.³¹ If land is devised charged with a legacy, and the testator then sells a part of it, the remainder is no less charged with the whole legacy.³² A trust having been created for life for a daughter and a power of appointment given as to part of the fund the legacy is specific and does not abate because the trust fund has shrunk in the investment.³³ Where real estate devised specifically is sold for the payment of debts the devisee of such land is entitled to contribution from devisees of other lands of the testator remaining unsold, regardless of the difficulty in ascertaining the value of the remainder.³⁴

42. Exemptions from abatement.

Gibson, C. J., said:³⁵ "A pecuniary legacy may undoubtedly be exempt from abatement, as in the case of a wife or child destitute of other provision, or of a legacy given in lieu of a dower, or of a preference manifestly intended. But these cases are few in number, dependent on peculiar circumstances, and attended with strong expressions of intention." It requires clear and unambiguous language to create a preference and exemption from abatement.¹ No less will do.² The first named legatee gets no preference from the

²⁴ Ruddy's Est., 8 Lack. Jur. 12. Sando, P. J.

²⁵ Cryder's Ap., 11 Pa. 72; Hallowell's Est., 23 Pa. 223; Armstrong's Ap., 63 Pa. 312; Payne's Est., 50 Pitts. L. J. 392; Barkley's Est., 10 Pa. 387.

²⁶ Haddock's Est., 18 Phila. 77.

²⁷ Knecht's Ap., 71 Pa. 333.

²⁸ Kunkle's Est., 21 Supr. C. 200.

²⁹ Grim's Ap., 89 Pa. 333.

³⁰ Barkley's Est., 10 Pa. 387.

³¹ Hallowell's Est., 23 Pa. 223.

³² McDowell's Est., 3 D. R. 271.

³³ Huey's Est., 17 D. R. 1030.

³⁴ Mitchell's Est., 16 D. R. 520; 17 D. R. 566.

³⁵ Duncan v. Alt, 3 P. & W. 382.

¹ Alberti's Est., 1 W. N. C. 559; Howell's Est., 16 Montg. 89; P. & L. Dig., vol. 23, col. 41066; Barry's Est., 13 Phila. 310.

² Crawford's Est., 9 D. R. 378; Penna. Co., Etc., Ap., 109 Pa. 479.

fact that he is the first named.³ A pecuniary legacy to testator's minor child for maintenance will be preferred.⁴ A legacy to a widow in lieu of dower makes her a purchaser.⁵ If the testator expressly provides that a legacy shall be first paid, it must have priority.⁶ As already stated, the order in which the legatees are named does not determine priority.⁷ A legacy for a valuable consideration will be preferred;⁸ as for services as trustee though it be a dry trust;⁹ or a release of a valuable interest in land.¹⁰ The preference of a child and exemption of its legacy from abatement is based upon maintenance alone.¹¹

43. Priority of widow.

It is stated above that when the widow takes a legacy or devise under a will she does so, not as a volunteer, but as a purchaser; and therefore she takes priority over others in the same grade.¹² Her right to this is based on section 11 of the act of April 8, 1833, P. L. 249, *supra*. If, however, the testator has charged the legacy or devise with a burden, she accepts it *cum onere*.¹³ She cannot purchase a greater interest than that devised to her in the will.¹⁴ Debts and expenses must come out first in any event.¹⁵ The privilege of the widow does not extend to the remainderman.¹⁶

³ Lucas' Est., 53 Pitts. L. J. 161.

⁴ Boehring's Est., 17 D. R. 46.

⁵ Hill v. Hill, 17 D. R. 746; Anspach's Est., 16 D. R. 176; Mitchell's Est., 16 D. R. 520; Kunzi's Est., 24 Montg. 166; Kramer's Est., 26 Lanc. L. R. 51.

⁶ Bright's Ap., 100 Pa. 602; Murdoch's Ap., 31 Pa. 47; Bard's Est., 58 Pa. 393; Gantz's Est., 19 Lanc. L. R. 390.

⁷ McTighe's Est., 51 Pitts. L. J. 38; Bebout's Est., 50 Pitts. L. J. 279.

⁸ Gassman's Est., 14 Phila. 308; Wilson's Est., 15 Phila. 528.

⁹ Harper's Ap., 111 Pa. 243.

¹⁰ Henry's Est., 20 C. C. 415.

¹¹ Bixenstein's Est., 6 D. R. 19; Barry's Est., 13 Phila. 310; Gray's Est., 13 Phila. 372.

¹² Kirk's Est., 13 Phila. 276; Young's Est., 32 Pitts. L. J. 403; Taylor's Est., 175 Pa. 60; Bailey's Est., 23 C. C. 139; P. & L. Dig., vol. 23, col. 41075; Reed v. Reed, 9 Watts, 263.

¹³ Umbenbauer's Est., 2 Woodward, 231; Crone's Est., 4 York, 13; Hoover's Est., 15 Montg. 200; Pittman's Est., 182 Pa. 355; Risk's Ap., 110 Pa. 171; Kline's Ap., 117 Pa. 139.

¹⁴ Kline's Ap., 117 Pa. 139. Gordon, J.

¹⁵ Martin v. Fry, 17 S. & R. 426; Barnett's Ap., 104 Pa. 342; Wolf's Est., 9 W. N. C. 260.

¹⁶ Forepaugh's Est., 199 Pa. 484.

CHAPTER XLI.

PAYMENT OF LEGACIES AND ANNUITIES — INTEREST.

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| 1. Personal estate primarily liable. | 11. Interest on legacies by parents. |
| 2. When and to whom payment is to be made. | 12. Interest on legacy to widow or creditor. |
| 3. Jurisdiction of the Orphans' Court. | 13. Bequest of interest or income of fund. |
| 4. Time when due. | 14. Interest on specific legacies and annuities. |
| 5. Assent to legacy. | 15. Term of an annuity. |
| 6. Bequests in the alternative. | 16. Making up deficiencies in annuities. |
| 7. Release of legacy. | 17. Delay in distribution as affecting interest. |
| 8. Setting aside funds for annuities. | 18. Rate of interest. |
| 9. Interest, income and dividends. | |
| 10. Time of payment indicated by the will. | |

1. Personal estate primarily liable.

The personal estate of a testator is primarily liable for the payment of legacies unless he has charged them upon land,¹ or directed them to be paid out of the proceeds of the sale of real estate.² The claim to have them paid out of the personal estate must be made before distribution. A decree, unappealed from, will not be opened for that purpose.³ The residuary devisee, who as executor, misapplies the personal estate, is in no position to object to paying the legacies out of the real estate; neither is his assignee in bankruptcy.⁴ Unless specifically payable out of the land, before the land can be ordered sold to pay legacies, the executors must file an account of the personalty, showing a deficiency of assets.⁵ Where the intent of the testator is that his debts shall be paid out of the real estate, his first legatee of the personalty is entitled to be paid out of the proceeds of the realty to the extent that the personalty was applied to the payment of debts.⁶ The executors may not object when all the parties agree that the legacy for which there is no personal estate shall be charged on the land.⁷ Where the will provides for an equal division after the widow has been satisfied, it is mandatory.⁸ The devisee of

¹ Storey's Ap., 4 Penny. 421; Duvall's Est., 146 Pa. 176; Espy's Est., 207 Pa. 459; Myers' Ap., 48 Pa. 26.

² McFait's Ap., 8 Pa. 290; Sloan's Ap., 4 Atl. 350; Hershey's Est., 21 Supr. C. 651.

³ Kohler's Est., 16 Phila. 341.

⁴ McLean's Est., 26 Pitts. L. J. 81.

⁵ Prince's Est., 2 Kulp, 490. Rhone, P. J.

⁶ Alexander's Est., 45 Pitts. L. J. 465.

⁷ Bradley's Est., 5 C. C. 572.

⁸ Heathcote's Est., 209 Pa. 522.

the land which is sold for the payment of debts is entitled to the surplus.⁹ For various cases of construction of wills equalizing the claims of legatees and devisees, see P. & L. Dig., Vol. XXIII, col. 41084, *et seq.* A devise to one's wife of the use of all testator's interest in coal in certain land, for life, entitles the wife to the entire interest from his death.¹⁰ The income of a fund to a minor during minority will have to be paid by the guardian to him.¹¹ A pecuniary legacy payable out of the money received by the estate from a trustee is not payable out of the real estate purchased by the trustee.¹² Where a pecuniary legacy is not paid within two years as required by the will, it will be payable out of the fund arising from a sale of the real estate.¹³ When a fund has been subjected to a claim for a legacy under the will, it will not be further burdened with another legacy.¹⁴

2. When and to whom payment is to be made.

If the legatee is a minor his legacy must be paid to his guardian; otherwise, to himself.¹⁵ If the minors have no guardians the money may be paid into court, with leave, until guardians can be appointed and qualified.¹⁶ In case of a specific bequest of personalty, the estate being solvent, the legatee is entitled to have possession immediately after the death of the testator.¹⁷ The executors should make prompt delivery, after inventory had, and take the legatee's receipt in due form. In case of moneys specifically bequeathed, the same rule applies¹⁸ and payment should not be postponed to the end of the year. The same rule applies to a bequest of \$300 in cash to the widow as her exemption. The limit of one year by section 51 of the act of February 24, 1834, P. L. 70, is confined to cases where the will fixes no time.¹⁹ If the will gives the executor discretion as to the time of payment, his hand cannot be forced.²⁰ But if directed to pay in installments and in his discretion the court held that it meant reasonable time.²¹ If payable at the convenience of the executors, thirteen months was held not to be unreasonable time.²² Where a testator directed sums to be paid to his sons and another sum "as freedom when they come of age," the court held they should be paid as soon as practicable after testator's death.²³ The provision in section 51 of the act of 1834, *supra*, relates to payment by executors and

⁹ Hubert's Est., 181 Pa. 551.

¹⁰ Duffy's Est., 209 Pa. 390.

¹¹ Grauch's Est., 13 D. R. 329.

¹² Fleming's Est., No. 3, 15 D. R. 25. (See same estate, 15 D. R. 233, for different phases.)

¹³ Geist's Est., 16 D. R. 331.

¹⁴ Scholl's Est., 17 D. R. 471. (See Costello's Est., 16 D. R. 188.)

¹⁵ Gitt's Est., 203 Pa. 263.

¹⁶ Highgate's Est., 16 W. N. C. 336.

¹⁷ Robinson's Est., 24 C. C. 588.

¹⁸ Gilchrist's Est., 9 D. R. 249.

¹⁹ Leberman's Est., 7 D. R. 517.

²⁰ Wilson's Ap., 1 W. N. C. 321.

²¹ Patterson's Ap., 1 Mona. 388.

²² Phillips' Est., 133 Pa. 426.

²³ Park's Ap., 1 Pa. 164. (For other cases relating to the time of payment in specific cases, see P. & L. Dig., vol. 23, col. 41089.)

not by devisees.²⁴ If the legatee refuses to comply with the condition, the residuary legatee is entitled to it forthwith.²⁵ Where a gift or provision is for maintenance the court will lean to the construction that it is an annuity and payable from the death of the testator.²⁶

3. Jurisdiction of the Orphans' Court.

Section 47 of the act of February 24, 1834, P. L. 70, provides:

"Executors, after one year elapsed from the granting of the administration of the estate, upon the requisition of any legatee, or any other person interested shall pay and deliver, under the directions of the Orphans' Court having jurisdiction of their accounts, all such legacies as are due and payable by them, or a proportionate part thereof, first deducting all demands against the estate, and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue, distributable under the intestate laws of this commonwealth, they shall also distribute the same, and the proceedings in any such case shall, in all respects, whether of security or otherwise, be the same as are hereinbefore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will permit."

The jurisdiction is thus conferred on the Orphans' Court for the collection of a legacy.¹ In case the personal estate is insufficient to pay the debts, where there are devises, the latter must abate proportionally with the legacies, and the value of the devises must be estimated at the death of the testator and not the time of distribution.² When a bequest of a sum of money is made and time of payment fixed, that determines the precise sum to be paid at the time fixed; except where the law infers an intention to pay interest, from the relation of the testator to the legatee, which does not arise between godmother and goddaughter.³ The Orphans' Court has jurisdiction for the recovery of a legacy although it is not charged on the land. It has power to inquire into and determine all questions standing directly in the way of distribution, wherein every one must be heard in support of his claim and in opposition to every claimant interfering with it; it has power to decide all questions essential to distribution.⁴ It follows that a legatee cannot maintain a common law proceeding against the debtor of his testator's estate,⁵ although he may under section 50 of the act of 1834, *infra*, have such action against the executor for his legacy.⁶

²⁴ Hermann's Est., 220 Pa. 52.

²⁵ Arnson's Est., 24 Lanc. L. R. 382.

²⁶ Glandig's Est. (No. 2), 16 D. R. 546.

¹ Innes' Est., 4 Wharton, 179. (See also section 19 of the act of 1836, P. L. 784; Dundas' Ap., 73 Pa. 474.)

² Knecht's Ap., 71 Pa. 333.

³ Burd's Est., 71 Pa. 402.

⁴ Lippincott's Ap., 73 Pa. 474, following Kittera's Est., 17 Pa. 416; Whiteside v. Whiteside, 20 Pa. 473; Ashford v. Ewing, 25 Pa. 213; P. & L. Dig., vol. 14, col. 24311-2; Hummel v. Hummel, 80 Pa. 420.

⁵ Guthrie v. Kerr, 85 Pa. 303.

⁶ Gilliland v. Bredin, 63 Pa. 393; Burt v. Herron, 66 Pa. 400.

Where distribution has been made to legatees by an executor who has taken no refunding bonds, the obligation of the legatees to refund rests only upon a contract implied and the statute of limitations will run against it.⁷ The Court of Common Pleas in Equity of one county cannot determine the amount of a legacy under a will probated in another county; the Orphans' Court of the latter county is the proper forum.⁸ The ascertainment of next of kin is exclusively in the Orphans' Court.⁹

4. Time when legacies are due, when no time is fixed.

Section 51 of the act of 1834, *supra*, provides:

"Legacies if no time be limited for the payment thereof, shall, in all cases, be deemed to be due and payable at the expiration of one year from the death of the testator."

This act fixes the time absolutely,¹⁰ where the will fixes no time of payment, and is declaratory of the prior practice.¹¹ The rule that interest on legacies is chargeable only from one year after the death of the testator is administrative only and must give way at all times to the testator's intent whether express or implied from the tenor of the will.¹² This rule is not changed by a delay caused by gossip.¹³

Where a legacy is given the widow in lieu of her exemption it is, like her exemption, payable presently on demand.¹⁴ A legacy given for education and maintenance, which was not paid by the executor, will not be lost by laches from the fact that the legatee has arrived at the age of thirty years, especially where the real estate was sold for the payment of the legacy.¹⁵ Legacies made payable at the death or re-marriage of the widow become due on the happening of either event.¹⁶

5. Assent to legacy.

A legacy vests only by the assent of the legatee. An executor who is also legatee, by assenting to his own legacy vests it in himself as legatee, and his assent may be express or implied.¹⁷ But the testator may by his will withdraw articles from his executors and vest the title in them directly in the legatees. In such case the executor's assent is not required; in fact, he has nothing to do with them;

⁷ Robins' Est., 180 Pa. 630; Miller v. Hulme, 126 Pa. 277; Rastaetter's Est., 15 Supr. C. 549.

⁸ Henderson v. Stryker, 164 Pa. 170.

⁹ Clement's Est., 160 Pa. 391.

¹⁰ Brick's Est., 20 W. N. C. 45.

¹¹ Huston's Ap., 9 Watts, 477; Townsend's Ap., 106 Pa. 273; Koon's Ap., 113 Pa. 621; Phillips' Est., 133 Pa. 426.

¹² Flickwir's Est., 136 Pa. 374; Townsend's Ap., 106 Pa. 268, and cases cited; Twell's Est., 11 D. R. 713, Penrose, J., criticizing the cases *supra* and others.

¹³ Eichelberger's Est., 170 Pa. 242, approving Eyre v. Golding, 5 Binney, 472; Spangler's Est., 9 W. & S. 135. (See 7 Supr. C. 401, for Eichelberger's Est.)

¹⁴ Leberman's Est., 21 C. C. 416.

¹⁵ Lynch's Ap., 12 W. N. C. 104.

¹⁶ Brick's Est., 20 W. N. C. 499.

¹⁷ Hanbest's Est., 12 Phila. 72; Karns v. Tanner, 74 Pa. 339.

neither has the Orphans' Court jurisdiction, and the articles should not figure in the inventory. If, however, there are debts which these articles may be assets for, then the executor may insist on including them in the inventory and only deliver them, on bond for their return to answer the debts of the testator.¹⁸ If a legatee purchases goods at the sale, the executor may carry the debit for them over against his legacy, in his discretion.¹⁹ "Custom makes law." It has been the custom, "time out of mind," for children to take articles as "heirlooms," or family keepsakes, at the appraisement, and either pay for them, or have them charged against their respective shares. It needs no "case law" for this. The records of our Orphans' Courts, running back for more than a century, disclose in the accounts of executors and administrators, the evidence of the custom, when the estate was solvent.

If the estate, however, be insolvent, the legatee who receives a sum from the executor in excess of the bequest becomes a party to the *devastavit*.²⁰

6. Bequests in the alternative.

Where the bequest is in the alternative and payment is postponed, the thing substituted should be valued from the date of the death of the testator.¹ If there is a general legacy of stock and the legatee elects to take its value, it will be fixed as of the time of settlement.² Where there were female dresses specified, or the value thereof, the auditor distributed the value of such dresses to the legatees.³

7. Release of legacy.

If the legatee accepts the bond⁴ of the executor, or his note under seal⁵ in lieu of his legacy, it has been held to operate as a release and extinguishment. In a suit upon such obligation the executor cannot plead want of assets of the estate, nor is he entitled to a stay under section 53 of the act of February 24, 1834, P. L. 70.⁶ An estate given the widow during life or widowhood, terminates at her remarriage and her release is not binding upon the children.⁷ A successor to the trustee who defaulted cannot recover from a legatee a portion of what he received, alleging overpayment, the legatee not being aware of any deficit.⁸ But the Orphans' Court has power to compel restitution from legatees, on the application of creditors whose claims have been disregarded.⁹

¹⁸ Wood's Est., 7 D. R. 484. Penrose, J.

¹⁹ Baughman v. Divler, 3 Yeates, 9.

²⁰ Dunlap v. Bard, 2 P. & W. 307.

¹ Barnhill's Est., 29 Pitts. L. J. 203; McKeen's Ap., 42 Pa. 479.

² Dunlevy's Est., 51 Pitts. L. J. 331.

³ Wall's Est., 3 York, 87.

⁴ Hall v. Hurford, 2 Clark, 291.

⁵ Stewart's Ap., 3 W. & S. 476.

⁶ Hall v. Hurford, *supra*.

⁷ Hermes v. Hermes, 36 Pitts. L. J. 265.

⁸ Rahm's Est., 49 Pitts. L. J. 283.

⁹ Clinton's Est., 9 D. R. 455. Penrose, J.

8. Setting aside funds for annuities.

Where the eventualities of the estate are such that the executor cannot certainly know whether sufficient of the funds remains to pay the annuitants, he may set aside a sum from the residue for the purpose.¹⁰ The court may award to the trustee a sufficient fund to cover all contingencies, in addition to the annuity.¹¹ The annuitant cannot insist upon a greater security than that which the court deems ample; ¹² but he may insist upon the security afforded by the preservation of the estate as a whole.¹³

9. Interest, income and dividends.

Interest on a legacy begins to run one year after the death of the testator, unless the will clearly provides otherwise.¹⁴ If the will provides for payment as soon as convenient, interest begins after one year.¹⁵ This is also the rule as to a pecuniary legacy, although the fund is not realized until some time after.¹⁶ Also to a general legacy of stocks; ¹⁷ but before distribution, the dividends belong to the residuary estate.¹⁸ The burden of proving that a legacy bears interest before payable is upon him who asserts it.¹⁹ A legacy payable in installments bears interest from the time each installment becomes due.²⁰ In case of a life estate and remainder to a son charged with legacies to be paid by him, interest begins only at the death of the life tenant.²¹ On a trust fund interest begins at the time when the payment of the fund should have been made to the trustees.²² Residuary legacies do not generally bear interest until an administration account is filed showing that there is a fund for their payment.²³

10. Time of payment indicated by the will.

Usually the time when a legacy is payable indicates the time when interest begins.²⁴ If the executor be given two years in which to settle the estate, interest does not begin until two years have expired.²⁵ Whatever time is indicated in the will should govern.²⁶

¹⁰ Lathrop's Est., 3 D. R. 100.

¹¹ Mullen's Est., 16 Phila. 306.

¹² Rowan's Ap., 25 Pitts. L. J. 77.

¹³ Aubert's Ap., 119 Pa. 48; Joyce's Est., 5 C. C. 179.

¹⁴ Tweed's Est., 1 Chester Co. 469; Koon's Ap., 113 Pa. 621; Miller's Est., 7 Montg. 62; Beehler v. Smith, 3 Grant, 141; Eichelberger's Est., 170 Pa. 242; Phillips' Est., 133 Pa. 426; Flickwir's Est., 130 Pa. 374; Eyre v. Golding, 5 Binney, 472; Barr's Est., 33 C. C. 647; Herr's Est., 15 Lanc. L. R. 409.

¹⁵ Morris' Est., 3 C. C. 191.

¹⁶ Martin v. Martin, 6 Watts, 67; Huston's Ap., 9 Watts, 472.

¹⁷ Eckfeldt's Est., 13 Phila. 202; Dunlevy's Est., 51 Pitts. L. J. 331.

¹⁸ Yerkes' Est., 8 D. R. 83.

¹⁹ Randolph's Est., 6 D. R. 735.

²⁰ Lynch's Ap., 12 W. N. C. 104; Schall's Est., 17 D. R. 471.

²¹ Hermann's Est., 220 Pa. 52.

²² Trotter's Est., 15 D. R. 352. (See Hoffman's Est., 10 D. R. 669.)

²³ Herr's Est., 15 Lanc. L. R. 414.

²⁴ Langendorfer's Est., 8 D. R. 273.

²⁵ Patterson's Ap., 25 Pitts. L. J. 69.

²⁶ Meyers' Est., 7 York, 39; Simmon's Est., 16 Phila. 225; Lewis' Est., 19 York, 39.

After a life estate, a reasonable time is allowed for conversion.²⁷ So also, when a term expires by the re-marriage of the widow.²⁸ A bequest payable by the administrator is without limitation.²⁹ A contingent legacy does not bear interest until the contingency happens.³⁰ Without a different provision, interest will not be paid before the legacy falls due.³¹ The rule does not apply, where the executor is directed to put out a sum at interest for his minor son;³² and so where he holds the estate until the minors come of age.³³ A legacy in remainder bears interest from the death of the life tenant.³⁴

11. Interest on legacies by parents.

Where the legatee is a minor child, or a child in respect to which the donor stood *in loco parentis*, the law makes an exception and allows interest from the death of the testator,¹ unless other provision is made in the will for maintenance and education.² The same principle has been applied to a grandchild³ and an orphan grand-niece where the testator stood *in loco parentis*.⁴ But if the relation does not subsist the rule does not apply.⁵ If the intention of the testator is expressed in his will, it must govern.⁶

12. Interest on legacy to widow or creditor.

The rule as to interest from one year after the death of the testator applies to the widow, her position being different from that of the child which needs maintenance peculiarly.⁷ However, if no other means of support for her is provided, her case may come within the rule applied to the minor child.⁸ A legacy given in payment of a debt bears interest from the date of testator's death.⁹ A legacy to a daughter was held to bear interest only from one year after the death of the testator under the circumstances.¹⁰

²⁷ Stockdale's Est., 2 D. R. 577; Steel's Est., 2 D. R. 459.

²⁸ Laporte v. Bishop, 23 Pa. 152.

²⁹ Duffey v. Presb'y, Etc., 48 Pa. 46.

³⁰ Engle's Est., 167 Pa. 463.

³¹ Sill v. Rogers, 2 York, 185; Dewart's Ap., 70 Pa. 403; Leech's Ap., 44 Pa. 140; Kerr v. Bosler, 62 Pa. 183; Page's Ap., 71 Pa. 402.

³² Huston's Ap., 9 Watts, 472; Miles v. Wister, 5 Binney, 477.

³³ Yost's Est., 134 Pa. 426; P. & L. Dig., vol. 23, col. 41105.

³⁴ Hobson's Est., 16 Phila. 287; Jones' Ap., 3 Grant, 169; Boyle's Est., 12 Phila. 83; Wilstach's Est., 13 D. R. 733; Middleton's Ap., 103 Pa. 92.

¹ Magoffin v. Patton, 4 Rawle, 113; Cooper v. Scott, 62 Pa. 139; Jacoby's Est., 204 Pa. 188; Scott's Est., 22 Pitts. L. J. 58; P. & L. Dig., vol. 23, col. 41108.

² Skinner v. Bradford, 1 Miles, 52.

³ Leech's Ap., 44 Pa. 140; Dewart's Ap., 70 Pa. 403; Kerr v. Bosler, 62 Pa. 183; Bitzer v. Hahn, 14 S. & R. 232.

⁴ Robinson's Est., 35 Supr. C. 192.

⁵ Page's Ap., 71 Pa. 402; Sill v. Rogers, 2 York, 185.

⁶ Townsend's Ap., 106 Pa. 268; Phillips' Est., 133 Pa. 426.

⁷ Gill's Ap., 2 Pa. 221; Spangler's Est., 9 W. & S. 135.

⁸ Landis v. Landis, 2 Pearson, 109; Louck's Est., 17 York, 160; Townsend's Ap., 106 Pa. 268.

⁹ Smith's Ap., 2 Pa. 258; Randolph's Est., 6 D. R. 735.

¹⁰ Knauss' Est., 148 Pa. 265. (See Sinclair's Est., 116 Pa. 316.)

13. Bequest of income or interest of a fund.

The legatee or annuitant of the interest or income of a fund for life with remainder over is entitled to interest from the death of the testator.¹¹ The rule applies equally to interest on the residue or a part of it.¹² But if the fund is non-productive interest begins from the time it becomes productive.¹³ If it is productive the rule applies where the fund is paid to trustees to invest,¹⁴ although the investment is made as directed by the Orphans' Court.¹⁵ The rule is different as to the principal sum.¹⁶

14. Interest on specific legacies and annuities.

Interest on specific legacies is payable from the death of the testator.¹⁷ Unpaid annuities bear interest from the time they become due;¹⁸ the same is true of a charge on land payable at definite periods.¹⁹ A weekly sum payable to the widow, in lieu of dower, is of the same nature.²⁰ Delay, owing to mistake or misapprehension of the time when due, does not stop the interest.²¹ The executor is chargeable with legal interest on the arrears he has neglected to pay.²²

15. Term of an annuity.

An annual allowance for keeping testator's children means during their minority only and terminates when they come of age;²³ unless upon the whole will the intent be to continue it for a longer period.²⁴ Whatever term the will directs, by fair construction, is the time during which an annuity shall run.²⁵

16. Making up deficiencies in annuities.

Where the income proves insufficient to pay an annuity, the deficiency cannot be made up out of the income of succeeding years, where the will does not admit of it;²⁶ nor out of the *corpus* of the

¹¹ *Eyre v. Golding*, 5 Binney, 472; *Flickwir's Est.*, 136 Pa. 374; *Eichelberger's Est.*, 170 Pa. 242; *Louck's Est.*, 17 York, 160; *Heinitsh's Est.*, 22 Lanc. L. R. 27; P. & L. Dig., vol. 23, cols. 41115-7.

¹² *King's Est.*, 11 Phila. 26; *Brown's Est.*, 190 Pa. 464; *Jacoby's Est.*, 204 Pa. 188.

¹³ *Spangler's Est.*, 9 W. & S. 135.

¹⁴ *Penna. Co., Etc., Ap.*, 41 Leg. Int. 26; *Lysinger's Est.*, 21 Montg. 172; *Mooney's Est.*, 19 Montg. 174.

¹⁵ *Eichelberger's Est.*, 170 Pa. 242.

¹⁶ *Eichelberger's Est.*, 7 Supr. C. 401.

¹⁷ *Ash's Est.*, 8 W. N. C. 28; *Bird's Est.*, 2 Parsons, 168; *Robinson's Est.*, 24 C. C. 528; *Yerkes' Est.*, 8 D. R. 83; *Culbertson's Est.*, 42 Pitts. L. J. 368; *Schell's Est.*, 3 D. R. 738.

¹⁸ *Lewis' Est.*, 19 York, 39.

¹⁹ *Addams v. Heffernan*, 9 Watts, 529; *Brotzman's Est.*, 133 Pa. 478.

²⁰ *Tees' Est.*, 5 D. R. 361.

²¹ *Hoffman's Est.*, 3 D. R. 663.

²² *Solliday v. Bissey*, 12 Pa. 347.

²³ *Hewson's Ap.*, 102 Pa. 55.

²⁴ *Engle's Est.*, 166 Pa. 280; *Garrett's Est.*, 12 D. R. 325.

²⁵ *Brotzman's Est.*, 133 Pa. 478.

²⁶ *Brewster's Ap.*, 12 Atl. 470; *Sell's Est.*, 4 W. N. C. 14.

estate.²⁷ But where the annuity is to be paid out of net income a different rule was laid down by Burnside, J.,²⁸ and although criticized, the justice of it is obvious. *Quære* whether the exception is not wiser than the rule. In a later case the deficiency was allowed out of the rents of the residuary estate.²⁹ An executor, unless permitted by the will, cannot invest a further sum to meet the deficiency.³⁰ Where the rents from a coal lease produced a deficiency one year, it was held, following the older authorities that it could not be paid out of the surplus of a former year, since that goes into the residue.³¹ The burden of proving that the income is insufficient to pay the annuities, is upon the legatee.³² An annuity of dower, or in lieu of dower stands on a different footing.³³ And so a provision for the maintenance of a niece for life is not dependent upon what the residuary legatee for life receives from the income.³⁴

17. Delay in distribution as affecting interest.

As a rule delay in distribution by litigation, or because the fund is unproductive, does not deprive the beneficiary of the right to have interest.³⁵ But where the legatee himself causes the delay by litigation, it is otherwise.³⁶ The executor is liable to pay interest to a minor grandchild from the death of the testator although no demand is made or refunding bond tendered. Laches cannot be imputed to the child.³⁷ If the legatee allows the specific fund to remain in the hands of the executor until the death of the latter he can recover interest only from the date of demand.³⁸ An executor who tenders payment but does not keep it good, must pay interest from one year after the death of the testator.³⁹

18. Rate of interest.

The rate of interest is six per cent. although the fund on deposit may be drawing less.¹ But by way of compromise a rate of four per cent. was fixed.² If the bequest is "net income" it means the income actually earned.³ Where the legatee contested the will, the court allowed him at the rate which the fund earned.⁴ Where an estate was idle the deficiency was ordered made up out of the principal, and six per cent. interest allowed.⁵

²⁷ Stevenson's Est., 52 Pitts. L. J. 137.

²⁸ Rudolph's Ap., 10 Pa. 34.

²⁹ Denis' Est., 169 Pa. 493.

³⁰ Ulrich's Est., 2 Chester Co. 357.

³¹ Shupp v. Gaylord, 103 Pa. 319.

³² Brolasky's Ap., 3 Penny. 322.

³³ Earp's Will, 1 Parsons, 453.

³⁴ McCloskey's Est., 14 Phila. 255.

³⁵ Evans' Est., 11 Phila. 113; Patterson's Est., 3 D. R. 796; Sloan's Ap., 168 Pa. 422; Eichelberger's Est., 170 Pa. 242; Huston's Ap., 9 Watts, 472.

³⁶ Wickersham's Est., 16 Phila. 213; Vandergrift's Ap., 80 Pa. 116.

³⁷ Bitzer v. Hahn, 14 S. & R. 232.

³⁸ Starr's Est., 190 Pa. 162.

³⁹ Godwin's Est., 22 Supr. C. 469; Louck's Est., 17 York, 160.

¹ King's Est., 11 Phila. 26; Sloan's Ap., 168 Pa. 422.

² Twell's Est., 11 D. R. 713. (See Lysinger's Est., 21 Montg. 172.)

³ Patterson's Est., 3 D. R. 796.

⁴ Baugh's Est., 12 D. R. 303.

⁵ Reighard's Ap., 125 Pa. 628.

CHAPTER XLII.

RECOVERY OF LEGACIES CHARGED ON LAND — ACTIONS FOR LEGACIES — PROTECTION OF CON- TINGENT INTERESTS, AND THOSE IN RE- MAINDER.

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| 1. What creates a charge on land. | 21. Form of decree. |
| 2. Request to pay not a charge. | 22. Court to distribute the fund. |
| 3. When intention is indicated by the will. | 23. Charges, satisfaction of. |
| 4. Deficiency of personalty. | 24. Action for legacy. |
| 5. Effect of blending estates. | 25. Demand before suit. |
| 6. Provisions for maintenance, etc. | 26. Plea of "no assets" suspends suit. |
| 7. Recovery of legacy charged on land. | 27. Execution to be stayed for want of assets. |
| 8. Jurisdiction and procedure. | 28. Nonsuit when there are no assets. |
| 9. Executor not a party. | 29. Costs in the discretion of the court. |
| 10. Petition by legatee. | 30. Ademption — conclusiveness of decree. |
| 11. Form of petition. | 31. Abatement of legacies. |
| 12. Form of order for citation. | 32. Interests in remainder in personalty. |
| 13. Form of citation. | 33. Protection of contingent interests. |
| 14. Form of appointment of auditor. | 34. Security by holders of interests limited or conditional. |
| 15. Form of auditor's subpoena. | |
| 16. Auditor's report. | |
| 17. Form of decree for petitioner. | |
| 18. Land lying in another county. | |
| 19. Legatee required to give security. | |
| 20. Payment into court. | |

1. What creates a charge on land.

The term "devise" as used in its more restricted sense relates to land given by a will. If, then, a testator gives a bequest of any form which he intends shall be paid out of land devised it is a charge on that particular land and the devisee takes the land subject to it, provided the condition of the devise is that he pay such legacy or annuity or other charge.¹ It must be a condition not coupled with the legacy, but with the devise; and so a devise "provided he pays" a certain legacy effects a charge on the land devised;² so, also, "by paying" a legacy designated;³ or, by "paying thereout" certain bequests;⁴ and all tantamount words or phrases affixing the condition

¹ Wise's Est., 188 Pa. 258; Moran's Est., 13 Supr. C. 251; Gumaer's Est., 19 Supr. C. 621; Dobbin's v. Stevens, 17 S. & R. 13; Gallagher's Ap., 48 Pa. 121; Lefevre's Est., 171 Pa. 404.

² Holliday v. Summerville, 3 P. & W. 533; Pryer v. Mark, 129 Pa. 529; Phillips' Ap., 34 Pitts. L. J. 240.

³ Drake v. Brown, 68 Pa. 223; Lake's Est., 4 York, 141.

⁴ Newell's Will, 1 Browne, 311; Swoope's Ap., 27 Pa. 58.

to the devise, so that when the devisee accepts, the charge is definitely vested.⁵ Any form of charge to be paid by "the holder" of the devise, or the person to whom the devise is made, is sufficient to charge it upon the land.⁶ So, the reservation of a living out of the land for testator and wife as long as both and each lives is a charge.⁷ But a legacy payable out of the testator's estate is not a charge on the land devised, since it is not made a condition thereof,⁸ unless the meaning of the testator in connection with the word "estate" and the devise was the real estate or land.⁹

2. Request to pay, not a charge.

A devise coupled with a request to pay legacies, etc., which does not amount to a condition, will not create a charge.¹⁰ Where the testator requires the devisee to give security for the legacy it is not charged on the land.¹¹ A direction to his executor to erect a monument on testator's grave is not a charge on the land, either.¹²

3. When intention is indicated by the will.

The intention of the testator to charge the legacy upon the land may be gathered from the provisions of the will and implied therefrom.¹³ It cannot be implied from equivocal words. The intention must be obvious and not conjectural.¹⁴ Where all the circumstances connected with the devise point to a charge on the land the court will hold the implication to be obvious.¹⁵ An annuity charged on the land is not divested by a sheriff's sale of the land for arrearages.¹⁶

⁵ *Solliday v. Gruver*, 7 Pa. 452; *Sharp's Est.*, 7 Supr. C. 372; *Hand's Est.*, 50 Pitts. L. J. 350.

⁶ *Newman's Ap.*, 35 Pa. 339; *Hammond's Est.*, 197 Pa. 119; *Knecht's Ap.*, 71 Pa. 333; *Springer's Ap.*, 111 Pa. 228; *Wertz's Ap.*, 69 Pa. 173; *Walter's Est.*, 197 Pa. 555; *Hanna's Ap.*, 31 Pa. 53; *McCredy's Ap.*, 47 Pa. 442; *Pierce v. Livingston*, 80 Pa. 99; *Rutt's Est.*, 35 Supr. C. 522; *Sweigart's Est.*, 26 Lanc. L. R. 53; *De Haven's Est.*, 7 Dauphin Co. 219.

⁷ *Hamilton v. Whitely Twp., etc.*, 12 Pa. 147.

⁸ *Brookhart v. Small*, 7 W. & S. 229.

⁹ *Lloyd's Est.*, 174 Pa. 184.

¹⁰ *Brandt's Ap.*, 8 Watts, 198; *Montgomery v. McElroy*, 3 W. & S. 370; *Dewitt v. Eldred*, 4 W. & S. 414; *Hackadorn's Ap.*, 11 Pa. 86; *Wright's Ap.*, 12 Pa. 256; *Hamilton v. Porter*, 63 Pa. 332; *Buchanan's Ap.*, 72 Pa. 448; *Cable's Ap.*, 91 Pa. 327; *Walter's Ap.*, 95 Pa. 305; *Van Vliet's Ap.*, 102 Pa. 574; *Schmehl v. Bickel*, 8 Atl. 874; *Rowson's Est.*, 6 D. R. 61; *P. & L. Dig.*, vol. 23, col. 41150; *King's Est.*, 216 Pa. 483; *Malone v. Mounts*, 17 D. R. 884.

¹¹ *Seybert's Est.*, 6 Kulp, 141.

¹² *Stark v. Byers*, 213 Pa. 101.

¹³ *Ripple v. Ripple*, 1 Rawle, 386; *Gilbert's Ap.*, 85 Pa. 347; *Sharp's Est.*, 7 Supr. C. 372; *Kleinhenz's Est.*, 45 Pitts. L. J. 306. (But see *Sauer v. Mollinger*, 138 Pa. 338.)

¹⁴ *McCleneghan's Ap.*, 24 Leg. Int. 276; *Okeson's Ap.*, 59 Pa. 99; *Gorgas' Ap.*, 22 W. N. C. 17; *Duvall's Est.*, 146 Pa. 176; *Mellon's Ap.*, 46 Pa. 165.

¹⁵ *Dickerman v. Eddinger*, 168 Pa. 240; *P. & L. Dig.*, vol. 23, col. 4154.

¹⁶ *Walters v. Steele*, 210 Pa. 219.

4. Deficiency of personalty.

An intention to charge a legacy upon the land will not be inferred from a mere deficiency of personal assets to pay it.¹⁷ There is a distinction between those cases where the devise is directly charged and those where the land is resorted to when the personalty is insufficient to pay the legacies. Lowriè, Ch. J., said:¹⁸ "Land may be contingently liable for the latter purpose, though the testator had no thought of such an event. For the former purpose his will must show that he intended it. In the one case it is a question of charge in the strict sense of the term; in the other, it is a question of contribution among legatees and devisees, and where devisees take land by will they hold it subject to this contingency, as they do subject to debts." To cast the legacies upon the land it must appear that the testator intended to relieve the personalty from paying them.¹⁹ If the executor has personal assets sufficient to pay the debts and the legacies the land will not be laid under tribute.²⁰ In case of a deficiency, it must be determined from the whole will whether the testator meant that the legacies should be paid out of the land.²¹ But the intention cannot be inferred from the fact alone that there was no personal estate when testator made his will.²² Where, at the time, the testator had supposedly abundance of personalty and also real estate which he does not mention except to give his wife the right to occupy the mansion, the legacies are not charged on the real estate.²³

5. Effect of blending estates.

When the testator blends realty and personalty in disposing of the residue the legacies become charged on the land coming within the residuary clause.¹ In such case it is immaterial how the personalty was applied,² or that there was a gift to charity, avoided by the testator's death within a calendar month.³ The rule may be applied where there is a blending in a general devise not residuary.⁴

¹⁷ Duvall's Est., 146 Pa. 176; Dugan v. Law, 1 Supr. C. 338; Heathcote's Est., 209 Pa. 522; Breden v. Gilliland, 67 Pa. 34.

¹⁸ Riley's Ap., 34 Pa. 291; Donnelly's Est., 8 D. R. 182; Clery's Ap., 35 Pa. 54.

¹⁹ Eavenson's Ap., 84 Pa. 172; Mann's Ap., 14 Atl. 270.

²⁰ Hanna's Ap., 31 Pa. 53; Kohler's Ap., 3 Grant, 143.

²¹ English v. Harvey, 2 Rawle, 305; Davis' Ap., 83 Pa. 348; Wiltberger's Est., 24 W. N. C. 493; Linnard's Est., 24 W. N. C. 492; Monro's Est., 9 Phila. 309; Field's Ap., 36 Pa. 11; McFait's Ap., 8 Pa. 290.

²² Haddock's Est., 18 Phila. 77.

²³ Espy's Est., 207 Pa. 459.

¹ Nichols v. Postlethwaite, 2 Dallas, 131; Hassanclever v. Tucker, 2 Binney, 525; Bennett's Est., 148 Pa. 139; Markley's Est., 148 Pa. 538; Sloan's Ap., 168 Pa. 422; Walter's Est., 197 Pa. 555; P. & L. Dig., vol. 23, cols. 41165-8.

² Cook v. Petty, 108 Pa. 138.

³ Davis' Ap., 83 Pa. 348.

⁴ McLanahan v. Wyant, 1 P. & W. 96; Snyder's Est., 14 Supr. C. 509; Walter's Est., 197 Pa. 555; Powell's Est., 10 D. R. 46; P. & L. Dig., vol. 23, cols. 4170-3.

6. Provisions for maintenance, etc.

A bare direction that the devisee shall maintain a certain person is not a charge on the land.⁵ The "wish and desire" that devisee should give testator's daughters "a home and residence in the house I now live in," does not bind the land for their maintenance.⁶ Expressions of "wish" and "desire" amount to a purely personal duty which the testator charges upon the devisee and not the land devised.⁷ But if he directs the maintenance out of the proceeds of the land, it is charged.⁸ A legacy need not be of a specific sum to be charged on land.⁹ The expression of a "wish" that a devisee shall permit testator's parents to remain on the premises for life and that he should maintain them, while not a charge on the land under the rule, is a trust which the court might feel constrained equitably to enforce by applying the rents to that purpose.¹⁰

7. Recovery of legacy charged on land by petition in the Orphans' Court.

Section 59 of the act of February 24, 1834, P. L. 70, provides:

"When a legacy is or shall be hereafter charged upon, or payable out of real estate, it shall be lawful for the legatee to apply, by bill or petition, to the Orphans' Court having jurisdiction of the accounts of the executor of the will by which such legacy was bequeathed; whereupon, such court having caused due notice to be given to such executor, and to the devisee or heir, as the case may be, of the real estate charged with such legacy, and to such other persons interested in the estate as justice may require, may proceed, according to equity, to make such decree or order touching the payment of the legacy, out of such real estate, as may be requisite and just."

8. Jurisdiction and procedure.

Where there is a will charging the land with a devise on condition, it cannot be evaded by partition proceedings.¹¹ To charge a legacy on land it must be done so by express words or that it may be inferred as the intention of the testator, from the whole will.¹² The jurisdiction of the Orphans' Court in such case is exclusive.¹³ A mere direction to pay a legacy, is however not a charge, but the devisee who is so directed becomes personally bound, if he accepts the devise with the direction.¹⁴ Where an annuity is charged on land

⁵ Haworth's Ap., 105 Pa. 362.

⁶ Kennedy's Ap., 81 * Pa. 163; Cable's Ap., 91 Pa. 327; Sight's Pet., 7 C. C. 49.

⁷ South Mahoning Twp. v. Marshall, 138 Pa. 570; Pringle v. Marshall, 152 Pa. 603; Walter's Est., 197 Pa. 555.

⁸ Gibson's Ap., 25 Pa. 191.

⁹ Marcy's Est., 22 Pa. 140; Steele's Ap., 47 Pa. 437.

¹⁰ Carey's Est., 14 D. R. 891.

¹¹ Downer v. Downer, 9 Watts, 60; Craven v. Bleakney, 9 Watts, 19.

¹² Montgomery v. M'Elroy, 3 W. & S. 370.

¹³ Reed v. Reed, 5 Pa. 241 n.; Strickler v. Strickler, 5 Pa. 240; Gibson's Ap., 25 Pa. 191; Pierce v. Livingston, 80 Pa. 99; P. & L. Dig., vol. 14, col. 24406.

¹⁴ Miltenberger v. Schlegel, 7 Pa. 241.

devised the alienee of such devisee become personally liable for the arrears and the Orphans' Court may decree payment, and if the lands are deficient the alienee must respond out of his personal estate.¹⁵ The Orphans' Court has jurisdiction to compel payment of a charge on land not bequeathed, to which the personal representatives are entitled under the intestate laws.¹⁶

The proceeding being equitable a petition will not be dismissed for the misjoinder of a party plaintiff. The beneficiaries are the proper parties and need not raise an administrator *de bonis non* for the purpose.¹⁷

The Orphans' Court has jurisdiction whether the sum charged be specific or otherwise.¹⁸ Where a devisee accepts land at a valuation or price to be paid, the title passes subject to the lien thereof, and on petition of the proper parties, the court will decree that the second purchaser shall pay such valuation, interest and costs within a time fixed, and in default thereof a *levari facias* to issue against the land.¹⁹ The executors should be made parties respondent and all the legatees may join in the same petition. "Reasonable time" to pay the legacies charged is one year. The granting of an issue is discretionary with the court.²⁰ Where a legacy is charged not on the land, but on the person of the devisee, suit may be brought for it and it is payable forthwith. The above section does not apply to such a case.²¹

Words in a will expressing that the testator desires, wishes or wills are commands and not merely precatory. So where he desires his debts, naming creditors, to be paid, it is a direction and a legacy to those named as a class, but not a charge on the land.²² If exclusively payable out of lands, the proceeding is in the Orphans' Court.²³ The jurisdiction of the court attaches on the presentation of the petition, and the court having all the power over it that a court of Equity would have may decree the legacy to the respondent if entitled.²⁴ If a party who ought to be joined is omitted the petition may be amended. In case of a devise to a son subject to

¹⁵ Mohler's Ap., 8 Pa. 26.

¹⁶ Sheaffer's Ap., 8 Pa. 38.

¹⁷ Downer v. Downer, 9 Pa. 302. Rogers, J.: "It is impossible to make me believe the legislature had the intention to take one man's property and give it to another."

¹⁸ Marcy's Est., 22 Pa. 140.

¹⁹ Hart v. Homiller's Ex., 23 Pa. 39; Swoopes' Ap., 27 Pa. 58.

²⁰ Baker's Ap., 59 Pa. 313. Lands of the residuary devisee can only be charged on petition of the legatee, though the executor must be brought in as a party. Fleming's Est., No. 4, 15 D. R. 233, Penrose, J. Where a legacy is bequeathed in trust, the trustee may petition. Robinson's Est., 16 D. R. 31; 35 Supr. C. 192.

²¹ Hamilton v. Porter, 63 Pa. 332.

²² Burt v. Herron, 66 Pa. 400; Wertz' Ap., 69 Pa. 173; Wingett v. Bell, 14 Supr. C. 558; Pierce v. Livingston, 80 Pa. 99; Giddings, Ex., v. Decker, 8 Luz. R. 177; Weaver's Est., 2 Dauphin, 84.

²³ Breden v. Gilliland, 67 Pa. 34; Gibson's Ap., 25 Pa. 191; Pierce v. Livingston, 80 Pa. 99; P. & L. Dig., vol. 14, col. 24406.

²⁴ Shirey's Est., 68 Pa. 477; Giddings v. Decker, 8 Luz. L. R. 177; Walker v. Gibson, 164 Pa. 512; P. & L. Dig., vol. 14, col. 24407.

the payment of a certain sum in ten equal installments without interest until due, etc., the legacy is demonstrative, payable out of the land and a charge on the devise. The personal estate being insufficient to pay the legacies and devise, they must abate proportionally, and the devise must be valued as of the date of the death of the testator.²⁵ Where the Orphans' Court jurisdiction is exclusive, it means both the equity and common law sides of the Common Pleas.²⁶

9. Executor not a party.

The executor has nothing to do with legacies expressly charged on land, either primarily or as part of the residuary estate of the testator, and such legacies can only be enforced in the Orphans' Court. In a proceeding by attachment execution as against the executor as garnishee, the residuary legatees not being in court, they are not concluded by the judgment against such garnishee, and are entitled to be heard by equity before equity appropriates their estate to creditors.²⁷

That the executor has no standing as petitioner has been adjudicated in many cases;²⁸ but that he is entitled to notice of the proceeding by the parties is equally adjudged and unshaken,²⁹ except by the generalization in *Hartzell's Est.*, cited. A charge on land is not affected by a sheriff's sale under a judgment against the devisee prior to the event when made payable.³⁰ Under the act of February 24, 1854, P. L. 70, the administrator of a legatee's estate has a standing to enforce payment of a vested legacy charged on land;³¹ the widow not being the proper party.³² It is held that the legatee is entitled to partition in order to apply for the sale of the real estate, although his petition does not in terms ask for it, since the Orphans' Court will "do equity and reach the justice of the case."¹ Amendment will be allowed at any stage of the case to reach the equities and afford appropriate relief.² If the legacies were plainly payable out of the personal estate a petition to sell land for their payment will be dismissed.³ Where a charge on land was created, the interest to be paid to a son who became a pauper, the overseers of the poor had no claim upon the principal as against the remainderman.⁴ The

²⁵ *Knecht's Ap.*, 71 Pa. 333; *Kunkle's Est.*, 21 Supr. C. 200.

²⁶ *Brozman's Ap.*, 119 Pa. 645; *Brozman's Est.*, 133 Pa. 478, distinguishing *Kearns v. Kearns*, 107 Pa. 575.

²⁷ *Luckenbach's Est.*, 170 Pa. 586; *Luckenbach v. Luckenbach*, 175 Pa. 484; *Hartzell's Est.*, 178 Pa. 286, overruling *Hart v. Homiller*, 23 Pa. 39; overruled so far as making the executor petitioner or joining him with other petitioners is concerned.

²⁸ *Conard's Ap.*, 33 Pa. 47; *Field's Ap.*, 36 Pa. 11; *Baker's Ap.*, 59 Pa. 313; *Knecht's Ap.*, 71 Pa. 333, and *Hartzell's Est.*, 178 Pa. 286.

²⁹ *Conard's Ap.*, 33 Pa. 47; *Weiler's Est.*, 169 Pa. 66; *Fleming's Est.*, No. 4, 15 D. R. 233; *Robinson's Est.*, 16 D. R. 31; 35 Supr. C. 192.

³⁰ *Hammond's Est.*, 197 Pa. 119.

³¹ *Moran's Est.*, 13 Supr. C. 251.

³² *Palm's Est.*, 13 Supr. C. 296.

¹ *Penrose, J.*, in *Cassady's Est.*, 9 W. N. C. 275.

² *Eyres' Ap.*, 106 Pa. 184.

³ *Murphy's Est.*, 24 W. N. C. 232.

⁴ *Worthington's Est.*, 9 C. C. 188.

same principle which governs a legacy applies also to an annuity.⁵

The jurisdiction of the Orphans' Court "is not confined to the collection of legacies strictly, so called, charged upon and payable out of land, but extends to every charge upon land springing out of a testamentary disposition. Nor is such jurisdiction left to implication from the general jurisdiction of the Orphans' Court to settle and distribute decedent's estates, but is expressly conferred by section 59 of the act of February 24, 1834."⁶ After long delay, the legatee may be barred of his remedy⁷ and be cut out, unless he can prove a family arrangement by which his right was preserved. The Orphans' Court has no jurisdiction where the testator provides that his widow shall have the farm for life, but his son shall have the refusal of the renting of the same, paying her one-half the proceeds, as this was not a charge on land.⁸

10. Petition of legatee.

A legatee or one who claims a charge upon land is the proper person to apply to the Orphans' Court for such relief as may be equitable and just and a number of legatees may join in the same petition.¹⁰ If the person entitled shall die before proceedings are begun, his legal representative is the proper person to petition.¹¹ So far as the executor is concerned he cannot petition¹² but he must be made a party respondent¹³ and if he be dead, it has been held an administrator should be appointed to represent the estate, with good reason.¹⁴ There is an exception, however, in which the executor may petition, viz.: where by the will it is directed that the charge is payable to him;¹⁵ and if he be dead the administrator *c. t. a.* may petition,¹⁶ but this does not take away the right of the legatee to petition without having to raise an administrator *de bonis non* for the purpose.¹⁷ It is not fatal to the petition if the executor be joined with the legatees.¹⁸ The executor has no right to the proceeds, of the sale, it seems, unless the will provides so.¹⁹ If there is a misjoinder, it is amendable.²⁰ If one of the executors be also a legatee and joins in the petition and the other being the sole devisee is made respondent

⁵ Dinsmore v. Ramsay, 13 C. C. 119; Danforth's Ap., 121 Pa. 359; Mohler's Ap., 8 Pa. 26.

⁶ Kunkel, J., in De Haven's Est., 7 Dauphin, 219, citing Downer v. Downer, 9 Watts, 60, and others, *supra*.

⁷ Stark's Est., 22 C. C. 25.

⁸ Parker's Est., 2 D. R. 101.

⁹ Springer's Ap., 111 Pa. 274.

¹⁰ Baker's Ap., 59 Pa. 313; Conard's Ap., 33 Pa. 47.

¹¹ Wertz's Ap., 69 Pa. 173; Palm's Est., 13 Supr. C. 296.

¹² Hartzell's Est., 178 Pa. 286, overruling Hart v. Homiller, 23 Pa. 39, on this point.

¹³ Baker's Ap., 59 Pa. 313.

¹⁴ Brownhill's Est., 7 Phila. 494.

¹⁵ Weaver's Est., 2 Dauphin Co. 84.

¹⁶ Newman's Ap., 35 Pa. 339.

¹⁷ Downer v. Downer, 9 Pa. 302.

¹⁸ Littleton's Ap., 93 Pa. 177.

¹⁹ Dunn's Est., 8 D. R. 289.

²⁰ Downer v. Downer, 9 Pa. 302.

the irregularity is amendable.²¹ The title will not be invalidated where the devisees had notice and did not object, although they were not made parties to the record.²² Misjoinder of respondents is not fatal, where they have not been prejudiced.²³ If the devisee has died, his personal representative is properly substituted for him.²⁴ The estate being in the devisees they are entitled to be made parties respondent.²⁵

11. Form of petition.

To the Honorable — —, President Judge of the Orphans' Court of — — County:

The petition of — — respectfully represents that

1. — — late of — — county, died on the — — day of — — A. D. 19—, having previously made his last will and testament which was duly proved and recorded in Will Book — — in the office of the Register of Wills in said county, wherein and whereby he devised unto — — a certain piece and parcel of land described as follows: [Description by metes and bounds and *situs*].

2. That said piece and parcel of land was by said will charged and made subject to the payment of — — dollars to your petitioner — —, which became due and payable on the — — day of — — A. D. 19—, and that as yet no part of the same has been paid although demanded.

3. That all the debts of the said — —, testator as aforesaid have been paid so far as they have been made known, and one year has elapsed since the granting of letters on said estate [or as the case is].

4. That said — — devisee as aforesaid entered into possession of the above described land and is now in possession thereof.

Your petitioner therefore prays that an order be made by your honorable court commanding the said — — to pay your petitioner the sum of — — dollars, or in default thereof that the land so charged be sold for the payment of said sum.

And he will ever pray, etc.

— —.

Sworn to, etc.

12. Form of order for citation.

Now, to-wit: — — day of — — it is considered and ordered that a citation is awarded directed to — — commanding him to appear and show cause, if any he have, why the prayer of the petitioner shall not be granted.

Returnable, at — o'clock — M.,
— — day of — —, A. D. 19—. }

Per cur.
— —, P. J.

²¹ Knecht's Ap., 71 Pa. 333.

²² Cresson's Est., 3 Phila. 270.

²³ Springer's Ap., 111 Pa. 228.

²⁴ Swoope's Ap., 27 Pa. 58.

²⁵ Torrance v. Torrance, 53 Pa. 505; Jenkins v. Jenkins, 7 Pa. 246.

13. Form of citation.

Lancaster County, ss.

The Commonwealth of Pennsylvania.

To ———, greeting:

At the instance of ——— you are hereby cited to be and appear in your proper person before the judge of the Orphans' Court, at an Orphans' Court to be held at Lancaster City, in and for said county, on the ——— day of ———, A. D. 19—, at ——— o'clock — M. then and there to show cause, if any you have, why the prayer of said ———, should not be granted. Hereof fail not at your peril.

Given under my hand and the seal of said court this ——— day of ———, A. D. 19—. By the Court,

[Seal.] Attest:

———, Clerk.

This citation will be served as other process is and due return made. The respondent may answer and admit or deny. If his answer raises questions of facts which the court does not itself pass upon, it may refer the same to an auditor for his report.

14. Form of appointment of auditor.

In the matter of, etc.

In the Orphans' Court of ——— County.

Now, to-wit: ———, day of ———, A.D. 19—, upon agreement of counsel [or the parties] the court, on motion of ———, Esq., appoints ———, Esq., auditor, to take testimony and report upon the questions of fact and law arising herein.

Per cur.

———, P. J.

15. Form of the auditor's subpoena.

The auditor having accepted and been sworn to perform his duties faithfully and impartially, will fix a day for hearing, give due notice thereof, and when necessary issue his subpoena for witnesses, which is in the following form:

County of Lancaster, ss.

The Commonwealth of Pennsylvania,

To ———, ———, and ———, greeting:

We command you and each of you that you be and appear in your proper person before ———, Esq., auditor, appointed by the Honorable, the Orphans' Court of Lancaster County, to take testimony and report in the matter of ———, at the Court House, in the City of Lancaster, in said County on the ———, day of ———, A.D. 19—, at ——— o'clock, in the ——— noon, then and there to give evidence on the part of the [petitioner or respondent]. Hereof fail not under the penalty which may ensue.

Lancaster, Pa., the ——— day of ———, A. D. 19—.

———, [Seal.] Auditor.

16. Auditor's report.

Having heard the parties and their witnesses the auditor will report his findings of fact and of law to the court and also annex such exceptions as may be filed as in other cases. [See Vol. II, Johnson's Practice.]

The court will hear and determine the exceptions, if any, in regular order, on the argument list of the court, and if the report is favorable to a decree of payment, the court will decree such payment, or, in the alternative that the land charged be sold; otherwise, will dismiss the petition and make an order as to costs.

17. Form of decree of court for petitioner.

And now, to-wit, — day of —, 19—, after due consideration, aided by the report of an auditor, the court order, adjudge, and decree, as follows: (1) That there is now due — —, by virtue of the bequest to her as set forth in her petition, the sum of — dollars [with interest], and that said sum is a charge on the lands described in the petition. And it is further adjudged and decreed, that the said — —, the owner of said tract of land, shall each pay forthwith to — —, the petitioner, the sum of — dollars [with interest], and that in default of payment of the said sum for thirty days, then the payment may be enforced out of the land of the defaulting owner by a public sale of the land on writ of *levari facias* at such time and place, and on such terms as this court may hereafter further decree. And that the said respondent pay the costs of this proceeding.

By the Court.

The above form complies with the accepted practice.¹ However, a decree that the executor sell the land at public vendue has been sustained,² and it has also been held that the court has power to enforce its decree by attachment and sequestration.³ Where the land is held by several persons in distinct portions, the decree should be for the sale of the land charged, and not an apportionment.⁴ Where the respondent appears to be entitled to the legacy, the court may in this proceeding award it to him.⁵ If there are a number of pieces of land in an undivided interest, the court may order partition, although not asked for in the petition.⁶

18. Land charged with a legacy, lying in another county.

Section 60 of the act of 1834, *supra*, provides:

"If the real estate charged with such legacy shall be situate in another county, and the party against whom such decree may have been made shall fail to comply therewith, according to the terms thereof, such decree may be certified to the Orphans' Court of the county in which such real estate is situate, and thereupon the like proceedings may be had in such court for enforcing payment of the amount decreed to be paid, as if the real estate were situate in the county in which application was originally made."

¹ Dunn's Est., 8 D. R. 289; Rhone's O. C. Pr., vol. 2, p. 288; Pope's Est., 4 W. N. C. 431; Colhoon's Est., 16 Phila. 311; Baker's Ap., 59 Pa. 313.

² Wiltberger's Est., 24 W. N. C. 493; Lynch's Ap., 12 W. N. C. 104.

³ Solliday v. Gruver, 7 Pa. 452.

⁴ Dewart's Ap., 70 Pa. 403.

⁵ Postlethwaite's Ap., 68 Pa. 477.

⁶ Cassady's Est., 13 Phila. 383.

19. Legatee required to give security.

Section 61 of the act of 1834, *supra*, provides:

"Before such legatee shall be entitled to the benefit of any such decree, he shall give such security as the court, in which the application was originally made, shall direct, for the indemnity of the devisee or heir, or other person interested, in the event of any debt due by the testator being recovered, for the payment of which such real estate would be liable."

The form of the bond is similar to that given the executor on payment of a distributive share. See *infra*.

20. Payment into court by devisee or owner.

Section 1 of the act of May 1, 1861, P. L. 420, provides:

"Whenever any legacy or legacies shall have been or shall hereafter be charged as a lien upon any lands in this commonwealth, by virtue of any last will and testament, or whenever it shall be claimed that such legacy has been so charged, it shall be lawful for the devisee of such land, or any owner thereof, claiming under such devisee, to pay into the Orphans' Court of the county wherein the land is situated the full amount of such legacy; whereupon the said court shall make a decree discharging the land, so devised, from the lien of such legacies, or from so much thereof as may have been paid into court as aforesaid, which decree shall be entered of record in said court, and certified copies thereof may be recorded in the office for recording deeds in the proper county, in the same manner and with like effect as other papers, relating to the title to lands, may by law be recorded."

Under this section the owner may pay the legatee as much as he admits to be due, and upon paying the amount in dispute, into court, on petition praying leave, have a decree that the land be discharged from the lien of the legacy.⁷

21. Form of decree.

In the matter of the estate of ———.

In the Orphans' Court of ——— County.

Now, to-wit: ———, day of ———, A.D. 19——, it appearing to the satisfaction of the court that ———, the owner of the land devised and charged herein, has paid unto ———, the legatee, petitioner, the sum of \$——, and the remainder being in dispute between them, to-wit: \$——, he has this day, with leave, paid into court, now it is hereby adjudged and decreed that the land described in the petition herein, shall be and hereby is forever discharged from the lien of said legacy [or charge on land].

Per cur.
———, P. J.

22. Court to distribute the fund.

Section 2 of the act of May 1, 1861, P. L. 420, provides:

"Upon the application of any party paying into court the amount of any legacy, or of any legatee or other person claiming the same, the court shall, after notice to the parties interested, make distribution

⁷ Robinson's Est. Penrose, J. 15 D. R. 453.

of the money so paid into court, in the manner provided for the distribution of the proceeds of sheriff's sales, when paid into court, and direct it to be paid out to the parties who may be legally entitled to receive the same."

23. Charges on real estate, satisfaction of.

The act of March 22, 1907, P. L. 30, provides:

"In all cases in which, by proceedings in the Orphans' Court of any county, or by the provisions of a last will and testament, or otherwise any money has been charged upon real estate, payable at a future period, it shall be lawful for any person claiming an interest therein, when the same shall have become payable to apply by bill or petition to the said Orphans' Court for the payment of the same; whereupon such court, having caused due notice to be given to the owner of such real estate and to such other persons as may be interested, either by service or publication, shall proceed according to equity to make such decree or order for the payment of said charge, out of such real estate, as shall be just and proper."

24. Action for legacy.

Section 50 of the act of 1834, *supra*, provides:

It shall be lawful for any person to whom any bequest of money, or other goods or chattels, may be made by last will or testament, to commence and prosecute an action of debt, detinue, account render, or an action on the case for the recovery thereof, after it becomes due, against the executors of such will, having in their hands sufficient assets to pay all the just debts of the testator and the legacies by him bequeathed."

This jurisdiction is given only when the legacy is not charged on land, for in that case the jurisdiction of the Orphans' Court is exclusive under section 59 of the act of 1834.¹

It is not necessary to tender a refunding bond, before suing in this form, which is now assumpsit.² Where the legacy is not charged on land the Common Pleas has concurrent jurisdiction;³ but it has no jurisdiction of a suit for a distributive share or even for a legacy subject to an unperformed condition.⁴

Justinian decreed (Lib. 2, Lit. 20, section 2): "We, also, desirous of enforcing the wills of deceased persons, and regarding their intentions more than their words, have, after great study, enacted that the nature of all legacies shall be the same; and that all legatees, by whatever words constituted, may sue for what is left them, not only by a personal, but by a real or hypothecary action."

25. Demand before suit.

Section 52 of the act of 1834, *supra*, provides:

"No action for the recovery of any such legacy shall be com-

¹ Gilliland v. Bredin, 63 Pa. 393; Burt v. Herron, 66 Pa. 400; Pierce v. Livingston, 80 Pa. 99.

² Bixler v. Blankenbiller, 8 Watts, 64.

³ Fidelity, Etc., Co.'s Ap., 99 Pa. 443.

⁴ Dewald v. Berkheiser, 19 Supr. C. 570. In this case all the authorities are reviewed by Porter, J.

menced, until reasonable demand has been made by the legatee of the executor, for the payment or delivery thereof; nor shall such legatee be entitled to execution in such actions, until security has been given in the Orphans' Court, in the manner hereinbefore directed with respect to distributive shares."

The security herein referred to is contained in section 45.

26. Plea of "no assets" suspends suit.

Section 53 of the act of 1834, *supra*, provides:

"If the executor shall plead to such actions that he hath not sufficient assets to pay all just debts and demands against the estate, and also all the legacies given, without any other plea, no further proceedings shall be had on such action, until an account shall have been taken, in the proper Orphans' Court, of the debts and assets of the estate, and the amount, if any, payable on such legacy, be ascertained; and in such case it shall be competent for the court to order the executor to proceed without delay, in the Orphans' Court for the purpose aforesaid, and to enforce such order by attachment."

"The primary fund for the payment of all legacies, whether charged on land or not, unless special provision is made to the contrary, is the personal estate. 'The rule is general,' says Mr. Roper⁵ 'that in the absence of contrary intention, the personal estate is the first and natural fund for the payment of debts and legacies; and the real estate is only to be resorted to in aid of the former.' When a legacy is exclusively payable out of the land in possession of the heir or devisee, the only remedy is in the Orphans' Court."⁶ Where the executors give bond to the legatee, it is payment and extinguishment of the legacy and the only remedy of the legatee is on his bond. So, in a suit upon the bond, the defendant, having pleaded payment, etc., and not "no assets" as the above section provides, the replication being "*non solvit*," the executor is precluded from going back to the defense of "no assets."⁷

27. Execution to be stayed for want of assets.

Section 54 of the act of 1834, *supra*, provides:

"If any other plea be pleaded by such executor, the issue thereon shall be decided in due course as in other cases; and if judgment thereupon be rendered against such executor, he may, nevertheless, aver the want of sufficient assets to pay all the debts and legacies as aforesaid, and thereupon execution shall be stayed, until such accounts shall be taken as is provided in the next preceding section of this act; and the court in which such action is brought, may, by attachment, compel such executor to proceed in the Orphans' Court for such purpose."

If a general judgment be given against an administrator for costs, it is against the estate only and not against him.⁸

⁵ Roper on legacies, vol. 1, p. 463.

⁶ Sharswood, J., in *Breden v. Gilliland*, 67 Pa. 34.

⁷ *Hall v. Hurford*, 4 Clark, 291. This case was decided upon demurrer and Hayes, P. J., noted thereon "*curia advisare vult* — the court is willing to be advised."

⁸ *Callender's Admr. v. Keystone, Etc., Co.*, 23 Pa. 471, overruling *Ewing*

28. Nonsuit, when there are no assets.

Section 55 of the act of 1834, *supra*, provides:

"If it shall appear, by the account taken in the Orphans' Court, that there are no assets in the hands of such executor which ought to be applied to the payment of the legacy demanded, or if such legacy be a chattel, that is required for the payment of debts, judgment of non-suit shall thereupon be entered."

29. Costs in the discretion of the court.

Section 56 of the act of 1834, *supra*, provides:

"If judgment as aforesaid be entered for the plaintiff, for any sum, or for the value of any chattel bequeathed, the court shall, according to justice and equity, either award costs, or no costs out of the testator's estate, or if such executor has been faulty in delaying, without sufficient excuse, the payment or delivery of the legacy demanded, or a proportionable part thereof, then out of the proper estate of such executor."

30. Ademption — Conclusiveness of Orphans' Court decree.

The doctrine of ademption of a legacy by a gift subsequent to the making of the will only applies when the testator stands *in loco parentis* to the legatee⁹ and an intent to adeem will not be presumed from a provision in the codicil.¹⁰

Where a legatee proceeds in the Orphans' Court to obtain his legacy and the adjudication there is against him, the decree is binding upon him in a suit in a court of concurrent jurisdiction;¹¹ and when the cause is removed to the U. S. Circuit Court, the cause will be determined as by the *lex fori* and not the *lex loci contractus*.¹² The extension of the judicial power of the U. S. Courts does not provide another law than that of the state, but another forum.¹³

31. Abatement of legacies.

Section 48 of the act of February 24, 1834, P. L. 70, provides:

"If, after deducting the amount of debts as aforesaid the residue shall not be sufficient to discharge all the pecuniary legacies bequeathed, an abatement shall be made, in proportion to the legacies so given, unless it shall be otherwise provided by the will." This section declares the law as laid down by the courts before, and the priority of some general legacies over others will not be presumed.¹⁴ A legacy charged with payment of debts is general and abatable.¹⁵ The testator cannot defeat his creditors by any legacy or devise.¹⁶ But specific legacies charged on the land are not abated *pro tanto*, by sale of a part

v. Furness, 13 Pa. 531, and explaining *stare decisis*; also *communis error facit jus*, by Lowrie, J.

⁹ Gill's Est., 1 Parsons, 139; Miner v. Atherton, 35 Pa. 528.

¹⁰ Alsop's Ap., 9 Pa. 374; Garrett's Ap., 15 Pa. 212.

¹¹ Wilson v. Smith, 11 D. R. 665, citing Raisig v. Graf, 17 Supr. C. 509.

¹² Wilson v. Smith, *supra*. [By act March 3, 1911, District Court, after Jan'y 1, 1912.]

¹³ McClain v. Provident, Etc., Soc., 110 Fed. R. 80.

¹⁴ Penna. Company, Etc., Ap., 109 Pa. 479.

¹⁵ Ingersoll's Est., 3 D. R. 399.

¹⁶ Blake's Est., 134 Pa. 240.

of the real estate.¹⁷ In the absence of clear and conclusive proof of the intention of the testator to the contrary, all legacies and annuities must abate *pro rata*.¹⁸

32. Interests in remainder, in personalty, to be secured.

Section 49 of the act of 1834, *supra*, provides:

"Whenever personal property is bequeathed to any person for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor of such will shall not be compelled to pay or deliver the property so bequeathed to the person so entitled, until security be given, in the Orphans' Court having jurisdiction of his accounts, in such sum and form as, in the judgment of such court, shall sufficiently secure the interest of the person entitled in remainder, whenever the same shall accrue, or vest in possession."

This section follows Chancery practice¹⁹ and requires those who have contingent interests in a chattel to give security.²⁰ But where the payment is absolute and there is no remainder, the act does not apply.²¹

"A life estate in personal property is now regarded as in many respects analogous to the usufruct of movables under the civil law. They are either wholly consumed, or, at least, impaired by use, depending upon the nature of the articles. Thus, grain and liquors are wholly consumed when one uses; and cattle, hangings, beds, and other movables, suffer some diminution by use, and even by the bare effect of time, although they are not used; and, at last these things perish. He who has the universal usufruct of a totality of goods has also the right to enjoy and use all the movable effects according to their nature; to consume what is liable to be consumed in the ordinary use; to gather from the living creatures the profits which they yield; to receive the interest of debts which bear interest; and to make use of everything according to its natural use. Things which are not consumed immediately by the use of them, may be put to the use for which they are designed without abusing them, taking due care of them, and they are to be restored to the proprietor in the condition in which they happen to be after the usufruct has expired, although wasted and diminished by the effect of the use, provided the usufructuary has not misused them. Things which are consumed in the use become the property of the usufruct, since he cannot use them but by consuming them. In the case of living animals which reproduce themselves, the usufruct is entitled to the progeny; but in that case he is bound to preserve entire the number which he had received, so that when any of them die he must fill up their places out of the fruits; money in possession, or in action, is not necessarily impaired by the use, because the use of money is nothing more than the interest or dividends which may be enjoyed by the usufruct without diminishing the principal."²²

¹⁷ McDowell's Est., 3 D. R. 371.

¹⁸ Gray's Est., 13 Phila. 372.

¹⁹ Brinton's Est., 7 Watts, 203.

²⁰ Clevestine's Ap., 15 Pa. 495.

²¹ Fisher v. Redsecker, 19 Pa. 113.

²² Lewis, J., in Holman's Ap., 24 Pa. 174, citing 1 Domat's Civil Law,

Where money is substituted for land, after a sale of real estate, all interests, subsequent to those of the first taker, which may vest on the happening of a contingency must be secured under the above section.²³ A bequest of a sum of money both principal and interest (if needed) to one for life and remainder to nephews and nieces, does not come within the requirement for security, and the nephews and nieces, do not include those by curtesy on testatrix's husband's side.²⁴ The bequest of a sum "the interest of which is to be paid to her during life and the principal to her children at her death," is a direct bequest of the principal for life, and the legatee is entitled to receive it on giving security.²⁵ An executor who is also devisee for life may be compelled to give security.²⁶

Security is not to be indiscriminately required without reference to the peculiar terms of the will. It depends upon the nature of the legacy or devise whether security shall be exacted.²⁷ Where security is required under the act of 1834, *supra*, and the act of May 17, 1871, P. L. 269, and it is not given, the personal property remains in the hands of the executor as such, and his liability continues.²⁸

In a case where perishable personal property was bequeathed to a wife in trust until she should die or re-marry, then to his daughters, security was not exacted.²⁹

33. Protection of contingent interests.

Section 1 of the act of April 17, 1869, P. L. 70, provides:

"The owner of any contingent interests in the personal property of any decedent may legally require any executor or administrator thereof to make and exhibit in the register's office, his or her account of the trust, in one year from the time of administration granted, and may require the legatee of any previous interest in the same property, before receiving the same to give security in the Orphans' Court having jurisdiction of the account of the executor or administrator of the decedent, in such sum and form as in the judgment of such court shall be sufficient to secure said contingent interest whenever the same may accrue or vest."

This act is constitutional¹ and applies to trustees although not mentioned in it.² It is to be liberally construed in favor of one interested in setting aside the will.³ It can be invoked to protect the contingent interests of the children of a beneficiary;⁴ but the owner of a contingent interest in real estate cannot compel an accounting by a

b. 1, tit. 11; *Kinnard v. Kinnard*, 5 Watts, 108; *Brinton's Est.*, 7 Watts, 203.

²³ *Duval's Ap.*, 38 Pa. 112.

²⁴ *Green's Ap.*, 42 Pa. 25. (See *Reiff's Ap.*, 60 Pa. 361, 365, for exposition of life estate in legacies.)

²⁵ *Parker's Ap.*, 61 Pa. 478.

²⁶ *Van Dusen's Ap.*, 102 Pa. 224.

²⁷ *Zehender's Est.*, 8 D. R. 439.

²⁸ *Miller's Est.*, 11 D. R. 714. *Penrose*, J.

²⁹ *Grabill's Est.*, No. 2, 19 Lanc. L. R. 189.

¹ *Keene's Ap.*, 64 Pa. 298.

² *Hartman's Ap.*, 90 Pa. 203; *Bushong's Est.*, 11 W. N. C. 107.

³ *Stewart's Est.*, 20 Phila. 9.

⁴ *Kennedy's Est.*, 190 Pa. 79.

trustee of the particular estate therein.⁵ The interest must be in an estate under process of administration generally.⁶ If the estate is absolute the act does not apply.⁷

34. Security by holders of interest limited or conditional.

Section 1 of the act of May 17, 1871, P. L. 269:

"Whenever any personal property, or the increase, profits or dividends thereof, has been or shall hereafter be bequeathed to any person, for life or for a term of years, or for any other limited period, or upon a condition or contingency, the executor or executors, administrator with the will annexed, or trustee or trustees, under such will, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security in the Orphans' Court having jurisdiction of the accounts, in such form and amount as, in the judgment of the court, will sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession; and any married woman availing herself of the benefits of this act shall have power, as a *feme sole*, to bind her separate estate and property by any obligation given by her, as security under this act."

A nonresident trustee cannot be appointed to a relinquished testamentary trust without security.⁸ A vested remainder, i. e., vested *in præsenti* but enjoyable *in futuro*, on the death of one named, does not come within this act;⁹ but it does apply where an executor is the devisee for life with remainder over.¹⁰ This act and previous ones on the same subject are to be interpreted on principles of equity, as to requiring security for the enjoyment of a conditional trust fund.¹¹ In the devolution of estates the law presumes that the possibility of bearing children exists, even when a woman has passed the age to which the ability to do so usually continues, even though she has reached the age of seventy-five years, and the possibility of issue not being extinct, the estate being contingent. Whilst ordinarily the age of forty-five to fifty is considered the limit, yet it was said by Coke, "that the law seeth no impossibility of having children,"¹² and that "a possibility of issue is always supposed to exist in law * * * even though the donees be each of them an hundred years old."¹³ "The argument makes a conjectural conclusion rest on a fact, when the law declares no such conclusion shall be deduced from that fact."¹⁴

Security will not be exacted in case of an active trust created by will wherein the income is payable to a son for life and after his death the principal to his children.¹⁵ But where a condition is attached

⁵ Wagener's Est., 190 Pa. 513; 191 Pa. 566.

⁶ Perrett's Est., 14 Supr. C. 611.

⁷ Haly's Est., 18 C. C. 124.

⁸ Schott's Est., 2 W. N. C. 398; Strobel's Est., 2 W. N. C. 409.

⁹ McKee's Ap., 96 Pa. 277.

¹⁰ Van Dusen's Ap., 102 Pa. 224.

¹¹ Gowen's Ap., 106 Pa. 288, approving List v. Rodney, 83 Pa. 483.

¹² Coke on Littleton, 28 a.

¹³ 2 Blackstone's Com., 125 *.

¹⁴ Mercur, J., in List v. Rodney, 83 Pa. 483.

¹⁵ Watson's Ap., 125 Pa. 340; Sims' Est., 130 Pa. 451.

which remains unfulfilled, as the birth of a child, security must be given under the act *supra*, and that of April 17, 1869.¹⁶ Where the will expresses trust and confidence in the executor, "without demanding or desiring security," this act has been held not to apply.¹⁷ Where by a limitation over in a codicil, the executors are authorized to invest a certain sum, at the death of his wife, for certain beneficiaries, security may be required.¹⁸

When a will "authorizes" it may mean "directs."

Said Penrose, J., in McCoy's Est.: "There is, as has often been said, no magic in words, and to determine whether there is a trust we are to look not at the terms used, but at the powers and duties conferred, and the object designed to be accomplished: *verba intentioni debent inservire*." * * * "The word 'issue' following a gift of a life estate in personalty to the parent is a word of purchase, and the life estate is not enlarged thereby."¹⁹

The act, *supra*, requires the delivery to the *cestui que trust* upon security being given, of property bequeathed in trust, where there are interests in remainder to be preserved, and this includes active trusts.²⁰

A bequest "for life" refers to a natural person and not a corporate entity.²¹ A trust to hold the entire estate for the use and benefit of a son during his life and after his death to a contingent remainderman is an active trust, not within the above act.²²

¹⁶ Kennedy's Est., 190 Pa. 79.

¹⁷ Lindsay's Est., 10 W. N. C. 36.

¹⁸ McCoy's Est., 16 W. N. C. 243.

¹⁹ Myers' Ap., 49 Pa. 111.

²⁰ Oakford's Est., 4 C. C. 465. Yerkes, J., remarked that the act did not include spendthrift and separate use trusts.

²¹ Haly's Est., 18 C. C. 124.

²² Mooney's Est., 27 C. C. 450; Mason's Est., 29 C. C. 240.

CHAPTER XLIII.

BENEFICIARIES UNDER A WILL.

1. Uncertain designation of beneficiaries.
2. Gifts to heirs.
3. "Heirs" in gifts of personalty.
4. Other meanings of "heirs."
5. Gifts to legal representatives, etc.
6. Gifts to children and grandchildren.
7. Great grandchildren and step-children.
8. Gifts to "issue."
9. Gifts to next of kin.
10. Wife or husband divorced.
11. Gift to child unborn.
12. Illegitimate children.
13. Adopted children.
14. Gifts by reference.
15. Words of exclusion from a class.
16. Death of member — survivors.
17. Gifts to survivors.
18. Gifts *per stirpes* and *per capita*.
19. Division "between" and "among."

1. Uncertain designation of beneficiaries.

If the court is unable to discover from the alleged will who are the beneficiaries, the writing is no will at all.¹ A gift to "my heirs or executors" is void for uncertainty.² But if the writing itself, the will proper, does not disclose the names of the beneficiaries, the envelope enclosing it may do so, and then it will be read into it as a part of the will itself.³ If the person be not named, but be sufficiently individualized by description so that he may be identified, the will is not void.⁴ He must, however, answer the whole description.⁵ The description is even more important than the name where a mistake is involved as probable.⁶ Where two persons claim antagonistically, one answering one part of the description and the other person another part the decision of the court below will be affirmed.⁷ A gift of a residuary estate to his "spinster or unmarried nieces," was interpreted to read "and," thus including the widows.⁸ The court will endeavor to carry out the intention of the testator, by discerning his objects of bounty.⁹ But if the objects cannot be ascertained the gifts will fall into the residue.¹⁰ A legacy to testator's creditors and a firm is not void for uncertainty.¹¹ If the name be wrong but the characterization as "niece" can be ascertained the gift will not go to strangers.¹²

¹ McKennan v. Phillips, 6 Wharton, 571.

² Lynn v. Downes, 1 Yeates, 518.

³ Fosselman v. Elder, 98 Pa. 159; Harrison's Est., 202 Pa. 331.

⁴ Butterweck's Est., 4 D. R. 563.

⁵ Irwin v. Dunwoody, 17 S. & R. 61.

⁶ Von Phul's Est., 14 D. R. 277.

⁷ Wagner's Ap., 43 Pa. 102; Salter v. Howell, 15 S. & R. 188.

⁸ Conway's Est., 181 Pa. 156.

⁹ Ferry's Ap., 102 Pa. 207; Jones' Est., 7 D. R. 361.

¹⁰ Hoover's Est., 15 Montg. 200.

¹¹ Burt v. Herron, 66 Pa. 400.

¹² Hoover's Est., 9 Dauphin, 258; Potts' Est., 23 Lanc. L. R. 255.

2. Gifts to heirs.

The word "gift" is here used in its comprehensive sense. The word "heirs" has also a general as well as a restricted meaning and has occasioned volumes of learned disputation, an illustration of which is presented in the preceding chapter, and there will be more to follow. In a recent case where a testator gave land to one of his two sons for life, "and at his death the property to be sold for the benefit of the heirs," it was held that "the heirs" meant were the testator's and not the son's.¹³ So, "surviving heirs," on the death of the life-tenant unmarried were held to be the testator's.¹⁴ As to time, the heirs of a testator are those at his death and not those when the will was made, unless the will shows a different intention, and therefore if the law has changed since the will was made, the later law governs the right of heirship.¹⁵ After a life tenancy, "to all my legal heirs the same as if I had died intestate" is to the heirs at testator's death.¹⁶ The word "heirs" when used in a will is taken in its legal or technical sense, unless the testator indicates that he intends it to be used more comprehensively.¹⁷ Woodward, J., said:¹⁸ "Popularly we say of any legatee or devisee that the testator had made him an heir, that he had an heirship, etc. Strictly speaking, an heir is one on whom the law would cast the estate, if there were no will." Black, C. J., said:¹⁹ "Even in a will supposed to be made when the testator is *inops consilii* [devoid of counsel], the word 'heirs' has a fixed sense, which will adhere to it until it is explained away." A testator who shows by his will a knowledge of the use of technical words, will be held to have used "heirs" in its legal sense.²⁰ Heirs at law or "heirs" in its statutory sense means those who would inherit under the intestate laws of the state.²¹ "Real heirs" have been held to be heirs at law, or personal representatives.²² "Legal and natural heirs," means those under the intestate law.²³ The same is true of "the natural heirs of my own blood relatives."²⁴ When a testator directs his estate to "descend upon those persons who may be my heirs and distributees according to the law of the land," his real estate having all descended to him from his father, relatives on his mother's side were excluded because not being of the blood of the first purchaser.²⁵ "Heirs under and according to the intestate laws" excludes the

¹³ Abel's Est., 23 Supr. C. 531.

¹⁴ Hankin's Ap., 4 W. & S. 300.

¹⁵ Wood's Ap., 18 Pa. 478; Gantz v. Tyrrell, 7 Supr. C. 249.

¹⁶ Miller's Est., 13 Lanc. L. R. 33.

¹⁷ Porter's Ap., 45 Pa. 201; Eby's Ap., 50 Pa. 311; Zimmerman v. Briner, 50 Pa. 535; Clark v. Scott, 67 Pa. 446; Hauptman's Est., 12 Phila. 103; Ivin's Ap., 106 Pa. 216; Homet v. Bacon, 126 Pa. 176; Barnhart v. Barnhart, 18 Lanc. L. R. 12.

¹⁸ Porter's Ap., 45 Pa. 201.

¹⁹ Auman v. Auman, 21 Pa. 343.

²⁰ Clark v. Scott, 67 Pa. 446.

²¹ Baskin's Ap., 3 Pa. 304.

²² Robertjot v. Mazurie, 14 S. & R. 42.

²³ Wood's Ap., 18 Pa. 478.

²⁴ Phila., Etc., Co. v. Isaac, 167 Pa. 270.

²⁵ Eby's Ap., 50 Pa. 311.

half-brother although called "my brother" in the will.²⁶ "Heirs *per stirpes*" excludes an adopted child of a deceased brother, because adopted children cannot inherit collaterally.²⁷ "My heirs," on the failure of issue of one of them, will let in the heirs of another on this lapsed share, although the will said his provision was to be "his entire full share."²⁸

3. "Heirs" in gifts of personalty.

In the attempt to restrict the word "heirs" to real estate, the courts have been obliged to split the definition. So we have "heirs" technical and "heirs" as "next of kin." When a man bequeaths personalty, in trust, for the lives of the *cestuis que trustent*, and the limitation "to their heirs, etc.," it is held to mean next of kin under the statutes of distribution.²⁹ Such "heirs" are simply heirs at law, "under the statutes of distribution."³⁰ Where real estate is converted into personalty, "heirs" also includes husband and wife, as the case may be, unless the will shows a contrary intent.³¹

The widow, having been given the life estate, is excluded from the remainder to the "right heirs" or "heirs at law";³² as to realty, she is not included in "heirs";³³ nor is the husband in the phrase "legal representatives," when it refers to real estate, for then it means heirs.³⁴ The phrase "heirs and next of kin," referring to a remainder of real estate blended with personalty does not include the husband. Said Penrose, J.: "The construction will then be (as was said in *Gwynne v. Muddock*, 14 Vesey 488), '*reddendo singula singulis*, that the next of kin shall take the personal estate and the heir at law the real estate'; and in both cases alike the husband is excluded."³⁵

4. Other meanings of "heirs."

It is conceded that "heirs" may mean "children," when the context of the will shows that testator clearly meant it;³⁶ though, how a man may have children without heirs seems paradoxical. He may have heirs at law, without having children or descendants, because inherit-

²⁶ Lines' Est., 221 Pa. 374.

²⁷ Gable's Est., 16 D. R. 218.

²⁸ Lefever's Est., 16 D. R. 918.

²⁹ Comly's Est., 136 Pa. 153; Langshaw's Est., 9 C. C. 212; Ashton's Est., 134 Pa. 390; Gilmor's Est., 154 Pa. 523; Evans' Est., 155 Pa. 646; Rhoads' Est., 15 Lanc. L. R. 286.

³⁰ McKee's Ap., 104 Pa. 571; Patterson v. Hawthorn, 12 S. & R. 112; Shuman v. Walker, 1 Chester Co. 170.

³¹ Plank's Est., 9 Lanc. L. R. 249; Zoller's Est., 18 Montg. 176; Neely's Est., 155 Pa. 133; West's Est., 14 D. R. 788; 214 Pa. 35; Comly's Est., 136 Pa. 153, as to widow; Gibbons v. Fairlamb, 26 Pa. 217; Eby's Ap., 84 Pa. 241; Boyd's Est., 199 Pa. 487; Heilig's Est., 18 Montg. 91; Abel's Est., 23 Supr. C. 531, as to widower.

³² Keys' Est., 4 D. R. 281; McCrea's Est., 180 Pa. 81.

³³ Dodge's Ap., 106 Pa. 216; Barnhart v. Barnhart, 18 Lanc. L. R. 12, 9; Raleigh's Est., 206 Pa. 451.

³⁴ Lesieur's Est., 205 Pa. 119.

³⁵ Penrose, J., in Abbey's Est., 16 Phila. 291; affd., Ivin's Ap., 106 Pa. 176.

³⁶ Towne's Est., 5 Montg. 103.

ance under our law, which is adapted from the civil law, is upwards as well as downwards. A man's ascendants inherit from him in default of descendants. And when the lineals fail both ways, the inheritance goes to collaterals, as already shown in the chapter on intestacy, *supra*. Where a man in his will, directs that when the first taker dies without issue, the estate shall "fall to my heirs back" he means "issue" or "descendants," and grandchildren are let in *per stirpes*.³⁷ "Heirs" in its strict technical English sense means "heirs of the body"; but in its common sense it means all who may inherit from a person.³⁸ So "direct heirs" means lineal heirs or issue.³⁹

5. Gifts to legal representatives, etc.

"Legal representatives," like "heirs" may have different meanings as already shown. A devise in trust for a woman and to her legal representatives at her death, without appointment, means her heirs and does not include her husband.⁴⁰ It has also been said that the phrase includes heirs and legal representatives, when realty is devised.⁴¹ "Heirs and representatives" has been held to include the husband.¹ Under a bequest of personalty over, the widow was held entitled to take under the term "legal representatives."² "Heirs or legal representatives" was held to mean next of kin.³ This is obvious that "legal representatives" here refers to those who represent any of the deceased heirs.⁴ The addition to "heirs" of "assigns" is superfluous⁵ in a devise, though it might be of some purpose in a bequest.

6. Gifts to children.

"Children" in a will does not ordinarily import "grandchildren." But when necessary to make it operative or when the intent is to embrace them as descendants of deceased children it will include them, "*ut magis valeat quam pereat*."⁶ But grandchildren do not take where there are children unless the intention of the testator is apparent.⁷ The intention to exclude grandchildren may be inferred from

³⁷ Eichelberger's Est., 5 Pa. 264. "Descendants" means heirs of the body or issue. Allis v. Cleland, 37 C. C. 190.

³⁸ Doeblen's Ap., 64 Pa. 9. Sharswood, J.

³⁹ McKinney's Est., 52 Pitts. L. J. 321.

⁴⁰ Lesieur's Est., 205 Pa. 119.

⁴¹ Rankin's Est., 13 C. C. 617.

¹ Gibbons v. Fairlamb, 26 Pa. 217.

² Potter's Est., 13 Phila. 318; Mather's Est., 20 Montg. 186.

³ Shuman v. Walker, 1 Chester Co. 170; Hershey's Est., 23 Lanc. L. R. 37.

⁴ Stock's Ap., 20 Pa. 349.

⁵ Lawrence v. Lawrence, 105 Pa. 335; Comly's Est., 136 Pa. 153.

⁶ Dickinson v. Lee, 4 Watts, 42, Gibson, C. J.; Hallowell v. Phipps, 2 Wharton, 376; Gable's Ap., 40 Pa. 231; McKeehan v. Wilson, 53 Pa. 74; Castner's Ap., 88 Pa. 478; Hunt's Est., 133 Pa. 260; Weaver's Est., 13 Lanc. R. 153; Steinmetz's Est., 194 Pa. 611; Moses' Est., 3 Supr. C. 93; Harrison's Est., 202 Pa. 331; Fairfax's Ap., 103 Pa. 166; Union Trust Company's Ap., 19 Lanc. L. R. 361.

⁷ Todd's Est., 33 Supr. C. 117; Altdorfer's Est., 17 D. R. 690; Scott's Est., 37 Supr. C. 342; Field's Est., 16 D. R. 585; Hager's Est., 17 D. R. 1015.

the gift of the remainder.⁸ It being a question of what the testator would with his own if he wot himself, the court will gather that intent from the whole will.⁹ If "children" was used in the sense of "issue," grandchildren are included,¹⁰ for such a broad meaning is sanctioned by learned judges and lexicographers.¹¹ The presumption is in the old English phrase that "a man wot what he wot with his own," and that it should not go to strangers to his blood. So under the phrase "children or legal heirs," the child of a deceased child is comprehended;¹² and so of grandchildren whose parent in the line of descent is dead.¹³

7. Great grandchildren and stepchildren.

"Grandchildren" does not ordinarily include great-grandchildren, but the same rule of construction is applied as that given, *supra*, for "children."¹⁴ The testator leaving children of the whole blood the word "children" though coupled with "wife" does not import stepchildren.¹⁵ But "all our children" includes testator's own children by a former wife.¹⁶ On the same principle a devise to a son and his wife for life and at their death the land to be divided between their children, embraces the son's children by several marriages.¹⁷ This is because the stream of inheritance flows through the father's blood and not that of the mother. In searching a will to learn what children are meant the present or nearest children rather than the future or remote possibility of issue, will be preferred.¹⁸ "Children" is not to be construed minors, unless so limited.¹⁹

8. Gifts to "issue."

"Issue," without limitation, means descendants,²⁰ and the devise is carried over to the grandchildren through the line of issue of their parent.²¹ "And at his death to his legal issue or heirs," is a connection in which "heirs" is held to be "equivalent" with "legal issue," and the whole phrase means lineal descendants or heirs of the body.²² In bequeathing personal estate for life the word "issue" will be held equivalent to children.²³

⁸ Craige's Ap., 126 Pa. 223.

⁹ Eichelberger's Est., 5 Pa. 264; Ulrich's Ap., 86 Pa. 386.

¹⁰ Campbell's Est., 202 Pa. 459; Duckett's Est., 214 Pa. 362.

¹¹ Haldeman v. Haldeman, 40 Pa. 29; Potts v. Cline, 174 Pa. 513; McGlathery's Est., 7 C. C. 61.

¹² Sarver v. Berndt, 10 Pa. 213.

¹³ McDowell's Est., 194 Pa. 624; Hunter's Est., 10 D. R. 120; Von Steuben's Est., 3 Northam. 293.

¹⁴ Pemberton v. Parke, 5 Binney, 601; Morton's Est., 43 Pitts. L. J. 403; 49 Pitts. L. J. 406.

¹⁵ Kurtz's Est., 145 Pa. 637.

¹⁶ Wampler's Est., 40 Pitts. L. J. 451; Ritz's Est., 15 Lanc. L. R. 21.

¹⁷ Luce v. Harris, 79 Pa. 432.

¹⁸ Webb v. Hitchins, 105 Pa. 91; Sharpe's Est., 16 Phila. 403.

¹⁹ Hughes' Est., 16 Phila. 236.

²⁰ Miller's Ap., 52 Pa. 113; Barry's Ap., 20 W. N. C. 26.

²¹ Wistar v. Scott, 105 Pa. 200; Wistar v. Gillilan, 4 Atl. 815.

²² Angle v. Brosius, 43 Pa. 187; Allis v. Cleland, 37 C. C. 190.

²³ Meckes' Est., 16 Phila. 304.

9. Gifts to next of kin, etc.

"It is well settled that the words 'next of kin' exclude the testator's widow; and that the word 'relations' excludes those who are only so by affinity."²⁴ Yet the will may be so worded as to exhibit the intention to include her,²⁵ and also her "relations."²⁶ It includes only such as are entitled under the statute of distribution, unless the testator enlarges its meaning.²⁷ "Nearest relatives" places sisters before nephews and nieces.²⁸ Under "next of kin" nephews and nieces precede grand-nephews and grand-nieces.²⁹ The "wife's relations, such as she shall see fit to name in her last will," authorizes her to will it to her second husband, if she sees fit.³⁰

A devise in trust, with the income to the son for life, and at his death to those entitled under the inheritance laws gives the son's wife the same interest as in case of intestacy.¹ A testator may create an equitable fee in a spendthrift trust by thus giving the estate to the son or his heirs.² Where, after a life estate, it is given to the "son or his children," if the son survives the life, he takes a fee. "Or" does not mean "and," here. The will "points unmistakably to an alternative gift and with equal certitude to the intended alternate beneficiary."³ A bequest of personalty to brothers and sisters includes those of the half blood;⁴ so also their children under the designation of "nephews and nieces."⁵ A bequest of the residue to her nephews and nieces by a woman does not include her husband's.⁶ Where there are two nephews of the same name, one of the blood and the other not, the first will take it.⁷ "Nephews and nieces named in this will" does not carry the gift to children of such nephews and nieces.⁸ "Family" means children and not the husband.⁹

10. Wife or husband, divorced.

Where a man makes a devise to his wife and she obtains an absolute divorce and he does not alter the will, the devise is not revoked by the divorce.¹⁰ The same is true of a devise to his son's wife, the gift being to the person and not to the conjunction.¹¹ The rule is also applied to a husband.¹²

²⁴ Gibson, C. J., in *Storer v. Wheatley*, 1 Pa. 506.

²⁵ King, P. J., in *Darrah v. McNair*, 1 Ashmead, 236.

²⁶ *M'Neilledge v. Barclay*, 11 S. & R. 103.

²⁷ *Damert's Est.*, 15 Lanc. L. R. 385; *Peters' Est.*, 11 Phila. 85.

²⁸ *White's Est.*, 20 Phila. 93; *Altdorfer's Est.*, 17 D. R. 690.

²⁹ *Everitt's Est.*, 195 Pa. 450.

³⁰ *Hendricks v. Senior*, 25 C. C. 220.

¹ *Binder's Est.*, 9 Phila. 305.

² *Kelly v. R. Co.*, 226 Pa. 540.

³ *Stewart, J.*, in *Bender v. Bender*, 226 Pa. 607. (See *Gilmor's Est.*, 154 Pa. 523, for a review of the authorities.)

⁴ *Luce v. Harris*, 79 Pa. 432; *Yetter's Est.*, 160 Pa. 506.

⁵ *Weiss' Est.*, 1 Montg. Co. 209.

⁶ *Green's Ap.*, 42 Pa. 25.

⁷ *Root's Est.*, 187 Pa. 118.

⁸ *Lewis v. Fisher*, 2 Yeates, 196.

⁹ *Heck v. Clippenger*, 5 Pa. 385; *Livingston's Est.*, 5 Lanc. L. R. 25.

¹⁰ *Jones' Est.*, 211 Pa. 364.

¹¹ *Sharpe's Est.*, 16 Phila. 403.

¹² *Mellon's Est.*, 28 W. N. C. 120.

11. Gift to child unborn.

A child unborn but begotten, comes in under the term "children."¹³ In a gift to grandchildren by a class such a child is embraced.¹⁴ One who dies before his child is born does not die "without issue living," for the quick child is living issue.¹⁵ Remainder to the mother's issue in fee carries a vested remainder in fee to the unborn child when the will is made.¹⁶

12. Illegitimate children.

Under the name "children" in a will only legitimate children are meant,¹⁷ unless the will contains some description other than that to identify the beneficiary.¹⁸ But under the statutes legitimatizing bastards as to their mothers and other kin, a will to the children of the female will include illegitimates.¹⁹

13. Adopted children.

An adopted child stands as heir to the person alone adopting it and no further, so that it cannot take under a will of another person as an heir *per stirpes*;²⁰ nor can a devisee by appointment bring it into the distribution.²¹ But it may take in remainder by adoption as the heir of the life tenant.²² An adoption cannot be made by a will.²³

14. Gifts by reference.

Where one part of the will refers to other portions, the different parts must be read together in the light of each other and if the testator has used the technical and sacred word "heirs" to represent legatees or devisees or both, it will not be thrown out of "chancery" for that reason.¹ And although technically "devise" relates only to land, if the testator has used it interchangeably for chattels, goods, lands, proceeds, etc., his will is not to be annulled to gratify a little legal finesse of the *arachne* variety.² Cicero said: "Law is right reason commanding what is just and forbidding what is wrong." The Orphans' Court does not sit to deny rights upon hair-splitting technicalities. And, bearing in mind the proneness to error, if the testator, particularly, with his own hand, and as the jurists say, "*inops consilii*," makes a reference which is wrong, or mixes his syntax, his solecisms

¹³ *Barker v. Pearce*, 30 Pa. 173. The law-Frenchites termed it "*en ventre sa mere*."

¹⁴ *Swift v. Duffield*, 5 S. & R. 38.

¹⁵ *Laird's Ap.*, 85 Pa. 339. (See *Martin's Est.*, 3 C. C. 212.)

¹⁶ *Wells v. Ritter*, 3 Wharton, 208.

¹⁷ *Leedom's Est.*, 4 Del. Co. 418.

¹⁸ *Bealafeld v. Slaugenhaupt*, 213 Pa. 565.

¹⁹ *Rowan's Ap.*, 35 Leg. Int. 70; *Forsythe's Ap.*, 36 Leg. Int. 28; *Seitzinger's Est.*, 170 Pa. 500; *Miller's Ap.*, 52 Pa. 113; P. & L. Dig., vol. 23, col. 40630.

²⁰ *Gable's Est.*, 16 D. R. 218.

²¹ *Freeman's Est.*, 17 D. R. 472.

²² *Kohler's Est.*, 199 Pa. 455.

²³ *Phillips' Est.*, 17 Supr. C. 103.

¹ *Hoff's Ap.*, 28 Pa. 51; P. & L. Dig., vol. 23, col. 40635, *et seq.*

² *Fetrow's Est.*, 58 Pa. 424; *Pentz's Est.*, 200 Pa. 2; *Hackett v. Milnor*, 156 Pa. 1; P. & L. Dig., vol. 23, col. 40638.

will be treated euphemistically, and only his real meaning translated from the tangled skein of words.³

15. Words of exclusion from a class.

An heir belonging to a class to which a legacy is given cannot be excluded by implication, unless it fairly and clearly appears in the will.⁴ Because a son has been given a legacy is no reason why he should be excluded from the residue.⁵ But if clearly excluded he cannot participate.⁶ After being disinherited expressly the son cannot come in under the *aegis* of "my children";⁷ and when it gives a specific legacy as "the only share she is to have out of my estate," she is shut out of the residue.⁸ But where there are two estates in the land, one the surface and the other the minerals, they will share equally in the minerals under the terms of the will.⁹ In general, distribution of gifts to a class will be made only to those in being at the date of the provision including posthumous children.¹⁰ A bequest to a number of unnamed persons answering the same general description is a gift to them as a class.¹¹ The rule above stated will give way to an intent to the contrary.¹² Those in the same class take *per capita*.¹³ The death of one of the class does not create an intestacy.¹⁴ But where the gift is to some by name they do not take as a class and on the death of one of them there is an intestacy.¹⁵

16. Death of member — Survivors.

In the absence of an intention expressed by the will, the rule of construction is that only those members who are in being at the death of the testator participate in the distribution,¹⁶ which is modified as to a child begotten but yet unborn.¹⁷ The legacy being to the class, the survivors of the class take the entire legacy which is divided equally between them¹⁸ and though there are children of the deceased

³ Edwards' Est., 209 Pa. 19; Bentz's Est., 221 Pa. 380. •

⁴ Stickle's Ap., 29 Pa. 234; Faulstich's Est., 154 Pa. 188.

⁵ Gantz v. Tyrrell, 7 Supr. C. 249; Fahnestock's Est., 147 Pa. 327.

⁶ White's Est., 135 Pa. 341.

⁷ Sullivan v. Straus, 161 Pa. 145.

⁸ Everitt's Est., 195 Pa. 450. See P. & L. Dig., vol. 23, col. 40642, *et seq.*, for further illustrations.)

⁹ Christy v. Christy, 162 Pa. 485. (See also Mehard's Est., 5 Supr. C. 336, as to equalization.)

¹⁰ Scott, J., in Nunnemacher's Est., 10 Northam. 313; Gross' Est., 10 Pa. 360; Herr's Est., 28 Pa. 467; Wunder's Est., 13 Phila. 409.

¹¹ Todd's Est., 33 Supr. C. 117.

¹² Benson's Est., 15 D. R. 355.

¹³ Brundage's Est., 36 Supr. C. 211.

¹⁴ Keene's Est., 16 D. R. 538; 221 Pa. 201.

¹⁵ Sharpless' Est., 214 Pa. 335; Martin's Est., 16 D. R. 521. (For time of payment of gift to a class see Smith's Est., 226 Pa. 304.)

¹⁶ Gross' Est., 10 Pa. 360.

¹⁷ Thompson v. Garwood, 3 Wharton, 287; Haskins v. Tate, 25 Pa. 249; Heisse v. Markland, 2 Rawle, 274; Denlinger's Est., 170 Pa. 104; P. & L. Dig., vol. 23, col. 40650.

¹⁸ Hershey's Est., 9 Lanc. L. R. 121.

member.¹⁹ This has become a fixed rule of property and it will require an act of the legislature to change it.²⁰ The justice of the argument in favor of changing the rule can hardly be doubted in the interest of a fair distribution.²¹ Regardless of an error in the will as to the number in the class all who are actually in the class at the death of the testator take.²² A gift to two without more is to them as tenants in common and not as joint tenants since the act of March 31, 1812, 5 Sm. L. 395, abolishing survivorship in joint tenancy.²³ A bequest to one in his name and to his wife in equal proportions is not a joint ownership but a severance and there is no survivorship involved.²⁴

17. Gifts to survivors.

Where there is a gift to "survivors," the time at which they are to be such is at the death of the testator.²⁵ This is the general rule, but it does not apply where the will itself fixes the time, as, for example, the death of the life tenant;²⁶ or where the income accrues after the death of the testator;²⁷ or the end of a trust.²⁸ When necessary to carry out the meaning of the will "survivors" will be construed as "others."²⁹ "Surviving brothers and sisters" will not let in the children of a son who died before the will was made, as claimants upon a share of a sister who died before the testator.³⁰

18. Gifts per stirpes and per capita.

The terms *per stirpes* and *per capita* have been explained under Inheritance, *supra*. In doubtful cases, courts will follow the law of inheritance.¹ Whether it is one or the other depends on the will, if the language is clear.² Where the bequest is to next of kin in classes the distribution will be made to them *per stirpes*.³ Where the de-

¹⁹ Diemer's Est., 2 D. R. 543; Rogers' Est., 2 Lanc. L. R. 49; Livingston's Est., 5 Lanc. L. R. 25; Guenther's Ap., 4 W. N. C. 41.

²⁰ Stiewig's Est., 169 Pa. 61; Moses' Est., 3 Supr. C. 93; P. & L. Dig., vol. 23, col. 40654.

²¹ Guenther's Ap., 4 W. N. C. 41; Norris' Est., 217 Pa. 548; Moore's Est., 15 D. R. 39.

²² Vernor v. Henry, 6 Watts, 192; Urie v. Irvine, 21 Pa. 310; Miller's Est., 18 Montg. 46; McMasters v. Shellito, 14 Supr. C. 303; Good's Est., 10 D. R. 598; Hennershotz's Est., 16 Pa. 435.

²³ Yard's Ap., 86 Pa. 125; McCallum's Est., 211 Pa. 205.

²⁴ Mitchell's Est., 15 Phila. 597; P. & L. Dig., vol. 23, col. 40659.

²⁵ Sharpe's Est., 16 Phila. 403; Vance's Est., 209 Pa. 561.

²⁶ Sloan's Est., 1 Del. Co. 302; Mowrer's Est., 19 Lanc. L. R. 223.

²⁷ Morris' Est., 9 Montg. 69.

²⁸ Smith v. Myers, 12 Luz. L. R. 183; Coates v. Street, 2 Ashmead, 12.

²⁹ Devine's Est., 199 Pa. 250.

³⁰ Hauer's Est., 16 Supr. C. 257. (For a number of involved cases see P. & L. Dig., vol. 23, cols. 40662-7.)

¹ Fissel's Ap., 27 Pa. 55; Gring's Ap., 31 Pa. 292; Miller's Est., 26 Supr. C. 453; Scott's Est., 163 Pa. 165; P. & L. Dig., vol. 23, col. 40676.

² Thomas' Est., 18 Phila. 91; Worley's Est., 7 York, 198; Sipe's Est., 30 Supr. C. 145; Brundage's Est., 36 Supr. C. 211; Hoover's Est., 9 Dauphin, 258; Duckett's Est., 214 Pa. 362; Kline's Est., 38 Supr. C. 582.

³ Sipe's Est., 38 Supr. C. 582.

scriptive words make out a class they take their parent's share,⁴ although the will may use the words "share and share alike."⁵ But by individualizing them and dividing it equally "between" them, they take *per capita* though named in a class.⁶ The general rule is stated to be that where a devise or bequest is made to one person and to children of another they all take *per capita*, though the parent be dead, but this rule must yield to a very slight indication of a contrary intention.⁷ It appears that our courts do not favor the rule although they recognize it,⁸ and the contrary intent will be inferred, where under the intestate laws the distribution would be *per stirpes* as in the case of a gift to a son or brother of the testator and to the children or heirs of deceased son or brother.⁹ If the beneficiaries are designated by relationship to a living ancestor they take *per capita*. But this also must give way to manifest intent.¹⁰ If upon the face of the will are words pointing to equality of division the same is *per capita*.¹¹ "Share and share alike," and tantamount phrases or words do not always mean *per capita*; for where there are classes, those under the class may be held to be intended to take only in right of the head of the class and then that share will be divided equally among those in the class, that is, *per stirpes*.¹²

19. Division "between" and "among."

The words "between" and "among" may be used as synonyms in a will;¹³ or "between" may connect two classes equally.¹⁴ Where the residuary estate is to be divided among certain legatees before named, *pro rata*, the ratio will be the same as for the prior division.¹⁵

⁴ Fissel's Ap., 27 Pa. 55.

⁵ Hiestand v. Meyer, 150 Pa. 501; Stout's Est., 16 Montg. 193; Fleck's Est., 28 Supr. C. 466; Miller's Ap., 35 Pa. 323.

⁶ Herneisen v. Blake, 1 Phila. 131; Penney's Est., 159 Pa. 346; Scott's Est., 163 Pa. 165; Harris' Est., 74 Pa. 452.

⁷ Osburn's Ap., 104 Pa. 637; Dible's Est., 81 * Pa. 279.

⁸ Penrose, J., in Ashburner's Est., 2 D. R. 828, affd., 159 Pa. 545; P. & L. Dig., vol. 23, cols. 40684-5.

⁹ Scott's Est., 163 Pa. 165.

¹⁰ Risk's Ap., 52 Pa. 269; Priester's Est., 23 Supr. C. 386.

¹¹ Priester's Est., *supra*; Thomas' Est., 18 Phila. 91; Ortt's Ap., 35 Pa. 267; Gest v. Way, 2 Wharton, 445; Ashton's Est., 134 Pa. 390; Hogan's Est., 12 D. R. 47; Mather's Est., 20 Montg. 186; Witmer v. Ebersole, 5 Pa. 458; Bittner's Ap., 3 W. N. C. 70.

¹² Hoch's Est., 154 Pa. 417; Rhoad's Est., 15 Lanc. L. R. 289; Miller's Est., 26 Supr. C. 453; Young's Ap., 83 Pa. 59.

¹³ Hick's Est., 134 Pa. 507.

¹⁴ Ihrie's Est., 162 Pa. 369; Carey's Est., 1 Chest. Co. 99; Connolly's Est., 50 Pitts. L. J. 188.

¹⁵ Gray's Est., 147 Pa. 67; Porter's Est., 77 Pa. 43. (See P. & L. Dig., vol. 23, cols. 40698-9; Jacoby's Est., 219 Pa. 554; Carter's Est., 217 Pa. 542.)

CHAPTER XLIV.

PROPERTY TRANSMITTED BY DEVISE.

1. Intention and power to pass estate.
2. Property which passes as personalty.
3. Devises, nature of.
4. Devises to pass the whole estate.
5. General devise passes after-acquired real estate.
7. Distinction between estate and easement or privilege.
8. Appraisement of real estate directed by will.
9. Form of petition for valuation.
10. Appraisers to be appointed.
11. Form of notice.
12. Oath of appraisers.
13. Rights of the devisees and others.
14. Return, confirmation and record of the appraisement.
15. Acceptance or refusal at the valuation.
16. Decree, adjudging the title.
17. Fees of sheriff and appraisers.
18. Legatee's interest is personalty.
19. Extent of liability for charge.
20. Liability of executor.
21. Liability of devisee for interest.
22. Liability of assignee of devisee.
23. Contribution and marshaling.
24. What general devise includes—power to appoint.
25. Interest of devisee in sum charged.
26. Release of charges on land.
27. Devise on condition not to marry.
28. Discharge of legacies by sales.
29. Distribution of proceeds.
30. Devises subject to incumbrances.
31. Vested and contingent devises and legacies.
32. Vested gifts.
33. Gift over in event of death before time of payment.
34. Implied gifts.
35. Contingent gifts.
36. Vested but defeasible interests.
37. Effect on lineal issue of death of lineal legatee.
38. Construction of words importing failure of issue.
39. Purpose of act of 1897.
40. Construction since act of 1897.

1. Intention and power to pass estate.

The maxim "*expressio unius est exclusio alterius*," applies to wills.¹ General language will not be restricted except upon clear intention.² The residuary clause becomes an important index as to such intention.³ "Inheritance," although commonly used to cover anything that is inheritable, like "heirs," the root of it, is not allowed by the scholastics to be properly applied to personalty, it seems.⁴ However, in a will, such general words as "all I have" will pass realty, personalty, in short, all the man possessed in this world⁵ and "prop-

¹ Walters' Est., 24 Pitts. L. J. 49; Howe's Ap., 126 Pa. 233; Eckert v. Penna. Trust Co., 212 Pa. 372; Finney's Ap., 113 Pa. 11.

² Cooper's Est., 10 C. C. 605; Wambold v. Scholl, 12 Montg. 173; Williams v. Brice, 201 Pa. 595.

³ Hunter's Est., 6 Pa. 97.

⁴ Griffith's Est., 1 Lack. L. N. 311.

⁵ Clingan v. Mitcheltree, 31 Pa. 25.

erty" is equally comprehensive.⁶ It may be so qualified as to cover only a particular kind or quantity of property; but the man who makes the will must do the qualifying and not the interpreter.⁷ "Estate" is as comprehensive as property,⁸ and yet it may mean real estate from the whole will.⁹ "All the rest, residue and remainder of my estate" passes personalty as well as realty.¹⁰ "Capital" may include realty;¹¹ also a gift in trust when its character is indicated.¹² The intention of the testator is the controlling factor; although he may use "bequest" for "devise" or *vice versa*.¹³ "Effects" in connection with other language may also mean real estate;¹⁴ though it is usually employed with a qualifier,—“personal effects.”¹⁵ "Effects" embraces chattels as well as goods, and may also embrace real estate.¹⁶ But "my worldly goods of all sorts and kinds" does not pass real estate;¹⁷ nor "earthly property" where there is no direction to sell the land.¹⁸ "Remainder of my estate, whatever it may be" covers real estate as a residue.¹⁹ But where the residue of real estate is distinctly devised there is nothing to construe.²⁰ "Personal property" does not include real property.²¹ A devise of a house and lot by street and number does not carry a bakery and lot fenced off on the rear as a part of the original lot.²² Profits of a business directed by the testator to be continued are property;²³ so are monthly payments due on a coal lease an "interest" that will pass by a will.²⁴

2. Property which passes as personalty.

"All my household goods and personal property" includes the entire personal estate as distinguished from the real estate;¹ but a bequest of all the personalty in a certain place will not include a chose in action, since it has no place.² A mortgage passes under the term personalty.³ The fact that the testator fails to dispose of all his property does not defeat his expressed intention to keep the real and personal property separated.⁴ "All my personal property" in

⁶ Rossetter v. Simmons, 6 S. & R. 452.

⁷ Howe's Ap., 126 Pa. 233.

⁸ Schropp v. Shaeffer, 2 D. R. 362.

⁹ Turbett v. Turbett, 3 Yeates, 187.

¹⁰ Comth. v. Hackett, 102 Pa. 505.

¹¹ Arrott's Est., 9 C. C. 535.

¹² Bradford v. Bradford, 6 Wharton, 236.

¹³ Bruckman's Est., 195 Pa. 363; Hofius v. Hofius, 92 Pa. 305.

¹⁴ Butler's Will, 37 Pitts. L. J. 122.

¹⁵ Reimer's Est., 159 Pa. 212.

¹⁶ Dowdel v. Hamm, 2 Watts, 61; discussion by Rogers, J.

¹⁷ Bradford v. Bradford, 6 Wharton, 236.

¹⁸ Brown v. Dysinger, 1 Rawle, 408.

¹⁹ Eiseman's Est., 13 Lanc. L. R. 401.

²⁰ York v. Weber, 195 Pa. 140; Watson v. Smith, 210 Pa. 190.

²¹ Freas v. Yost, 23 Montg. 85.

²² Smith v. Metzger, 32 Supr. C. 596.

²³ Gebbie's Est., 9 D. R. 56.

²⁴ Duffy's Est., 209 Pa. 390.

¹ Schultz's Est., 21 Lanc. L. R. 301; Williams' Est., 8 Del. Co. 120.

² Alexander's Est., 45 Pitts. L. J. 465; Sloan's Ap., 4 Atl. 350.

³ Finney's Ap., 113 Pa. 11.

⁴ Shedder's Est., 210 Pa. 82.

its restricted sense does not include the proceeds of realty.⁵ "Personal property," in the connection used, was construed not to include cash in bank.^{5a}

3. Devises, nature of.

A man cannot so devise as to direct an inheritance contrary to law.⁶ An estate by will may pass an inheritance without the word "heirs";⁷ and "all my temporal estate" passes a fee.⁸ A feoffment to the use of his will and to the use of him and his heirs is all one.⁹ A devise imports a consideration in itself, and therefore cannot be averred to be to the use of anyone but the devisee, if it be not expressed in the will. No more can a devise be averred to be for a jointure, unless it be expressed in the will.¹⁰ A devise without attornment is good.¹¹ A devisee of lands may enter without livery of seisin thereof to be made to him.¹² The freehold or interest, in law is in him before he doth enter, and if the heir enter and hold the devisee out, he may either enter, peaceably if he can, or by the writ of *ex gravi querela*;¹³ which lies to execute the devise.

It is truly said that the first grant and the last will are of greatest force. Where in one will are diverse devises (repugnant) the last shall stand. *Cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est.*¹⁴

4. Devise to pass the whole estate.

Section 9 of the act of 1833, *supra*, provides:

"That all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over or by words of limitation or otherwise, in the will, that the testator intended to devise a less estate."

When a man devises a tract of land by boundaries, quantity does not control. All within the boundaries passes.¹⁵ When there is a plain description of the thing devised anything less will not answer.¹⁶ A devise of a certain number of acres gives the right to the devisee to locate and measure them from a tract and having taken possession he is in by right.¹⁷ A devise with power to give a fee vests a fee in the devisee.¹⁸ A devise over of what remains, where the devisee

⁵ Manville's Est., 8 Kulp, 407. (See Patterson's Ap., 25 Pitts. L. J. 69; Myers' Ap., 48 Pa. 26.)

^{5a} Gibbons' Est., 224 Pa. 38.

⁶ 1 Inst. 25 b; 377 a; Corbet's Case, 1 Coke, 85.

⁷ 1 Inst., 9 b.

⁸ Grayson v. Atkinson, 1 Wilson, 333.

⁹ Sir Edward Clere's Case, 6 Coke, 18.

¹⁰ Vernon's Case, 4 Coke, 4.

¹¹ 1 Inst. 111, 112 a; 322 a.

¹² 1 Inst. 112.

¹³ 1 Inst. 111 a.

¹⁴ Inst. 112, 113.

¹⁵ Bear v. Bear, 13 Pa. 529; Stackhouse v. Stackhouse, 2 Dallas, 80.

¹⁶ Miller v. Graham, 40 Supr. C. 307.

¹⁷ Galbraith v. Bowen, 5 D. R. 352; Breinig v. Whitely, 1 Pitts. 340.

¹⁸ Hoxie v. Chamberlain, 228 Pa. 31; Brown's Est., 38 Pa. 289; Church v. Disbrow, 52 Pa. 219; Witmer v. Delone, 225 Pa. 450.

has the power to dispose of and use the principal, does not reduce the estate.¹⁹ Where there is a dispute about the division lines under a will the court will adopt the line which seems to have been intended by the will.²⁰ The testator having willed part of his plantation to one and part to another son, an immediate division was contemplated.²¹ A division line made by the father in contemplation of his will is admissible to show what he intended to devise, regardless of the quantity.²² The court will have due regard for the legal rights of the devisee in construing the will.²³ If a street is called for as a boundary the middle line of the street is intended unless the contrary appears.²⁴ When the call along a street gives the distance but also the point to which the line extends the call for the point controls the distance although it be 100 feet more.²⁵ A devise of a lot with the words "leaving an open passage or alley for the back houses" gives a good title to the use of the alley.²⁶ A devise of "50 acres of the most adjacent woodland thereunto next adjoining" does not carry improved land as six per cent. for roads.²⁷ The devise of a house and its appurtenances carries the right to use an appurtenant way and where the house is built over it, the soil as well.²⁸ A devise of a lot by street number carries the entire lot to the rear although testator had built another house on the rear and erected a fence between the two houses.²⁹ But where he lived in a part of the house and rented a part to a bank his devise of "the use of the premises occupied by me situated at," etc., for life was held not to include the entire property.³⁰ When a house is devised it is tantamount to "messuage" which not only means the manor house but the curtilage and buildings and orchards connected with it.³¹ A devise of a farm without qualification and a subsequent devise of a vein of coal in other farms, gives the devisee of the farm absolute title to the surface and subjacent coal.³² Where two houses were joint, it was left to the jury to determine whether testator considered them as one;³³ so where

¹⁹ *Bailey v. R. Co.*, 208 Pa. 45; *Gilchrist v. Empfield*, 194 Pa. 397.

²⁰ *Curty v. Monnin*, 14 Supr. C. 102; *Brown v. Brown*, 6 Watts, 54.

²¹ *Hill v. Roderick*, 7 Pa. 95.

²² *Hunt v. Devling*, 8 Watts, 403.

²³ *Snider v. Snider*, 3 Phila. 158.

²⁴ *Falls v. Reis*, 74 Pa. 439.

²⁵ *St. Margaret, Etc., v. Penn. Co., Etc.*, 158 Pa. 441.

²⁶ *Peters v. Maxwell*, 3 W. N. C. 543.

²⁷ *Blaine v. Chambers*, 1 S. & R. 169.

²⁸ *Cheetham v. Muhlenberg*, 133 Pa. 309.

²⁹ *Kelly's Est.*, 8 D. R. 51. (But see *Smith v. Metzger*, 32 Supr. C. 596; *Metzger's Est.*, 24 Lanc. L. R. 217.)

³⁰ *Handley's Est.*, 208 Pa. 338. (See *Updegraff v. McCormick*, 199 Pa. 590, as to devise of a corner lot; *McClelland v. Brownfield*, 142 Pa. 533, as to "a strip of woodland enclosed"; *Piper's Ap.* as to what was embraced in a mill site property; *Brendlinger v. Brendlinger*, 26 Pa. 131, as to several tracts of land; *Rankin's Est.*, 2 C. C. 264, as to "my divide of the coal," etc.)

³¹ *Rogers v. Smith*, 4 Pa. 93.

³² *Cruzen v. Boughner*, 196 Pa. 12. (See *Nitzell v. Paschall*, 3 Rawle, 76, as to appurtenant right to erect dam and back the water on a tract.)

³³ *McAfee v. Magee*, 4 Penny. 94.

the will called for a post and there were two posts.³⁴ "Unimproved real estate in said city" does not carry a farm and buildings.³⁵

Upon the question as to what lands were included in a devise of "wild lands," the will and the circumstances are admissible in evidence in an action of trespass.³⁶ "Dwelling house and lot of land attached thereto" does not carry a bakery, etc., on the lots fenced off on the rear with a way and shed.³⁷

5. General devise passes after-acquired real estate.

Section 10 of the act of 1833, *supra*, provides:

"That the real estate acquired by a testator after making his will, shall pass by a general devise, unless a contrary intention be manifest on the face of the will."

The old English law was to the contrary.

6. Gift of interest or proceeds.

A provision that donee shall be maintained out of the products of land is a charge but does not entitle the beneficiary to possession.¹

A devise of the use of a farm for life is not a devise of the farm.²

A testamentary trust to pay the interest of a portion to a son for life gives the son no interest in the land.³ A direction to the devisee to pay a part of the value of a devise to another is not an interest in the devise itself, simply in the proceeds.⁴ "One thousand dollars more than one-fifth of my real estate" is a devise of an interest in the land itself.⁵ Where the testator directed the sale of his land and the investment of the proceeds in securities a devisee takes no interest whatever in the land.⁶ But a widow's interest in the land is fixed and will not be changed by a provision giving the son a refusal of the renting of it.⁷

7. Distinction between estate and easement or privilege.

An estate for life is a freehold and when the wife is given "the use and occupation of the house we now occupy as well as the garden and outbuildings belonging thereto, as long as she remains my widow," it is neither a legacy nor a charge on the land but a freehold, defeasible only by her act of re-marrying.⁸ When the estate is given to the

³⁴ *Brownfield v. Brownfield*, 12 Pa. 136; 20 Pa. 55. (As to flats on a river as between the children and residuary devisees, see *Jones v. Janney*, 8 W. & S. 436.)

³⁵ *Robb v. Robb*, 173 Pa. 620. "The moiety or half part of the premises" construed in *Kennedy v. Cowden*, 6 Dauphin, 159. A life estate to mother and daughter and remainder to daughter in the whole, see *Graham v. Heidrick*, 204 Pa. 238.)

³⁶ *Fuller v. Cole*, 33 Supr. C. 563.

³⁷ *Smith v. Metzger*, 32 Supr. C. 596.

¹ *Walker v. Gibson*, 164 Pa. 512.

² *Buchanan v. Duncan*, 40 Pa. 82.

³ *Wilson v. Shoenberger*, 34 Pa. 121; *Selfridge's Ap.*, 9 W. & S. 55.

⁴ *Brownfield's Est.*, 193 Pa. 151.

⁵ *Lentz v. Lamplugh*, 12 Pa. 344.

⁶ *Huey's Ap.*, 1 Grant, 51.

⁷ *Springer's Ap.*, 111 Pa. 274.

⁸ *Gingrich's Est.*, 34 C. C. 392. (See 36 Supr. C. 266.)

mother for life and the privilege of use and occupancy to the daughter during said life, with the right to take the land at a valuation at her mother's death, she has no present interest in the land and the privilege ends with her death in the lifetime of her mother.⁹ When the widow is given the estate for life and power to use and consume, her executor may, after her death, sell the land to pay her debts.¹⁰ A man may devise a fee to his wife defeasible on her re-marriage. A provision in the will that she should not sell without the consent of the executor does not cut down the estate, if she does not re-marry.¹¹ No words of inheritance are requisite. Her fee can only be defeated by re-marriage. The same result follows though she convey in her lifetime and does not re-marry.¹²

A devise of a mill and race with contiguous land to give access to the race to repair it gives a fee in the whole, although the tract through which the race passes is subsequently devised to another.¹³ A devise of a house with a reservation of two rooms in the house for the use of the widow "during life" is a life estate in the rooms.¹⁴ A devise of the land and then a devise of the shad fishery between high water and low water mark is an easement only in the shad fishery, though it be in fee simple.¹⁵ A reservation of a part of a tract for the use of camp meeting people is merely a privilege for the particular use.¹⁶ "An equal privilege forever of the coal bank now opened," is a mere privilege of an incorporeal hereditament and ejectment cannot be maintained for it.¹⁷ In connection with a tannery and the right to take water from the creek, a provision that the brother to whom the adjoining tract was given should have the right to have hides tanned free, gives only a personal privilege to the latter.¹⁸ "Free privilege of taking what coal he wants for his own use or plantation," is personal and does not go to the successor in title.¹⁹

Whilst power to consume and dispose of given to the widow during her life gives her an absolute estate, if she does not see fit to consume or dispose of it, what is left goes to the legal representative.²⁰ She had the power while she lived to dispose of it,²¹ but not having done so, what was left at her death belonged to the estate;²² and the proper practice is by petition for sale and conveyance.²³

⁹ Union Trust Co. v. Hopkins, 25 Lanc. L. R. 385.

¹⁰ Frew's Est., 57 Pitts. L. J. 501; Schwab's Est., 22 C. C. 218.

¹¹ Fidelity Trust Co. v. Bobloski, 19 D. R. 252; 228 Pa. 63.

¹² Redding v. Rice, 171 Pa. 301.

¹³ Harlan v. Moore, 9 Watts, 360.

¹⁴ Wusthoff v. Dracourt, 3 Watts, 240.

¹⁵ Hart v. Hill, 1 Wharton, 124.

¹⁶ Saxton v. Mitchell, 78 Pa. 479.

¹⁷ Carnahan v. Brown, 60 Pa. 23; P. & L. Dig., vol. 23, col. 40733.

¹⁸ Mosser v. Leshner, 154 Pa. 84.

¹⁹ Youghiogeny River Coal Co. v. Pierce, 153 Pa. 74.

²⁰ Nieman's Est., 229 Pa. 41.

²¹ Nieman's Est., 131 Pa. 346; Gross v. Strominger, 178 Pa. 64; Trout v. Rominger, 198 Pa. 91.

²² Dickinson's Est., 209 Pa. 59.

²³ Tyson's Est., 191 Pa. 218.

8. Appraisement of real estate — Directed by will.

Section 1 of the act of April 17, 1869, P. L. 72, provides:

"In all cases of wills heretofore made and duly proved and recorded, and in all cases of wills hereafter to be made wherein the testator directs all or any part of his real estate to be appraised and sold, or where such real estate is devised to any person or persons at an appraisement to be made; or when the same is given to one or more persons to take such real estate at any appraisement directed by the testator to be made, in all such cases, when the testator has not or shall not indicate by whom such appraisement shall be made, it shall be lawful for any of the parties interested in the real estate directed to be appraised to apply, by petition, to the Orphans' Court of the county in which such real estate is situated, setting forth the terms and character of such devise or direction of the testator, and also the name and residence, when known, of all the parties interested in the real estate directed to be appraised."

Where land is devised at a valuation to be paid by the devisee to testator's estate the land passes subject to the payment of the valuation money;¹ so, also, where it is to be divided among persons named;² or to sons named with a direction for the equal distribution of the residuary personal estate;³ also, on direction to value at the widow's death.⁴ The valuation is not a charge on the land where the value is stated and there is no direction to pay;⁵ upon acceptance of the devise the legacy charged becomes a charge on the devisee's share and not upon the whole estate.⁶ Where one son takes the land at a valuation agreed upon between them and dies without paying the share of one of his brothers, it remains a lien.⁷ If the charge is per acre and a deficiency in the number of acres is discovered the devisee need only pay for the actual quantity.⁸

9. Form of petition for valuation.

In the estate of Oswald Dubs, deceased.

To the Hon. ———, president judge of the Orphans' Court, for the County of ———.

The petition of Louise Dubs respectfully represents that she is one of the children and heirs at law of said Oswald Dubs, late of ———, deceased; that in and by his last will and testament duly probated, the said Oswald Dubs did devise an entire messuage and tract of land to his son, Daniel Dubs, at a valuation to be affixed by appraisement in language as follows, to-wit:

[Here insert the clause of the will in full.]

That no provision was therein made as to the number of appraisers or manner of appraisement. That all the parties interested in said estate are:

¹ Fishburn's Ap., 10 W. N. C. 489; Martin v. Ryder, 16 D. R. 770.

² Gilbert's Ap., 85 Pa. 347; Hartzell's Est., 138 Pa. 384.

³ Weiler's Est., 169 Pa. 66.

⁴ Hart v. Homiller, 20 Pa. 248; 23 Pa. 39.

⁵ Knaub's Est., 144 Pa. 322; Shenk v. Shenk, 150 Pa. 521.

⁶ Albright v. Albright, 128 Pa. 381.

⁷ Zerby v. Zerby, 9 Watts, 234.

⁸ Schmick's Est., 2 Woodward, 449.

[Here give the names and residences of all.]

She therefore prays your honorable court to appoint three disinterested persons to appraise the same and make return according to law and she will ever pray, etc.

[Sworn to the truth.]

Louise Dubs.

10. Appraisers to be appointed.

Section 2 of said act, *supra*, provides:

"Upon the presentation of such petition, the Orphans' Court of the proper county shall appoint three disinterested and judicious persons, citizens of the county, to make such an appraisement, unless where the testator has designated the number of persons to make such appraisement, and in such cases the Orphans' Court shall appoint the number of persons so designated, and award an inquest, directed to the sheriff of the proper county, for the purpose of having such appraisement made; and shall order and direct notice to be given to all parties interested, of the time and place of making such appraisement, in the same manner that notice is required to be given in proceedings in partition in the Orphans' Court on estates of decedents."

11. Form of notice.

In the estate of Oswald Dubs, deceased.

In the Orphans' Court of ——— County.

To all whom it may concern:

By authority of an order of the Orphans' Court of said county made on the ——— day of ———, A.D. 19—, notice is hereby given that the appraisers duly appointed by said court, will meet on the premises situate in ———, on the ——— day of ———, A.D. 19—, at ——— o'clock — M., then and there to value and appraise the land devised by the said Oswald Dubs to his son Daniel Dubs, according to law; when and where all who may see fit are at liberty to attend.

Samuel Gramly.

Sheriff.

The above form is designed for publication when personal notice cannot be served. If the parties all reside within the jurisdiction a notice similar to the above may be served upon each.

12. Oath of appraisers.

Section 5 of the same act provides:

"The appraisers shall be duly qualified by the sheriff to well and truly, and without prejudice or partiality, value and appraise such real estate."

13. Rights of the devisees and others.

Where the will provides that all the sons shall have their choice in turns to take at the appraisement, the right extends to the youngest when he arrives at age as directed by the will.⁹ The right to take is alternative when the will so directs,¹⁰ and minors cannot be deprived of it.¹¹ When a son has been given the right to take "either share"

⁹ Hoke v. Leman, 8 S. & R. 248.

¹⁰ Lies v. Stub, 6 Watts, 48.

¹¹ Boshart v. Evans, 5 Wharton, 551.

at the appraisement, he is not concluded by one choice, the purpose of the will being to enable him to take the entire farm if he chooses.¹² If the testator himself fixes the number of appraisers and directs that his sons shall agree upon them, the above act does not apply;¹³ nor has the executor any duty to perform for which he may claim pay.¹⁴ Where the will directs that six jurors shall be appointed by the court, the proceedings may be under the act, *supra*, but if the jurors err in the valuation by mistake as to the number of acres their report will be set aside.¹⁵

14. Return, confirmation and record of appraisement.

Section 3 of said last act, *supra*, provides:

"The appraisement so made shall be returned to and be confirmed by the said Orphans' Court, and the proceedings thereon shall be entered on record and shall be conclusive on all the parties interested in said real estate, unless an appeal therefrom to the Supreme Court shall be taken within three months thereafter."

(See act of 1897, Vol. I, as to appeals from the Orphans' Court.)

15. Acceptance or refusal at the valuation.

When the devisee takes the land at the valuation, whether made by the will, or by appraisement, under the act of 1869, and tenders the money, the title vests in him *eo instanti*.¹⁶ If the land is devised to his children by the testator, subject to legacies which are more than the personal estate and become charged on the land, but gives no power to sell, the children may recover possession subject to the lawful liens.¹⁷ The land being devised to one in possession at a valuation, his continued possession may be taken as an acceptance at the valuation.¹⁸ A recovery in ejectment by the devisee is an election *in pais* to accept the burden.¹⁹ If the devisees agree to grant a right of way through the land, they are estopped from denying their acceptance.²⁰ The devisee of an equitable estate under contract of sale, cannot defeat an annuity charged upon it, by rescinding the contract without notice to the annuitant.²¹ If the devisee refuses to accept in the first instance his refusal may be shown by his actions when he subsequently claims the devise.²² If the devisee is directed

¹² Drennan's Est., 32 Pitts. L. J. 462. (As to right to take a share of the household furniture at the appraisement see Brick's Est., 7 D. R. 396.) (For cases where the testator fixed the value see P. & L. Dig., vol. 23, col. 41182.)

¹³ Drennan's Est., 32 Pitts. L. J. 462.

¹⁴ Kachlein's Ap., 5 Pa. 95.

¹⁵ Myers' Est., 5 York, 150. (See also King's Est., 216 Pa. 483.) But if the will directs no appraisement the act does not apply. Thompson's Est., 35 C. C. 321.

¹⁶ Johnson v. Johnson, 81 * Pa. 257.

¹⁷ Stevenson v. Scott, 188 Pa. 234.

¹⁸ Lobach's Case, 6 Watts, 167. (But see Rowson's case, 6 D. R. 61.) It depends upon the circumstances.

¹⁹ Newman's Ap., 35 Pa. 339; an annuity.

²⁰ McClane v. Washington & C. R. Co., 51 Pitts. L. J. 107.

²¹ Phillips' Ap., 34 Pitts. L. J. 240.

²² Phillips v. Phillips, 8 Watts, 195.

to take by deed from the executors and he refuses, there is an intestacy as to the land thus refused.²³ Where there is a doubtful state of facts as to acceptance, the court may properly leave it to the jury to decide.²⁴

16. Decree, adjudging the title.

Section 4 of the act of 1869, provides:

"Upon the return and confirmation of such appraisement, the court shall adjudge such real estate to the person or persons entitled to take the same, on compliance with the terms of the will; and if all of the parties entitled to take the same under the provisions of the will neglect to appear in court, during the first week of the term to which the inquest is returnable, to accept the same, then a record thereof shall be made, and such real estate shall then be disposed of as the testator may have directed in the event of such real estate not being taken at the appraisement directed by him."

17. Fees of sheriff and appraisers.

Section 6 of the act, *supra*, provides:

"The sheriff and appraisers shall receive the same fees as are now allowed by law in cases of partition of decedents, in the Orphans Court."

18. Legatee's interest is personalty.

Where a legatee's interest is charged on land it is none the less personalty and if he dies before payment is made, it goes to his administrator.¹ Such interest is unaffected by a judgment against the owner and an assignment of it is valid.²

19. Extent of liability for charge.

When land is devised charged with the payment of interest on a certain sum to the widow for life, such principal is not a part of the residuary estate, unless the will clearly casts it into the residuum.³ If the whole will indicates that the sum shall go as a residue to the children it is different.⁴ A legacy charged upon the life estate necessarily is not charged upon the remainder.⁵ The executor is not accountable for payments made prior to the time of giving possession.⁶ Where a legacy is made payable to legatee between the ages of 21 and 25, the devisee may elect to pay it after the legatee is 21 years old.⁷ "A reasonable time" to pay the heirs is one year.⁸ Where a

²³ Smith's Est., 6 Kulp, 76. Rhone, P. J.; Wissler's Est., 10 Lanc. L. R. 122.

²⁴ Rape v. Smith, 4 Atl. 360.

¹ Kemp's Est., 2 Woodward, 428.

² Hartzell's Est., 188 Pa. 384.

³ Weyerbach v. Weyerbach, 5 Wharton, 579.

⁴ Stoever's Ap., 5 W. N. C. 467.

⁵ McClurken's Ap., 48 Pa. 211; Malone v. Mounts, 17 D. R. 884.

⁶ Rhoad's Ap., 119 Pa. 468.

⁷ Schnure's Ap., 70 Pa. 400. (For a variety of cases where minors were concerned see P. & L. Dig., vol. 23, cols. 41193-4-5.)

⁸ Baker's Ap., 59 Pa. 313.

testator gives the widow the use of the manor as long as she may choose to occupy it herself and besides devises land to another charged with her support, the bequest is chargeable during her life and not while she chooses to occupy the house.⁹ But if she withdraws from the mansion she cannot demand the equivalent in money.¹⁰ A devise to sons conditioned upon their giving their mother comfortable room and maintenance does not force her to live on the premises. She is entitled to this much wheresoever she chooses to live.¹¹ Where the land is charged with a daughter's support, if it be sold at sheriff's sale, she is entitled to contribution from the purchaser.¹² But in case the beneficiary voluntarily relinquishes the home, he cannot later return and claim to be reinstated in a right he abandoned.¹³ If the widow, to whom certain privileges are reserved by the will including house, hay and apples, removes from the premises and fails to show that she has "one horse and two cows" to keep, it is decided that she has no claim on the devisee as a charge on the land.¹⁴ But it is also decided that where a charge is created and the devisee accepts he assumes a personal liability and may be sued thereon before a justice of the peace in assumpsit, if within the amount of his jurisdiction.¹⁵ The charge being upon the children, the executor is not concerned.¹⁶ If the devise lapses, with no gift over, the charge follows the land in its descent.¹⁷ If the devisee dies in the lifetime of the testator, it follows in the hands of his descendants.¹⁸ A devisee who accepts a gift on the condition that he pay a sum to another becomes personally liable¹⁹ and this is true even if it is not charged on the land.²⁰ A transfer of the land to another does not relieve the devisee.²¹ But if the devisee does not take by the devise there is no liability.²²

20. Liability of executor.

Where the executor is also devisee and no assets come into his hands for the payment of pecuniary legacies not charged on the land, he is in no sense liable to pay them.²³ Not being cast upon the real estate

⁹ *Santee v. Santee*, 64 Pa. 473.

¹⁰ *Goshen's Est.*, 9 Lanc. Bar, 18.

¹¹ *Steele's Ap.*, 47 Pa. 437.

¹² *Walter's Est.*, 197 Pa. 555. She is not obliged to remain on the place with strangers.

¹³ *Pringle v. Marshall*, 152 Pa. 603. (See *Gumaer's Est.*, 19 Supr. C. 621.)

¹⁴ *Gingrich's Est.*, 36 Supr. C. 266. Morrison, J., was of opinion that the apples remained a charge to keep.

¹⁵ *Hill v. Hill*, 17 D. R. 746.

¹⁶ *Knauss' Est.*, 2 Lehigh, 106.

¹⁷ *Solliday v. Gruver*, 7 Pa. 452.

¹⁸ *Newell's Will*, 1 Browne, 311.

¹⁹ *Ruston v. Ruston*, 2 Dallas, 243; *Lobach's case*, 6 Watts, 167; *McCredy's Ap.*, 47 Pa. 442; *Headley v. Renner*, 129 Pa. 542; P. & L. Dig., vol. 23, col. 41197.

²⁰ *Hamilton v. Porter*, 63 Pa. 332; *Etter v. Greenawalt*, 98 Pa. 422; *Horton v. Cook*, 10 Watts, 124.

²¹ *Steele's Ap.*, 47 Pa. 437.

²² *McCullough v. Wiggins*, 22 Pa. 288.

²³ *Duvall's Est.*, 146 Pa. 176; *McCullough v. Wiggins*, *supra*.

and the executor having no funds out of which to pay them, he cannot be held.²⁴ If the legacy be charged on the land devised to the executor the case is different²⁵

21. Liability of devisee for interest.

When the devisee accepts he becomes liable for interest to those entitled to payment out of the land devised, from the date of the death of the testator.²⁶ No demand is necessary.²⁷ But where there is a partnership interest and the son is given five years by the will in which to pay for it, interest only begins after five years.²⁸ Legacies draw interest from the time when payable.^{28a}

22. Liability of assignee of devisee.

Any person who takes the devised lands either by purchase or assignment takes them subject to the charge in favor of the widow.²⁹ It matters not in what form,³⁰ and although the executor embezzled the fund applicable to it.³¹ Where there is a power of sale, the purchaser to hold the amount of the shares given the grandchildren until they are of age, such shares are charged on the land.³² A tenant by the curtesy cannot enforce his tenancy until the legacies charged on his wife's devise are paid.³³

23. Contribution and marshaling.

In case land is devised to two or more subject to maintenance of testator's wife one may compel the others to contribute their proportion.³⁴ Where there are several tracts, the purchasers will contribute in the order of alienation unless there is sufficient evidence to sustain an inverse order.³⁵ In case of partition the charge is apportioned among the purparts, if they are adequate.³⁶

24. What general devise includes — Power to appoint.

Section 3 of the act of 1879, *supra*, provides:

"That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate

²⁴ Hackadorn's Ap., 11 Pa. 86.

²⁵ Glesenkamp's Est., 49 Pitts. L. J. 5.

²⁶ Hamilton v. Porter, 63 Pa. 332.

²⁷ Keech v. Speakman, 1 Clark, 72.

²⁸ Fleming's Est., 184 Pa. 80.

^{28a} Myers' Est., 15 Luz. L. R. 75; Herman's Est., 57 Pitts. L. J. 321.

²⁹ Kauffman v. Kauffman, 2 Wharton, 139; Steele's Ap., 47 Pa. 437; Swoyer's Ap., 5 Pa. 377; Gibson's Ap., 25 Pa. 191.

³⁰ Mohler's Ap., 8 Pa. 26; Becker v. Kehr, 49 Pa. 223.

³¹ Hammond's Est., 197 Pa. 119.

³² Neal v. Torney, 4 Clark, 421.

³³ Balz v. Kircher, 192 Pa. 63.

³⁴ Shillito v. Shillito, 160 Pa. 167; McIntyre v. Stewart, 29 Pitts. L. J. 405; Wingett v. Bell, 14 Supr. C. 558.

³⁵ Fessenden's Est., 170 Pa. 631; Becker v. Kehr, 49 Pa. 223.

³⁶ McLanahan v. Wyant, 2 P. & W. 279. (See P. & L. Dig., vol. 23, col. 41207, for lower court cases.)

to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint,¹ in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

25. Interest of devisee in sum charged.

The devisee of land charged with a legacy payable after the death of the life tenant to the heirs of the testator is entitled to his share as heir;² and therefore a sheriff's or other official sale of the interest will pass title to his share therein.³ An assignment of his interest in the fund for value, passes it as personalty to the assignee and it does not become merged and extinguished in the devise. Therefore the vendee of the land at the sheriff's sale takes the land subject to the charge.⁴

26. Release of charges on land.

The release of legacies charged on land may be proved by receipts in writing signed by the legatees, without formal releases.⁵ A general release will not relieve the devisee and administratrix from a charge of *devastavit*.⁶ The *cestui que trust* may show that a release obtained by the trustee was without consideration.⁷ An unfilial advantage secured by a son over his old and feeble mother by an agreement to minimize her dower interest will be held unconscionable.⁸

27. Devise on condition not to marry.

By the civil law a devise not to marry without consent was *in terrorem* and void. By the common law of England such devise or bequest was void unless there was a devise or bequest over, so as to prevent intestacy, if the person should marry.⁹ It was said that the law favors consents and will construe them with great latitude.¹⁰

In Pennsylvania the common law is recognized with a limitation. So it has been held that where a testator bequeaths the income on a

¹ A power of appointment is a power to dispose of an estate vested in another. (Wharton's Law Lexicon.)

² Harman's Est., 135 Pa. 441; P. & L. Dig., vol. 23, col. 41207.

³ Palm's Est., 13 Supr. C. 296; Weiler's Est., 169 Pa. 66.

⁴ Hartzell's Est., 188 Pa. 384.

⁵ Cassell v. Cooke, 8 S. & R. 268.

⁶ Menold's Est., 14 D. R. 275.

⁷ Lancaster, Etc., Ap., 127 Pa. 214.

⁸ Springer's Ap., 111 Pa. 228.

⁹ Jarvis v. Duke, 1 Vernon, 20; Garret v. Pritt, 2 Vernon, 293; Stratton v. Grimes, 2 Vernon, 357; Long v. Dennis, 4 Burrows, 2055.

¹⁰ Daley v. Desbouverie, 2 Atkyns, 264; Cage v. Russell, 2 Ventris, 352; Clarke v. Parker, 19 Vesey, 1; D'Aguilar v. Drinkwater, 2 V. & B. 225; Scott v. Tyler, 2 Bro. Ch. R. 431.

certain sum to a daughter "so long as she remains single, bearing the name of Elizabeth Hamlin," and if she marries, then to a cemetery company, it is not a condition in restraint of marriage, but a limitation only as to the time of enjoyment, and if she marries the income ceases.^{10a} There is a distinction between a bequest on condition and a conditional limitation.^{10b} A bequest limited to a period of celibacy is not void and in such case, no gift over is necessary.^{10c}

28. Discharge of legacies by sales.

A judicial sale of the land charged with legacies which are due and whose value can be readily ascertained discharges them,¹¹ although some installments are not yet accrued;¹² but if the contrary, they will remain a lien on the land.¹³ It depends very much upon the nature of the charge and the character of the beneficiary. For example, where charged for the widow or minor children under the terms of the will, the purchaser must take notice of the state of the record at the time of the sale and beware.¹⁴ Where a pecuniary legacy is bequeathed to the devisee for life with remainder to his children the sale by the sheriff will divest it.¹⁵ The sheriff has no power over the question whether or not the lien will be discharged.¹⁶ When the land is devised at a valuation and the description sets out the fact of the charge the purchaser buys it with notice and subject to it.¹⁷ There is a distinction between sales under section 19 of the act of February 24, 1834, P. L. 70, and under the Price Act (April 18, 1853). Sales under the latter act discharge the legacy.¹⁸

29. Distribution of proceeds.

Arrears of an annuity charged on land are entitled to be paid out of the proceeds of a sheriff's sale of the land.¹⁹ The distribution is *pro rata* according to the arrears due at an Orphans' Court sale.²⁰ If an annuity is charged on two tracts the annuitant may hold either.²¹ If a legatee connives at a *devastavit* by the executor and

^{10a} Bruch's Est., 185 Pa. 194; Hotz's Est., 38 Pa. 422.

^{10b} Bennett v. Robinson, 10 Watts, 348; Stahl's Ap., 2 Pa. 301.

^{10c} Heath v. Lewis, 3 De Gex, M. & G. 953; Hoopes v. Dundas, 10 Pa. 77; Holbrook's Est., 213 Pa. 93. (See Conditions, *infra*.)

¹¹ Hanna's Ap., 31 Pa. 53; Washburn's Est., 187 Pa. 162; Lapsley v. Lapsley, 9 Pa. 130; P. & L. Dig., vol. 23, col. 41218.

¹² Hellman v. Hellman, 4 Rawle, 440; Lobach's Case, 6 Watts, 167; P. & L. Dig., *supra*; Herr v. Groff, 17 D. R. 478.

¹³ Washburn's Est., 187 Pa. 162; Hiester v. Green, 48 Pa. 96; Hartzell's Est., 188 Pa. 384; Walter's Est., 197 Pa. 555.

¹⁴ Dewart's Ap., 43 Pa. 325; Schnure's Ap., 70 Pa. 400; Heintzelman's Est., 2 Lehigh, 351; Newman's Ap., 35 Pa. 339; Hammond's Est., 197 Pa. 119.

¹⁵ Wood's Ap., 20 W. N. C. 250; Rutt's Est., 22 Lanc. L. R. 189.

¹⁶ Hellman v. Hellman, 4 Rawle, 440.

¹⁷ Hart v. Homiller, 20 Pa. 248; 23 Pa. 39; Mowry's Est., 20 C. C. 76. (See also Laughlin's Est., 131 Pa. 333; Bryan's Ap., 101 Pa. 389; Woods v. White, 97 Pa. 222, on kindred features.)

¹⁸ Lombaert's Ap., 99 Pa. 580.

¹⁹ Reed v. Reed, 1 W. & S. 235.

²⁰ Bell's Est., 1 Woodward, 336.

²¹ Addams v. Heffernan, 9 Watts, 529.

residuary devisee, he will be postponed after the creditors.²² The devisee has no standing to object to the payment of legacies out of the proceeds of the land on which they were charged.²³

30. Devises subject to incumbrances.

A devise implies advantages like every gift and the burdens put upon the acceptor will not be increased by implication above its value.²⁴ But a devisee who volunteers to pay the debts of a deviser out of her own fund cannot be reimbursed out of other portions of the estate, it seems.²⁵ If there is an incumbrance the devisee takes it subject to the same.²⁶ A devise at a yearly rental is subject to the payment of taxes, water rents and municipal assessments.²⁷

31. Vested and contingent devises and legacies.

A clear gift in a will is not cut down by a later dubious provision.²⁸ The law leans towards an absolute rather than a defeasible estate and a vested rather than a contingent one.²⁹ This rule applies only where the language is doubtful,³⁰ and it is to be determined from the entire will.³¹ The construction will be made which vests the estate at the earliest period.³² Limitations divesting vested estates are to be construed with the utmost strictness against those seeking to take advantage of them.³³

In case of doubt the construction of a will should be in favor of the first rather than the second taker; of a general or primary intent rather than of a particular or secondary one; and where a devise is subjected to a charge of burden, doubts as to the *quantum* of the estate should be resolved in devisee's favor.

An indefinite devise coupled with a charge on the devisee passes a fee. A testator's devise to his wife to "take possession and enjoy and administer for the time that she remain a widow, all of my real and personal estate and effects" gives a fee defeasible only in event of her re-marriage. Having died unmarried her estate was a fee.³⁴

Where a direction in a will to pay or divide constitutes the bequest, the vesting of the interest itself is postponed and not merely the possession or enjoyment of it. A grandchild which dies before dis-

²² West Branch Bank v. Donaldson, 7 W. & S. 407.

²³ Drake v. Brown, 68 Pa. 223; P. & L. Dig., vol. 23, col. 41223.

²⁴ Littell's Est., 50 Pitts. L. J. 168.

²⁵ Piper's Est., 11 Phila. 141; Metzgar's Ap., 71 Pa. 330.

²⁶ Peter's Est., 16 Supr. C. 462; Meckley's Est., 20 Pa. 478; Thompson's Ap., 11 Atl. 455; Eyre's Ap., 106 Pa. 184.

²⁷ Sower's Est., 217 Pa. 192.

²⁸ Moyer v. Rentschler, 2 Berks, 318.

²⁹ Smith's Ap., 23 Pa. 9; Jackson's Est., 179 Pa. 77; Carstensen's Est., 196 Pa. 325; Waln's Est., 228 Pa. 259; P. & L. Dig., vol. 23, col. 41230; Throckmorton v. Thompson, 34 Supr. C. 214; Wagner's Est., 16 D. R. 184; Lefevre's Est., 16 D. R. 918.

³⁰ Geisinger's Ap., 1 Mona. 600.

³¹ Coggin's Ap., 124 Pa. 10; Shelmerdine's Est., 16 D. R. 222.

³² Fulton v. Fulton, 2 Grant, 28; Hershey's Est., 9 Lanc. L. R. 121; P. & L. Dig., vol. 23, col. 41231.

³³ Penrose, J., in Glading's Est., 13 D. R. 314.

³⁴ Fidelity Trust Co. v. Bobloski, 228 Pa. 63.

tribution had only a contingent and not a vested interest, in such case.³⁵

32. Vested gifts.

A legacy payable at a future time is held to be vested or contingent according to the language used, whether the time is annexed to the gift or the payment; if to the gift it is contingent, and if to the payment, it is vested.¹ A separate antecedent gift, independent of the time of payment, vests it.²

A fee simple in a devise is not limited to a life estate by a clause of reversion on failure of issue.³ An equitable fee may be created in a spendthrift trust, to the son and his heirs.⁴ And when the devise is to "son or his children," if the son survives the testator or life tenant, it will be a fee.⁵ "Or," in such case does not mean "and." The will "points unmistakably to an alternative gift, and with equal certitude to the intended alternate beneficiary."⁶ Where the share of a son is directed to be held for him until five years after the death of the testator the time is annexed to the payment and the gift is vested at the death of the testator.⁷ The rule above stated will admit of an exception when there is an intermediate gift of accruing income for the same person, and this carries with it the intention that causes the principal to be held vested also.⁸ A residuary gift to grandchildren as they come of age confers a vested estate subject to let in after-born children, to take effect at the death of the testator.⁹ A devise or legacy given to be paid, or in tantamount words, at some future time is a present debt, and if the donee dies before the time of payment it will be held vested.¹⁰ Where the income is given at once and the principal at some future time it is vested.¹¹ A bequest to a person "at" a certain age has been held vested, by force of the context.¹² If the provisions of the will are seemingly repugnant they must be

³⁵ *Rosengarten v. Ashton*, 228 Pa. 389. (See opinion of Morrison, J., in *Long's Est.*, 39 Supr. C. 323, affirmed in 228 Pa. 594, on vested and contingent estates.)

¹ *Reed v. Buckley*, 5 W. & S. 517; 15 Pa. 83; *Ferguson's Est.*, 31 Supr. C. 422; *Harding v. McAlpine*, 12 Leg. Int. 278; *Thompson's Est.*, 18 Montg. 41.

² *Bowman's Ap.*, 34 Pa. 19; *Cooper v. Scott*, 62 Pa. 139; *Gitt's Est.*, 15 York, 108; 203 Pa. 263; P. & L. Dig., vol. 23, col. 41234.

³ *Hoxie v. Chamberlain*, 228 Pa. 31.

⁴ *Kelly v. R. Co.*, 226 Pa. 540.

⁵ *Bender v. Bender*, 226 Pa. 607.

⁶ *Stewart, J.*, in *Bender v. Bender*, *supra*. (See *Gilmor's Est.*, 154 Pa. 523, for review of authorities.)

⁷ *Siegwarth's Est.*, 33 Supr. C. 622.

⁸ *Stiles v. Easton Natl. Bank*, 33 Supr. C. 57; *Jamieson's Est.*, 34 C. C. 417; *Hildebrandt's Est.*, 26 Lanc. L. R. 60; *Stahl's Est.*, 26 Lanc. L. R. 61; 25 Supr. C. 402.

⁹ *Irvine's Est.*, 31 Supr. C. 614. (See *Hill v. Hill*, 17 D. R. 746.)

¹⁰ *Middleton's Est.*, 212 Pa. 119; *Kerr v. Bosler*, 62 Pa. 183; *Page's Ap.*, 71 Pa. 402; P. L. & Dig., vol. 23, col. 41237.

¹¹ *Schively's Est.*, 9 W. N. C. 223; *Middleton's Est.*, *supra*.

¹² *Eckert v. Hetrick*, 2 Pearson, 37. (For a case of trust held vested see *Smith v. Myers*, 212 Pa. 51.)

reconciled with the main intent.¹³ The general rule is that where the postponement of the payment is for the benefit of the estate the gift is vested.¹⁴

33. Gift over in event of death before time of payment.

The rule is that a gift of personalty vests at the death of the testator unless the will discloses an intention to the contrary.¹⁵ If it is provided that should the legatee die before the time fixed for payment it shall be paid to his heirs if any, the legacy vests and is payable to the legal representatives of the deceased heir.¹⁶

34. Implied gifts.

Where the gift is vested an annexed condition that the donee must apply within a certain time for it does not make it contingent.¹⁷ Giving the fund to the executrix to be invested and to pay the income over, with discretion to pay the principal vests the legacy by implication.¹⁸ A gift of the income without limitation is a gift of the fund itself.¹⁹ This is so much the case that where the testator by his will provides that the donee shall have the income only, etc., "any rule of law to the contrary notwithstanding," the legacy nonetheless is vested absolutely.²⁰ In arriving at the decision of the question whether or not a devise is vested or contingent the court will consider the relationship of the parties and the entire situation from which the will sprang.²¹ In a gift to a class, *in futuro*, the thing vests in those of the class in being, subject to be opened to let in *post* born children of the same class.²²

35. Contingent gifts.

There being no separate antecedent gift, independent of the direction and time of payment, the gift being inferred from the direction to pay, a gift is contingent.²³ A gift to children who shall attain a certain age is contingent upon their attaining it.²⁴ So, also of a legacy

¹³ *Ficthorn v. Ficthorn*, 1 Berks, 193.

¹⁴ *Little's Ap.*, 117 Pa. 14; *Stone v. Massey*, 2 Yeates, 363; *Donner's Ap.*, 2 W. & S. 372; *Moran's Est.*, 13 Supr. C. 251.

¹⁵ *Wengard's Est.*, 143 Pa. 615.

¹⁶ *Reed's Ap.*, 118 Pa. 215. (See P. & L. Dig., vol. 23, col. 41244, for various lower court cases showing the application of the principle.)

¹⁷ *Little's Ap.*, 117 Pa. 14; 81 Pa. 190.

¹⁸ *Millard's Ap.*, 87 Pa. 457; *Roberts' Ap.*, 59 Pa. 70; *Provenchere's Ap.*, 67 Pa. 463.

¹⁹ *Bruch's Est.*, 185 Pa. 194; *Fell's Est.*, 6 Supr. C. 192; *Hartman's Est.*, 11 Supr. C. 35.

²⁰ *Ritter's Est.*, 190 Pa. 102; P. & L. Dig., vol. 23, col. 41249.

²¹ *Ryon's Ap.*, 124 Pa. 523.

²² *Plummer's Est.*, 46 Pitts. L. J. 289; *Larkin's Est.*, 4 Del. Co. 340. (For a case of absolute bequest after a life estate, see *Waln's Est.*, 228 Pa. 259; and an annuity *pur autre vie*, see *Hildebrant v. Hildebrant*, 42 Supr. C. 190.)

²³ *Moore v. Smith*, 9 Watts, 403; *Gilliland v. Bredin*, 63 Pa. 393; *Lumberman's Ntl. Bank's Ap.*, 13 W. N. C. 191; *Reichard's Ap.*, 116 Pa. 232; *Robinson's Est.*, 6 Lanc. L. R. 153; *Raleigh's Est.*, 216 Pa. 451.

²⁴ *McBride v. Smyth*, 54 Pa. 245; *Fairfax's Ap.*, 103 Pa. 166; *Engle's Est.*, 167 Pa. 463.

to brothers and sisters who shall be living at testator's death;²⁵ or other persons who shall be living at his death.²⁶ Generally, then when the gift or devise is made at or when the donee arrives at a certain age, it is contingent upon his arriving at such age;²⁷ and, so also of an accumulation until the children arrive at the age of 21, then to be divided among the survivors.²⁸ A legacy may be given upon a contingency of profits in a business undertaking.²⁹ If the will provides that the gifts shall not be paid if the beneficiaries die before receiving them, it is a divestiture.³⁰ Where the legacy is contingent it does not go to the legal representative but to the children or those entitled to it.³¹ A legacy may be contingent upon the act of the devisee, as if he should sell the thing devised for more than a certain sum.³² When the will clearly annexes the condition to the gift itself it is contingent upon the happening of the event indicated.³³ If a legacy is given on the happening of two contingencies both must eventuate before the legacy is in effect.³⁴

36. Vested but defeasible interests.

Unless there be a contrary intention indicated a legacy bequeathed in default of appointment vests at the death of the testator, subject to be divested by exercise of the power of appointment.³⁵ Where a fund is given in trust for the support of minors to be paid them when they arrive at 21 years respectively, if any die before 21, their shares go to the survivors;³⁶ and so in case of a provision for survivors where any should die without issue either before or after the death of testator.³⁷ With such provisions in a will the estate is not absolutely indefeasible, until the time has arrived or the event happened upon which it depends.³⁸ A contingent clog being removed, as where it is provided that should she die single and she marries, the estate vests in the beneficiary immediately when the event comes into fruition.³⁹ Where a number of contingencies

²⁵ Martin's Est., 185 Pa. 51. (For a case of contingent remainder see Long's Est., 225 Pa. 39; Ridgway's Est., 18 D. R. 137.)

²⁶ Patterson v. Caldwell, 124 Pa. 455; Rowland's Est., 141 Pa. 553; 151 Pa. 25.

²⁷ King v. Crawford, 17 S. & R. 118; Fox's Est., 6 Montg. 14; Jackson's Est., 209 Pa. 520.

²⁸ Sweitzer's Est., 1 Woodward, 295.

²⁹ Patterson's Est., 173 Pa. 185.

³⁰ Allen's Est., 192 Pa. 170.

³¹ Morrow's Est., 30 Pitts. L. J. 294; Gorgas' Ap., 22 W. N. C. 17. (See Raleigh's Est., 206 Pa. 451, where there was nothing to pass.)

³² Walker's Est., 219 Pa. 181.

³³ McClure's Est., 221 Pa. 556; Ritter v. Knerr, 214 Pa. 279; Young's Est., 16 D. R. 656; Muhr's Est., 15 D. R. 541.

³⁴ Foulke's Est., 52 Pa. 201; Vaux's Ap., 13 W. N. C. 171. (For a gift over to survivors see Haverstick's Ap., 103 Pa. 394.)

³⁵ Freeman's Est., 35 Supr. C. 185.

³⁶ Lewis' Est., 203 Pa. 219.

³⁷ Scull's Est., 9 C. C. 347; Weltmer's Est., 1 Pearson, 415; Glading's Est., 13 D. R. 314.

³⁸ Ward's Est., 16 Phila. 259; Thompson's Est., 8 D. R. 251.

³⁹ Davison's Est., 1 Mona. 185.

are put in the disjunctive, the estate becomes absolute when the time fixed has arrived, and neither of the disjunctives has happened.⁴⁰ An executory devise over in event of the death of the first taker under 21, is held sufficient to show an intention to give a fee on arriving at that age.⁴¹

A devise or bequest defeasible on failure of issue within a fixed period is vested and the legatee's widow is entitled to dower notwithstanding such failure.⁴² Where the will provides for nephews and nieces and the issue of those then deceased, the interest is vested.⁴³

37. Effect on lineal issue, of death of lineal legatee.

Section 12 of the act of 1833, *supra*, provides:

"That no devise or legacy in favor of a child or other lineal descendant of any testator, shall be deemed or held to lapse, or become void, by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator, but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise."

38. Construction of words importing failure of issue.

Section 1 of the act of July 9, 1897, P. L. 213, provides:

"That in any gift, grant, devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not indefinite failure of his issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made or contained."

Section 2 makes the act apply from July 1, 1897.

39. Purpose of act of 1897.

Shafer, P. J., thus explains the purpose of the act:¹

"Certain words and phrases in regard to failure of issue of a grantee or devisee had acquired in law a certain meaning and effect, which was, that subject to the power of the grantor or deviser, to express a different meaning, they had the legal effect of giving a fee

⁴⁰ Scott v. Price, 2 S. & R. 59; Kelso v. Dickey, 7 W. & S. 279.

⁴¹ Cassell v. Cook, 8 S. & R. 268, section 9, act of April 8, 1833, P. L. 249; Felheimer v. Hecht, 6 C. C. 368; Quigg's Est., 4 C. C. 667; Eckert v. Penna. Trust Co., 212 Pa. 372.

⁴² Lovett v. Lovett, 10 Phila. 537; Wood's Est., 48 Pitts. L. J. 427. (As to a trust estate cutting out the husband of the legatee, see Risser v. Risser, 15 Lanc. L. R. 158.)

⁴³ Robbins' Est., 199 Pa. 500.

¹ Dilworth v. Schuylkill, Etc., Co., 37 Pitts. L. J. (N. S.) 393; Shafer, J. Dean of Law Dept. Western University, Pittsburg, distinguishing Titusville, Etc., v. Penna. Oil Co., 122 Pa. 627.

to the first taker. This not being the meaning which one not learned in the law, would usually conceive the words to have, led to frequent failures of testators to accomplish what they really intended, and was well known in numerous cases to have frustrated the actual intention, giving a fee tail where only a life estate was intended. It seems plain that the intention of the legislature was to provide that these words and expressions which, standing by themselves, heretofore imported a fee tail, and thus a fee simple, unless the contrary was otherwise indicated in the will, should thereafter indicate a life estate, unless otherwise indicated in the will. That the legislature has power to do this we cannot doubt."

40. Construction since act of 1897.

A will made since the act of July 9, 1897, P. L. 213, which provides for a limitation over if testator's daughter shall die before or after attaining the age of twenty-one years, without issue "then I give and bequeath the whole of my estate herein bequeathed to my said daughter, Mary B. Daniels, as follows": "means a want or failure of issue in the lifetime or at the death of said Mary B. Daniels, and not an indefinite failure of her issue."²

The general rule is stated thus by Porter, J.: "If a bequest be made to a person, absolute in the first instance, and it is provided that in the event of death or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death or death without issue before the testator," there being nothing in the will which evinces a different intention upon the part of the testator."³ But where the language of the will and the related provisions clearly indicate that the testator had in mind the death of his beneficiary without issue at any time the rule must yield *ex necessitate rei*.⁴

In a devise over on failure of issue, the words "both die leaving no issue" mean an indefinite failure of issue.⁵

² Daniels' Est., 27 Supr. C. 358.

³ Galbraith v. Swisher, 19 Supr. C. 143; Mickley's Ap., 92 Pa. 514; Fitzwater's Ap., 94 Pa. 141; King v. Frick, 135 Pa. 575; Hoff's Est., 147 Pa. 636; Jackson's Est., 179 Pa. 77; Siegwarth's Est., No. 1, 33 Supr. C. 622.

⁴ Jessup v. Smuck, 16 Pa. 327; Sheets' Est., 52 Pa. 257; Mitchell v. Pittsburg, Etc., R. Co., 165 Pa. 645; Middleswarth, Etc., v. Blackmore, 74 Pa. 414; Snyder's Ap., 95 Pa. 174; Daniels' Est., 27 Supr. C. 358.

⁵ Arnold v. College, 227 Pa. 221. (See Eigenbrodt's Est., 19 D. R. 325.)

CHAPTER XLV.

THE RULE IN SHELLEY'S CASE.

1. Origin of the rule.
2. What the rule is.
3. Wolfe v. Shelley — facts.
4. Points of law.
5. Answers to points.
6. An English view.
7. Pennsylvania views.
8. The Gross parallels.
9. Words of "purchase" or "limitation."
10. Words of restriction must be unequivocal.
11. "Heirs," etc., in remainder.
12. "Heirs" as "heirs of the body."
13. Fees tail elongated.
14. "Heirs" as a word of "purchase."
15. "Heirs of the body."
16. Remainder to "issue," etc.
17. Remainder to "children."
18. "Children" as a word of "limitation."
19. Limitation over on failure of issue.
20. The rule in Wild's case.
21. The rule as applied to equitable estates.
22. Rule applied to personality.

I. Origin of the rule.

"The rule in Shelley's case" is not of the same origin as our inheritance laws, which, as has been shown, come down to us from the benign and equitable decrees of Rome in her magnificence. It is a relic of the feudal system, in disharmony with principles of free distribution and by its very harshness repugnant to a spirit of fair play, which is known as Equity, and perhaps for this reason, our reports of "Intermediate Conjecture and Ultimate Error," to quote the facetious Judge Orlady, teem with convulsions to throw it off in particular cases of apparent hardship. Chief Justice Lewis, than whom no judge ever evinced a keener analytical mind, declared:¹ "The rule in Shelley's case is of high antiquity. It did not originate in that case.² It existed long before. It is stated in our law books thousands of times, by judges and elementary writers." This fact stated, by itself, would argue, either that the rule has been constantly challenged, or that, laymen, lawyers and judges failed to know what right it has in our system of inheritance as a rule of property. Yeates, J., said: "The rule is agreed on all hands to be still an unbroken pillar of the feudal system, which cannot be demolished and thrown out with the rubbish of the Dark Ages. The maxim was originally introduced to favor the lord to prevent his being deprived of the fruits of the tenure; and likewise for the sake of specialty creditors. The reason of the maxim hath long ceased,³ because tenures are now abolished, and contingent remainders may be pre-

¹ Gernet v. Lynn, 31 Pa. 94.

² Shelley's Case, 1 Coke, 93 a, A. D. 1579.

³ There is another and a higher maxim of justice, to wit: When the reason for a law ceases the law itself should cease.

served from being defeated before they come *in esse*; yet, having become a rule of property, it is adhered to in all cases literally within it, although the reason has ceased."⁴ Gordon, C. J., admitted:⁵ "The rule may be an unreasonable one, and admittedly does generally defeat the particular intent of the testator, but it is so thoroughly fixed in our law, and upon it depend so many valuable land titles, that it would be a very serious breach of our judicial duty to even hesitate to enforce it."⁶ The late Judge Arnold, *inter alia* said: "And yet there is no rule which has done more injustice and received more condemnation, because of the injury it has accomplished in the majority of the cases in which it has been applied. * * * A determined effort was made to abolish or restrict it in this state at that time and occasional efforts have been made since, but without success, an inertia, miscalled conservatism, to the discredit of that good word, having prevented such a wise measure of justice from being imbedded in our law."⁷

2. What the rule in Shelley's case is.

It is not the purpose of this work to examine or discuss the multitudinous cases which have vexed the ears of justice and wounded the heart of equity. Let those who would scan the particular features of each particular case refer to Vol. XXIII, P. and L. Dig., col. 31822 *et seq.* and the cross references at the beginning of the chapter. Judge Frazer said in *Hill v. Giles*:⁸ "Courts have seized with avidity on any circumstance, however trivial, denoting an intention to fix the contingency at the time of the death, thereby avoiding the application of the rule." The clearest concrete definition of the rule is that given by White, J., in *Carson v. Fuhs*:⁹ "When by deed or will an estate in land is given to one for life and at his death the remainder to his heirs in fee the estate of the life tenant is enlarged to a fee; the two estates are merged in one, and the first taker takes the whole."

Probably the latest method of avoiding the rule, practically, is that sanctioned by the Supreme Court in a recent case, the opinion being by Brown, J.¹⁰ In this case the devise was to a son for life and immediately after his death, to his issue in fee, if any; but if not, then over to another son in fee; this cuts out the rule in Shelley's

⁴ Findlay v. Riddle, 3 Binney, 139; Ware v. Fisher, 2 Yeates, 578; Hoge v. Hoge, 1 S. & R. 144.

⁵ Bassett v. Hawk, 118 Pa. 94.

⁶ That learned and conscientious judge puts the whole case in a nutshell. *Quære*, whether or not the legislature should not put a law on the books settling the matter definitely by providing what words give a remainder and what words a fee in the first taker.

⁷ Peirce v. Hubbard, 10 C. C. 63; 152 Pa. 18. For defense of the rule see Hileman v. Bouslough, 13 Pa. 344, Gibson, C. J., and McGregor v. Davidson, 14 Supr. C. 230, W. D. Porter, J.; Sheeley v. Neidhammer, 182 Pa. 163. For a list of states in which the rule was annulled by positive law, see note by Thomas Raeburn White, Esq., in 60 Leg. Int. 464.

⁸ Hill v. Giles, 201 Pa. 215.

⁹ Carson v. Fuhs, 131 Pa. 256.

¹⁰ Kemp v. Reinhard, 228 Pa. 143. (See opinion, p. 147.)

case, because the devise was not to the issue of the son through him, but was direct from the testatrix to such issue.

3. Wolfe v. Shelley — Facts.

Edward Shelley, Sr., derived his tenement from Henry the 8th, after a life estate to Anne Cobham, widow, by letters patent, upon an annual knight service of "3 pounds, 2 shillings and 8 pence sterling at the Court of Augmentation and Revenue of his crown aforesaid, etc."¹¹ It was provided in this crown title paper, "and if it should happen the said Edward and Johan his wife, to die without issue of their bodies lawfully by them begotten, etc. * * * then to "wholly remain to the right heirs of the said Edward Shelley, forever." The fee tail which Edward and Johan Shelley took thereby, was averred to be entailed to their son Henry, and through him to his sons Henry and Richard. But Edward Shelley by indenture suffered a recovery of certain manors by writ of entry *sur disseisin en le post* to Richard Cowper and William Martin, with the proviso that "the said recovery thereof shall stand and be to the only use, profit and behoof of him the said Edward Shelley and of the heirs males of his body lawfully begotten, and for lack of such issue, to the use, profit and behoof of the heirs males of the body of John Shelley," father of Edward Shelley, etc. Upon this recovery a writ issued at suit of Cowper and Martin and they demanded of Henry Shelley "their demesne as of fee and right," and the sheriff delivered seisin. The jurors found that long before the writ of entry *sur disseisin* and before the death of Edward Shelley, Richard Belchamber was in possession as tenant under a demise for a term of years from Edward Shelley, and Richard Shelley, brother of Henry Shelley I, after the expiration of said lease, demised to Nicholas Wolfe, for twenty-one years, who, so seized under said demise, alleged a trespass against him by Henry Shelley. This was the case.

4. Points of law.

The questions of the law raised were:

1. If the tenant in tail suffers a common recovery with a voucher over, and dies before execution, can execution be sued against the issue in tail?

2. If tenant in tail makes a lease for years, and afterwards suffers a common recovery, whether the reversion be presently by judgment of law in the recoverer before any execution sued?

3. If tenant in tail, having two sons and the elder dies in the lifetime of the father, his wife being *privement enfeint* with a son, and then said tenant suffers a common recovery to the use of himself for term of his life, and after his death to the use of A. and C. for 24 years, and after to the use of the heirs males, etc., and presently a *hab. fa. seisinam* is awarded, but before its execution on the same day tenant dies, and after his death and before the birth of the son of the eldest son, the recovery is executed, by force of which Richard the uncle enters after the son is born, is such entry lawful?

¹¹ Wolfe v. Shelley, 1 Coke, 93.

4. If the uncle may take as a purchaser, forasmuch as the elder son had a daughter which was heir in general and right heir of Edward Shelley at the time of the execution of the recovery?

The argument for plaintiff was thus stated syllogistically:

A. "That which originally vests in the heir and was not in the ancestor, vests in the heir by purchase.

B. But this use originally vested in Richard Shelley and never was vested in Edward Shelley.

C. And therefore the use vested in Richard Shelley by purchase."¹²

But, says the report:¹³ "All the Justices of England, the Lord Chief Baron, and the Barons of the Exchequer, except one of the puisne Justices of the Court of Common Pleas, agreed that the defendant's entry upon the said Richard the uncle was lawful."

5. Answers to points.

Upon request the Lord Chief Justice answered the points:

1. Execution might be sued against the issue in tail.
2. The reversion was not in the recoverers immediately by the judgment.
3. The recoverers could not make whom they pleased inherit.
4. That the uncle was in, in course and nature of a descent, whilst he "claimed the use by force of the recovery and of the indentures by words of limitation and not of purchase."

The recovery was held good enough notwithstanding Edward Shelley died between five and six o'clock on the same day.

6. An English view.¹⁴

"It is commonly said; that in limitations coming within the rule in Shelley's case, the word heirs is not a word of purchase but a word of limitation. We have, therefore, the following essential features in these limitations: (1) A prior estate of freehold; (2) a subsequent limitation, contained in the same instrument, expressed to be to the heirs, whether general or special, of the same person. In all such cases the general rule is, that no estate is taken by the heirs; but an estate of inheritance, corresponding in *quantum*, to the class of heirs specified is taken by the specified ancestor. Thus, the mention of the heirs general will give him a fee simple; of the heirs of his body, will give him an estate in tail general; the mention of the heirs male of his body will give him an estate in tail male; and the mention of the heirs female of his body will give him an estate in tail female."

7. A Pennsylvanian's view.

In 60 *Legal Intelligencer*, p. 464, Thos. Raeburn White, Esq., author and reviewer, says:

"McCann v. Barclay, 204 Pa. 214, is another instance where the 'rule in Shelley's case' is invoked to defeat absolutely the plainly

¹² "Purchase" is the acquisition of property by any means but descent. We have this antithesis: purchase or limitation. Then limitation must be the converse.

¹³ 1 Coke, 106.

¹⁴ The Law of Real Property, p. 112, by Henry W. Challis, M. A., of the Inner Temple. Text Book Series, Rees, Welsh & Co., Pubrs., Phila., Pa.

expressed intent of the testatrix. She left two houses to her son, declaring them to be 'a lifetime lease,' and that he could not 'spend it' and yet, because she provided that after his death these houses should go to his heirs, it was decreed that he could 'spend it.' Another similar case with same unreasonable result, is *Piper v. Locke*, 205 Pa. 616. The effect of this 'rule in Shelley's case' is to deprive a donor of the power of making a perfectly proper disposition of his property according to his wishes."¹⁵

8. The Gross parallels.

In 1877, shortly after the new constitution went into effect on motion of Senator Jones, the Senate ordered printed the tabulated parallels of cases, prepared under the direction of the late Joseph P. Gross, Esq., showing the various constructions of the rule in Shelley's case. A summary of his comparisons shows that in ninety-nine cases the same words were held to be words of "limitation" 48 times and words of "purchase" 51 times. "Heirs" was construed to vest a fee ("limitation") 21 times and to create a life estate (purchase) 6 times; "children" fee 7 times and life estate 27 times.

9. Words of "purchase" or "limitation."

These words are also technical in law. "Purchase" means the acquisition of property in any way except by descent. "Limitation" then means by descent and not by any other way. "Restriction" is the usual synonym. But, by reference to "the rule in Shelley's case," as expounded by all the learned judges of England with "one puisne Common Pleas judge," dissentient, 'as we are told in the authentic report of the case, limitation means that the word "heirs" is not a word of purchase but of descent and that which the limitation over would graft upon the first-taker as a fee vests a fee in the one who is the root and stem of the inheritance. In other words, the graft can be no larger than the cleft of the stem upon which it is grafted. So in a devise which purported a life estate of freehold with remainder to life-tenant's "child, children or lineal descendants," the proposed life tenant took the fee because the words "lineal descendants," being words of inheritance were affixed possibly to round out the period."¹⁶

¹⁵ Mr. White in the same connection states that the legislatures have forbidden the application of this rule, in Alabama, California, Connecticut, Idaho, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New York, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia and West Virginia, and possibly North Carolina. As to wills it is under the enlightened ban of Equity, in Georgia, Kansas, Montana, New Jersey, New Hampshire, Ohio, Oregon, Utah, and a few others. A proper form of enactment in Pennsylvania is suggested in Bierly on Executors, p. 57: "That where any estate in real property is given by deed or will for his life, and after his death to his heirs, the heirs of his body, issue, children or offspring, by whatsoever words of equivalent import they may be designated, the conveyance or will shall vest an estate for life only in the person first named and a remainder in fee to those designated."

¹⁶ *Mason v. Ammon*, 117 Pa. 127. In *Grimes v. Shirk*, 169 Pa. 74, the cases are reviewed by that eminent jurist of Lancaster, Judge Livingston,

A unique application of the rule may be found in McIntosh's Ap., where a devise to "James T. McIntosh and children" was held to be double-barreled.¹⁷

10. Words of restriction must be unequivocal.

Strong, J., stated the rule to be that where one grants an estate of freehold and then wishes to restrict its terms and use he must do so in unequivocal words.¹⁸ Whilst requests in wills are commands, yet as to restrictions they must be imperative. Said Sharswood, J.¹⁹

"All expressions which are indicative of a wish or will are commands. It is different where, having made a disposition, he expresses a desire that the devisee shall make a certain use of his bounty."

"Issue" means "heirs of the body" and if not explained is a word of "limitation." But with words intending it to be of less extent, as for lives of each and the survivors of them, "with the remainder in fee to the issue of them," "issue" is equivalent to children and a life estate only passes to the devisees.²⁰

The same learned judge said: "The rule in Shelley's case is not a rule of construction—not a means of ascertaining the intention of the testator. It supposes that intention to be ascertained."^{20a} Then it must be a rule of application. First having discovered the elusive words "heirs," "issue," "children," "remainder," etc., the intention is supposed to be duly ascertained and then the deadly rule proceeds to move.²¹ If the intention butts up against the inflexible and insurmountable rule, "fixed as the laws of the Medes and Persians," the deceased testator's intention goes into the limbo of *erroris subimos!*²² The rule is of no use at all in discovering the intention of the testator.²³ And, quoting another of the highest authorities, Chief Justice Black: "But it is said that the testator did not mean to give an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life estate *voluit non dixit*, we must take what he said, not what he meant."²⁴

in the court below. (See also Evans v. Smith, 166 Pa. 625; Heister v. Yerger, 166 Pa. 445; Hahne v. Meyer, 173 Pa. 151; Armstrong v. Michener, 160 Pa. 21; Potts v. Kline, 174 Pa. 513; Potts v. Griesemer, 174 Pa. 516; Sheeley v. Neidhammer, 182 Pa. 163; Curry v. Patterson, 183 Pa. 238; Schuldt v. Herbine, 3 Supr. C. 65; Shoup v. Delong, 190 Pa. 331; Serfoss v. Serfoss, 190 Pa. 484; Reutter v. McCall, 192 Pa. 77; Reimer v. Reimer, 192 Pa. 571; Stigers v. Dinsmore, 193 Pa. 483; Beilstein v. Beilstein, 194 Pa. 152; Seybert v. Hibbert, 5 Supr. C. 537; Gilchrist v. Empfield, 194 Pa. 397; Palethorpe v. Palethorpe, 194 Pa. 409; Eby v. Shank, 196 Pa. 426; McGregor v. Davidson, 14 Supr. C. 230; Stouch v. Ziegler, 196 Pa. 489.)

¹⁷ McIntosh's Ap., 158 Pa. 528.

¹⁸ Sheets' Est., 52 Pa. 257.

¹⁹ Burt v. Herron, 66 Pa. 400; Bowlby v. Thunder, 105 Pa. 173; Hopkins v. Glunt, 111 Pa. 287.

²⁰ O'Rourke v. Sherwin, 156 Pa. 285.

^{20a} Kleppner v. Laverty, 70 Pa. 70.

²¹ Guthrie's Ap., 37 Pa. 9.

²² Grimes v. Shirk, 169 Pa. 74; 12 Lanc. L. R. 228.

²³ List v. Rodney, 83 Pa. 483; Moyer's Est., 1 D. R. 581; Carter v. McMichael, 10 S. & R. 429.

²⁴ Bender v. Fleurie, 2 Grant, 345. (Much to the same purport, see Sharswood, J., in Doeblers Ap., 64 Pa. 9, and the cases cited, *supra*, n. 10.)

11. "Heirs," etc., in remainder.

It boots little to discuss the conceded hardship of the rule. If the law-making power be too inert to prohibit its operation or if the judicial mind be of that peculiar psychic cast as to venerate all things hoary with antiquity, the most practical thing to do is to avoid its application by steering clear of it. Justice Brown in *Kemp v. Reinhard*,²⁵ has indicated a safe passage between Scylla and Charybdis, so that a layman, "*inops consilii*," or a justice of the peace or even a notary public, may write a will creating a life estate in A and a remainder in A's issue, if he will pay attention to a few little words and not try to import into the solemn document all the pompous phrases of the "law-latin." To challenge the criticism of the academicians, let it be put thus, in the language of that will: I give and devise to my son A my farm [or whatever it is] for and during his natural life, and immediately after his death I give and devise the same to C., D., E., and F., naming them; or "to his issue or children in fee, if any," he have; and if he have none, then to G. in fee. This is assuming now that the Supreme Court will stand by its decision through thick and thin, without tergiversation. The word "heirs" may then be sanctified and put away among the sacred relics of the legal antiquaries.

It will then be a mere reminiscence that a deed or will granting land to A. for life with the remainder in fee to his heirs, simply grants a fee to A., his heirs take nothing unless he gives it to them.²⁶ It does not matter what kind of "heirs" they were, whether the old feudal "tails" or the more modern variations, such as "legal heirs," "right heirs," "lawful heirs," "heirs and assigns," or equivalent terms,²⁷ legal representatives, etc.

It may also be remembered that in the past the remainder was generally swallowed up in the fee, when words of similar technical precision were used by a maladroit writer of a deed or will,²⁸ although, occasionally, one of the little progeny slipped through the net in the garb of children.²⁹

12. "Heirs" as "Heirs of the body."

It will not be forgotten either, then, that in the old days of scholastic refinement and heart-aches from disappointment, the word "heirs" was inflated or contracted so as to mean "heirs of the body" or "issue of the body" and thus create a fee

²⁵ *Kemp v. Reinhard*, 228 Pa. 143.

²⁶ *Warn v. Brown*, 102 Pa. 347; *Cockin's Ap.*, 111 Pa. 26.

²⁷ *Vowinckel v. Patterson*, 114 Pa. 21; *McGregor v. Davidson*, 14 Supr. C. 230; *Gruver's Est.*, 10 Kulp, 152; *Hahne v. Meyer*, 173 Pa. 151; *Reutter v. McCall*, 192 Pa. 77; *Conrow's Ap.*, 3 Penny. 356; *Garver v. Clouser*, 218 Pa. 611; *Nesbit v. Skelding*, 213 Pa. 487; 2 C. R. A., col. 4052; *Curry v. Patterson*, 183 Pa. 238; *McCann v. Barclay*, 204 Pa. 214; *P. & L. Dig.*, vol. 23, col. 31833; *Kimmel v. Shaffer*, 219 Pa. 375.

²⁸ *Yarnall's Ap.*, 70 Pa. 335; *Tucker's Ap.*, 75 Pa. 354; *Serfass v. Serfass*, 190 Pa. 484; *Kuntzleman's Est.*, 136 Pa. 142; *Shapley v. Diehl*, 203 Pa. 566; *Hendricks v. Senior*, 25 C. C. 220; *McCann v. McCann*, 197 Pa. 452.

²⁹ *Ackerman v. Ackerman*, 34 Supr. C. 162. [There are some others.]

tail, which by virtue of the act of April 27, 1855, P. L. 368, meant a fee simple in the first taker.¹

13. Fees tail elongated.

The act of April 27, 1855, P. L. 368, provides:

"That whenever hereafter by any gift, conveyance, or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable."

14. "Heirs" as a word of "purchase."

Let it be remembered, too, that "heirs" has very rarely been given the force of a word of "purchase" as antithetic to descent. Only when the search for the intent of the testator under the legal microscope disclosed that he meant "children" were they permitted to take in remainder.² In England the rule was long since modified so that by descriptive words it might be inferred that "heirs" was used as a word of purchase.³ But no such modification has yet been apparent here⁴ with a few exceptions.⁵

15. "Heirs of the body."

An estate tail created by using "heirs of the body" in giving the remainder, becomes a fee simple under the act of assembly and the rule applies in such cases.⁶ Other words if equivalent will be sufficient to bring a case within the rule.⁷ If, however, the remainder be given to the "male heir" or the "only heir" it will be held well lodged in the second taker.⁸ The same is true if to "children" or their equivalent.⁹

16. Remainder to "issue," etc.

"Issue" is such a term as narrows the legal scope of "heirs"

¹ Smith v. Piper, 229 Pa. 343; Carlisle v. Giffen, 57 Pitts. L. J. 412; Seely v. Seely, 44 Pa. 434; Bassett v. Hawk, 118 Pa. 94; Reimer v. Reimer, 192 Pa. 571; Shoup v. DeLong, 190 Pa. 331; Price v. Taylor, 28 Pa. 95; McCafferty v. Duerr, 207 Pa. 261. (By a divided court.)

² Kuntzleman's Est., 136 Pa. 142. Explanation by Clark, J.

³ Physick's Ap., 50 Pa. 128. Strong, J.

⁴ Nice's Ap., 50 Pa. 143; Steiner v. Kolb, 57 Pa. 123; Cockins' Ap., 111 Pa. 26; Carson v. Fuhs, 131 Pa. 256; Hiester v. Yerger, 166 Pa. 445; Eby v. Shank, 196 Pa. 426; Stigers v. Dinsmore, 193 Pa. 482.

⁵ Huss v. Stephens, 51 Pa. 282; Fowler's Ap., 125 Pa. 388; Porter v. Porter, 6 Del. Co. 158; Mowery v. Mowery, 3 Northam. 36; Criswell v. Grumbling, 107 Pa. 408; Thompson v. Ward, 12 W. N. C. 566; Jones v. Jones, 201 Pa. 548; Jones v. Bower, 20 C. C. 95.

⁶ McIntyre v. Ramsey, 23 Pa. 317; Phila. Trust Co.'s Ap., 93 Pa. 209; Bender v. Fleurie, 2 Grant, 345; Kinsel v. Ramey, 87 Pa. 248; Jones v. Jones, 201 Pa. 548.

⁷ Price v. Taylor, 28 Pa. 95, Lowrie, J.; Boyd v. Weber, 193 Pa. 651; Boyd v. Wingate, 13 W. N. C. 56.

⁸ Dunwoodie v. Reed, 3 S. & R. 435; Bennet v. Morris, 5 Rawle, 9; Clemens v. Hecksher, 185 Pa. 476.

⁹ P. & L. Dig., vol. 23, col. 31853; George v. Morgan, 16 Pa. 95.

sufficiently to get by the rule in Shelley's case, whenever the judicial mind is thoroughly *en rapport* with the "disposing mind" of the deceased testator.¹⁰ But the pass is really so narrow that the great majority have failed to go through it.¹¹ If now there be enough apparent on the face of the will to reflect an intention to use "issue" in a less comprehensive sense than "heirs" or "heirs of the body," then the court may declare it to be equivalent to "children" and other words of purchase. There are a number of cases to this effect.¹² If there are words added of distributive modification such as the names of children or grandchildren, or nephews and nieces, the case is cleared of the meshes.¹³ But these words must be significant and not merely added without any distinguishing effect.¹⁴

Where the remainder contains additional words as well as modifications the word "issue" then, metaphysically speaking, creates a new stem of descent from which the idea of purchase is formulated antithetical to that of "limitation" as an equivalent of descent.¹⁵ In a deed "issue" has been held to be a word of "purchase."¹⁶

17. Remainder to "children."

The word "children," either in a will or a deed, is held to be definitely distributive and intended to be a word of "purchase," because it is restrictive to a class. It may be that in the mind untutored in the law, which is oftenest the mind that makes the will, this very idea of restriction has led to confusion since the refined legal mentality has labeled "heirs" as a word of "limitation," which in the common mind, is universally associated with restriction, within space, time, quality, quantity and other abstract concepts. Be that as it may, "Children" has most frequently assisted the intention of the decadent donor to maintain his will after his demise, although not always.¹⁷ It has seldom been construed otherwise than a word

¹⁰ Kemp v. Reinhard, 228 Pa. 143; Nice's Est., 1 Berks, 6.

¹¹ Allen v. Markle, 36 Pa. 117; Angle v. Brosius, 43 Pa. 187; Armstrong v. Michener, 160 Pa. 21; Stayman v. Paxson, 221 Pa. 446; McCullough v. Johnetta Coal Co., 210 Pa. 222; Belcher's Est., 211 Pa. 615; Nes v. Ramsay, 155 Pa. 628; 2 C. R. A., col. 4053, P. & L. Dig.; vol. 23, col. 31857.

¹² Robins v. Quinliven, 79 Pa. 333; Gernet v. Lynn, 31 Pa. 94; Kern's Est., 5 D. R. 264; Du Four v. Bubb, 199 Pa. 107; Oliver's Est., 199 Pa. 509; Hill v. Giles, 201 Pa. 215; Parkhurst v. Harrower, 142 Pa. 432; Voegtly's Est., 46 Pitts. L. J. 30; Walker v. Milligan, 45 Pa. 178; Taylor v. Taylor, 63 Pa. 481; Wells v. Ritter, 3 Wharton, 208; O'Rourke v. Sherwin, 156 Pa. 285; Shalters v. Ladd, 141 Pa. 349.

¹³ Findlay v. Riddle, 3 Binney, 139; Abbott v. Jenkins, 10 S. & R. 296; Nebinger v. Upp, 13 S. & R. 65; Powell v. Board of Domestic Missions, 49 Pa. 46.

¹⁴ Grimes v. Shirk, 169 Pa. 74; Bright v. Esterly, 199 Pa. 188; Paxson v. Lefferts, 3 Rawle, 59; Carroll v. Burns, 108 Pa. 386 (4 to 3 opinion); Ogden's Ap., 70 Pa. 501.

¹⁵ Powell v. Board, Etc., 49 Pa. 46; P. & L. Dig., vol. 23, col. 31869.

¹⁶ Bacon's Est., 202 Pa. 535; Knowles' Est., 12 D. R. 631; Taylor v. Taylor, 63 Pa. 481.

¹⁷ Haldeman v. Haldeman, 40 Pa. 29; Cote v. Von Bonnhorst, 41 Pa. 243; O'Rourke v. Sherwin, 156 Pa. 285; Oyster v. Oyster, 100 Pa. 538; Affolter v. May, 115 Pa. 54; Oyster v. Knoll, 137 Pa. 448; Simpson v.

of purchase, unless the testator has attached to it some expressions that have made the courts conceive it to mean "heirs."¹⁸ This is so even where the testator has attached "heirs," "fee," etc., to the secondary gift, because the stem of that devise is a purchaser and the commencement of a new stem of descent,¹⁹ and even though the testator uses the word "devolve" in connection with the second devise, as "devolve to her children."²⁰

18. "Children" as a word of "limitation."

As stated above, "children" has not always run the gauntlet successfully. If conceived to mean "heirs of the body," then it created an estate tail elongated by law into a fee.²¹ But the limiting language must be clear and not open to "conjecture, doubt, or even equilibrium of apparent intention," as one of the judges put it.²² Where the word "heirs" refers to those of the remainderman and not the first taker it will not stretch the rule over the case.²³ If the word "descend" be used as one of devolution from the first taker to his children the rule applies.²⁴ If "descend" be qualified by other words the life estate may be held not to become a fee.²⁵

19. Limitation over on failure of issue.

"Failure of issue," since the act of 1897, has been discussed, in the preceding chapter. "Issue" as applied to the second taker was held to be a word of purchase,²⁶ unless it be an indefinite failure of issue.²⁷ Where the failure of issue is definite, applying to the remainderman alone the rule does not apply.²⁸ A devise over in default of heirs of

Reed, 205 Pa. 53; Pifer v. Locke, 205 Pa. 616. (See P. & L. Dig., vol. 23, col. 31873, for discussion of the cases, and distinctions.) Giffin's Est., 138 Pa. 327; Fetherman's Est., 181 Pa. 349.

¹⁸ Hoover v. Strauss, 215 Pa. 130; Emerick v. Emerick, 219 Pa. 187.

¹⁹ King v. Savage Brick Co., 30 Supr. C. 582; Hohein v. Hohein, 25 Lanc. L. R. 105; Seip's Est., 11 Northam. 138; Smyser v. Shindel, 19 York, 142; Bruner's Est., 14 D. R. 124.

²⁰ Keene's Est., 221 Pa. 201.

²¹ Piper v. Locke, 205 Pa. 616; Sheeley v. Neidhammer, 182 Pa. 163; Mason v. Ammon, 117 Pa. 127; Melsheimer v. Gross, 58 Pa. 412; Simpson v. Reed, 205 Pa. 53; Wilson v. Heilman, 219 Pa. 237; Smith v. Lindsey, 37 Supr. C. 171 (a deed); Hastings v. Engle, 217 Pa. 419; Sechler v. Eshelman, 222 Pa. 35; Fox's Est., 16 D. R. 349; Vilsack's Est., 207 Pa. 611; Halpin v. Cooke, 21 C. C. 111.

²² Smith's Est., 9 Phila. 348. (See Guthrie's Appeal, 37 Pa. 9, for a discussion of the various features; also P. & L. Dig., vol. 23, col. 31881, for the cases on this branch of the subject.)

²³ Lewis v. Bryce, 187 Pa. 362.

²⁴ Potts v. Kline, 174 Pa. 513; Potts v. Griesemer, 174 Pa. 513; Brinton v. Martin, 197 Pa. 615; Haldeman v. Haldeman, 41 Pa. 29.

²⁵ Tyler v. Moore, 42 Pa. 374; Keim's Ap., 125 Pa. 480; High's Est., 136 Pa. 222; Grim's Ap., 1 Grant, 209.

²⁶ Leightner v. Leightner, 87 Pa. 144.

²⁷ Hill v. Giles, 201 Pa. 215; Powell v. Board, Etc., 49 Pa. 46; Smith v. Coyle, 83 Pa. 242.

²⁸ Curtis v. Longstreth, 44 Pa. 297; Sheets' Est., 52 Pa. 257; Daley v. Koons, 90 Pa. 246; Bissey's Est., 4 C. C. 458; Pearson v. Willis, 1 C. C. 520; Mannerback's Est., 133 Pa. 342; Shades' Est., 15 Montg. 195; Walker v. Milligan, 45 Pa. 178.

the body of the life tenant to the sons and daughters of the life tenant does not enlarge the life estate into a fee.²⁹

20. The rule in Wild's case.

Strong, J., said:¹ "In Wild's case, 6 Coke 16b, 17a and b, it was resolved that if A devises land to B and to his children or issues and he hath not any issue at the time of the devise, the same is an estate tail. The reason given for this resolution was 'that the intent of the devisor is manifest that his (B's) children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore such words shall be taken as words of limitation, *scil.*, as much as children or issues of his body."² This rule has not been applied to personalty.³ Nor does it apply when the gift is in remainder to children.⁴

21. The rule as applied to equitable estates.

The rule has been held to apply to equitable estates and limitations in trust, the same as legal estates.⁵ The two estates, however, must be of the same quality and coalescent.⁶ If one be legal and the other equitable they do not coalesce and the rule is held inapplicable;⁷ such a case is a spendthrift trust;⁸ or a trust for a married woman;⁹ or a trust for the protection of contingent remaindermen.¹⁰ But a dry trust for a son with complete control and upon his death to his heirs gives him a fee.¹¹ A separate use trust for a married woman to protect her from her husband's creditors, if she outlives the husband, confers a fee in her.¹² If both estates are equitable the first taker has a fee under the rule.¹³

²⁹ *McMasters v. Shellito*, 14 Supr. C. 303.

¹ *Cote v. Bonnhorst*, 41 Pa. 243; *Peale's Est.*, 31 W. N. C. 551.

² *Seibert v. Wise*, 70 Pa. 147; *Shalfield v. Zehmer*, 6 Watts, 101; *Kennedy v. Humes*, 15 W. N. C. 508; *Oyster v. Orris*, 191 Pa. 606.

³ *Coursey v. Davis*, 46 Pa. 25; *Myers' Ap.*, 49 Pa. 111.

⁴ *Curtis v. Longstreth*, 44 Pa. 297; *Oyster v. Knull*, 137 Pa. 448; *Keim's Ap.*, 125 Pa. 480; *Taylor v. Taylor*, 63 Pa. 481; *Lancaster v. Flowers*, 198 Pa. 614.

⁵ *Findlay v. Riddle*, 3 Binney, 139. Yeates, J., quoting *Ld. Mansfield* in 2 Burrow, 1108.

⁶ *Little v. Wilcox*, 119 Pa. 439; *Barnhart v. Powers*, 18 Lanc. L. R. 9; *Hemphill's Est.*, 180 Pa. 95; *Crosby v. Davis*, 2 Clark, 403.

⁷ *Little v. Wilcox*, 119 Pa. 439; *Hickson's Est.*, 14 York, 108; *Bruner's Est.*, 14 D. R. 124; *Hemphill's Est.*, *supra*; *Eshbach's Est.*, 197 Pa. 153; *West's Est.*, 214 Pa. 35; *Xandor v. Easton Trust Co.*, 217 Pa. 485; *Schortz's Est.*, 10 Northam, 287; *Smith's Est.*, 16 D. R. 241.

⁸ *Rife v. Geyer*, 59 Pa. 393; *Stambaugh's Est.*, 135 Pa. 585; *Dull's Est.*, 137 Pa. 112; *Baeder's Est.*, 24 Montg. 57.

⁹ *Bacon's Ap.*, 57 Pa. 504; *Bruner v. Dobbins*, 26 Lanc. L. R. 25.

¹⁰ *Livezey's Ap.*, 106 Pa. 201; *Osborne's Est.*, 10 D. R. 191; *Bacon's Est.*, 202 Pa. 535; *Du Four v. Bubb*, 199 Pa. 107.

¹¹ *Marsh v. Platt*, 221 Pa. 431; *Carson v. Fuhs*, 131 Pa. 256; *Ogden's Ap.*, 70 Pa. 501; *Kay v. Scates*, 37 Pa. 31.

¹² *Wilson v. Heilman*, 219 Pa. 237.

¹³ *Pratt v. McCawley*, 20 Pa. 264.

22. Rule applied to personalty.

The real rule in Shelley's case had no reference whatever to personalty, but it has been so expanded by construction that it now applies by analogy to personal estate.¹⁴ So, where the words in remainder are words of limitation, as already explained, there "will be no core."¹⁵ And where the remainder is to the lineal heirs of the life tenant of the thing bequeathed the same result follows since there is no fee tail as to personalty.¹⁶ If the words used with the gift in remainder are words of purchase there will be a remainder.¹⁷

¹⁴ Keys' Est., 4 D. R. 134; Redmond's Case, 12 D. R. 142; Biddle's Ap., 69 Pa. 190; Bacon's Ap., 57 Pa. 504; Smith's Ap., 23 Pa. 9.

¹⁵ Little's Ap., 117 Pa. 14; Baker's Est., 6 C. C. 672.

¹⁶ Wharton v. Shaw, 3 W. & S. 124; Potts' Ap., 30 Pa. 168; Gerhard's Est., 160 Pa. 253; P. & L. Dig., vol. 23, col. 31905.

¹⁷ Myers' Ap., 49 Pa. 111; Heiss' Est., 1 C. C. 397; Gerhard's Est., *supra*; Francis' Est., 4 D. R. 694; Yoder's Est., 20 Lanc. L. R. 294; Glatfelter's Est., 18 York, 81; Bruner's Est., 14 D. R. 124.

CHAPTER XLVI.

EXECUTORY DEVISES.

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| <ol style="list-style-type: none"> 1. Definitions. 2. Executory interests. 3. Usual application of the term. 4. Limitation over after fee or fee tail. 5. Limitation over on failure of issue. 6. Failure in testator's lifetime. 7. Limitation over to children of first taker. 8. Indefinite failure of issue. | <ol style="list-style-type: none"> 9. Limitation over on failure of "heirs." 10. Limitation over on death during minority, etc. 11. Limitation <i>in futuro</i>, without particular estate. 12. Limitation when particular estate is ineffectual. 13. Incidents of executory devises. 14. Failure and destruction of executory devises. |
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I. Definitions.

"Limitations, or the gifts made by them, when considered with reference to their conferring, or not conferring vested interests, are termed either:

I. Immediate grants, devises, bequests, or limitations; meaning thereby, limitations or gifts of vested interests, whether present or future; or

II. Executory grants, devises, bequests, or limitations; meaning thereby, limitations or gifts of executory interests, whether certain or contingent."¹

"The term 'executory devise' would have been most properly used as above, in the generic sense, in contradistinction to an immediate devise, so as to include contingent remainders, as well as other future interests 'limited to arise and vest upon some future contingency'; so as to comprise, in fact, all limitations of executory interests by way of devise. But the term is almost invariably used in a narrower sense, in contradistinction as well to contingent remainders, as to immediate devises, so as to denote 'such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law'; or, in other words, to denote limitations of springing interests, limitations of interests by way of conditional limitation, and *quasi* remainders after a life interest in personal estate; as distinguished from those limitations of future interests which were good limitations at common law; namely, limitations by way of remainder, limitations of the whole or the immediate part of a reversion, augmentative limitations and diminuent limitations. An alternative limitation, though always an executory devise in the generic sense of the term, as opposed to an immediate devise, is not always an executory devise in the specific and usual sense, in contradistinction

¹ Smith on FEARNE on Executory Interests, section 111.

to contingent remainders; for many alternative limitations are contingent remainders in relation to the particular estate. Limitations of springing interests, conditional limitations, *quasi* remainders after a life interest in personal estate, and alternative limitations, when contained in wills, are seldom distinguished or designated by these or any other specific terms, but are usually denoted by the general term of executory devises."²

2. Executory interests.

"Executory interests do not admit of being limited under the rules of the common law. They owe their whole existence, partly to the statutes permitting devise of lands, and partly to the statute of uses. The limitations under which they arise are called executory limitations, which in a testament are executory devises, and in a deed are springing or shifting uses. * * * An executory interest arising by executory devise, is often briefly styled an executory devise."³

In order to keep cogency of expression, Challis is further quoted: "Since executory interests may, though they are not necessarily, limited to arise upon a contingency, they are liable to be confused with contingent remainders. The distinction between them is given by the following propositions:

Every limitation which creates, in favor of a specified person, a possibility of the vesting of an estate in him at a future time, which is valid by the rules of the common law, gives rise to a contingent remainder; and, every such limitation which is valid in a will or in a conveyance to uses, but would not be valid as a limitation under the rules of the common law, gives rise to an executory interest."

3. Usual application of the term.

It has been said: "An executory devise is a limitation by will of a future estate or interest in land which cannot consistently with the rules of law take effect as a remainder."⁴ So the definition of a remainder becomes immediately necessary. "A remainder is an estate limited to commence after the determination of a particular estate, previously limited by the same deed or instrument out of the same subject of property."⁵ "Remainder in legal Latin is *remanere* coming of the Latin word *remaneo*: for that is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time."⁶ "A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate."⁷ "Several fees may, at common law, be limited, in the alternative, by way of remainder upon the same particular estate, upon such contingencies that not more than one of them can by possibility happen."⁸

² Smith on Fearn, section 111 a, b.

³ Challis on Real Property, p. 57 *.

⁴ Watson, P. J., in *Lovett v. Lovett*, 10 Phila. 537; *Rash's Est.*, 2 Parsons, 160.

⁵ Preston on Estates (Eng.).

⁶ Coke on Litt. 143 a.

⁷ Coke on Litt. 22 b.

⁸ Challis on Real Property, citing *Loddingon v. Kime*, 1 Salkeld. 224.

PRACTICE IN PENNSYLVANIA.

4. Limitation over after fee or fee tail.

An estate may, provided the contingency is not too remote, be limited by way of executory devise, and in no other way, after a fee, whether the fee be immediate or in remainder, contingent or vested, or a fee simple or a base fee.^{8a} If it be too remote it will offend against the negating perpetuities.^{8b} An illustration of an executory devise is as follows:

Devised to his son, his son's wife and their children, during their lives, if he should ever have any children, if not the son shall take all himself. When the testator died the son was unmarried, but he subsequently married and died leaving a wife and three children. Held, executory devise to the wife and children which vested on the marriage and birth of children and the estates were contingent.^{8c}

5. Limitation over on failure of issue.

This subject has already been discussed in the two preceding chapters. Where the devise is to one and after his death leaving no issue, then over to another, it is a good executory devise.⁹ Where the ultimate devise becomes a gift of a fee upon a fee, it is executory only.¹⁰ Where a devise over contemplates a definite failure of issue it is effective,¹¹ and will be so held whether as a vested remainder or an executory devise.¹² Where there is a devise over on failure of issue, it is understood to refer to death without issue in the lifetime of the testator if the gift is immediate, or during the continuance of the life estate, if it is by way of remainder.¹³ If the devise over be a life estate the failure of issue refers to a definite failure at the death of the first taker, whether before or after the death of the testator and the executory devise is good.¹⁴ Where the devise imports an indefinite failure of issue, the devisee takes an estate tail which is by law enlarged into a fee.¹⁵

6. Failure in testator's lifetime.

Limitation over on the death of the first taker without issue means

^{8a} P. & L. Dig., vol. 7, col. 12260; *Redding v. Rice*, 171 Pa. 301; *Boyd v. Bingham*, 4 Pa. 102; *Jordan v. McClure*, 85 Pa. 495.

^{8b} *Smith v. Townsend*, 32 Pa. 434.

^{8c} *Mitchell v. Long*, 80 Pa. 516. (See *Harris v. Potts*, 3 Yeates, 141, for another form.)

⁹ *Lovett v. Lovett*, *supra*; *Ingersoll's Ap.*, 86 Pa. 240.

¹⁰ *De Hass v. Bunn*, 2 Pa. 335; *Sheet's Est.*, 52 Pa. 257. (See *Eby v. Eby*, 5 Pa. 461; *Riehle's Ap.*, 54 Pa. 97; *Rapp v. Rapp*, 6 Pa. 45; *Lippencott v. Warder*, 14 S. & R. 115, for further illustrations.)

¹¹ *Cameron v. Coy*, 165 Pa. 290.

¹² *Ivens v. Scott*, 26 Pa. 215; *Nicholson v. Bettie*, 57 Pa. 384; *Hill v. Hill*, 74 Pa. 173.

¹³ *McAlpin's Est.*, 211 Pa. 26; *Mayer v. Walker*, 214 Pa. 440; *Hoover v. Krick*, 1 Walker, 117.

¹⁴ *Stoner v. Wunderlich*, 198 Pa. 158.

¹⁵ *Palethorp v. Palethorp*, 194 Pa. 408; *Stouch v. Ziegler*, 196 Pa. 489; *Mason v. Slocum*, 25 C. C. 620; *McCafferty v. Duerr*, 207 Pa. 261; *Corrin v. Elliott*, 23 Supr. C. 449.

in the lifetime of testator or during the existence of a prior estate.¹⁶ If the devisee survives the testator she takes an indefeasible fee.¹⁷ So of another contingency which does not happen in the lifetime of the testator.¹⁸

7. Limitation over to children of first taker.

The limitation over to the lawful issue of a son after his death confers a life estate only to the first taker.¹⁹ The same rule applies where the remainder is to children.²⁰ When the first taker has a fee, but if he die without issue, then to his wife's children, the latter take by executory devise, there being no issue of the body of the first taker.²¹ A devise in trust for the separate use of a daughter, and at her death to the issue of her body, contemplates a definite failure of issue and the interest of the children attaches only upon the death of the daughter.²²

8. Indefinite failure of issue.

The courts favor estates tail rather than executory devises and hence a devise over after an indefinite failure of issue is held to be extinguished for remoteness. "Words which would give a fee simple when followed by a limitation over upon a dying without issue, give an estate tail, not a fee with executory devise over, on a definite failure of issue."²³ If one be given an absolute estate, with a limitation over after the death without issue, failure of issue is indefinite although there is a provision "either before or after the decease of my wife," and there is no effective executory devise.²⁴ Such devise, being bad, is not helped by a provision to go to the survivor or survivors.²⁵ "Without leaving issue" is not strengthened in favor of an executory devise by the word "leaving,"²⁶ even where there is a clause

¹⁶ *Caldwell v. Skilton*, 13 Pa. 152; *Fahrny v. Holsinger*, 65 Pa. 388; *Stevenson v. Fox*, 125 Pa. 568.

¹⁷ *Morrison v. Truby*, 145 Pa. 540.

¹⁸ *M'Carthy v. Dawson*, 1 Wharton, 4; *McCullough v. Fenton*, 65 Pa. 418; *Langley v. Heald*, 7 W. & S. 96.

¹⁹ *Powell v. Board, Etc.*, 49 Pa. 46; *Bate's Est.*, 3 Lehigh, 376; *Kemp v. Reinhard*, 228 Pa. 143; *Duval's Est.*, 228 Pa. 356; *Saxton v. Society*, 26 Montg. 155.

²⁰ *Manning v. Bader*, 224 Pa. 575; *Smith v. Coffman*, 224 Pa. 411.

²¹ *Nebinger v. Upp*, 13 S. & R. 65.

²² *Wallace v. Denig*, 152 Pa. 251; *Wilson v. Denig*, 166 Pa. 29. (See *Taylor v. Taylor*, 63 Pa. 481, where the devisee took a life estate with remainder in fee and an alternative limitation over.)

²³ *Heffner v. Knepper*, 6 Watts, 18. (For cases illustrating the application of these principles see P. & L. Dig., vol. 7, cols. 12280-4. See also, *Hope v. Ruska*, 88 Pa. 127; *Greenawalt v. Greenawalt*, 71 Pa. 483; 37 Pa. 95; *Wynn v. Story*, 38 Pa. 166; *Lawrence v. Lawrence*, 105 Pa. 335.)

²⁴ *Hoff's Est.*, 147 Pa. 636.

²⁵ *Haines v. Witmer*, 2 Yeates, 400; *Caskey v. Brewer*, 17 S. & R. 441; *Lapsley v. Lapsley*, 9 Pa. 130; *Smith's Ap.*, 23 Pa. 9; *Stone v. McMullen*, 1 Penny. 108; *Hackney v. Tracy*, 137 Pa. 53.

²⁶ *Eichelberger v. Barnitz*, 9 Watts, 447; *Criley v. Chamberlain*, 30 Pa. 161; *Ray v. Alexander*, 146 Pa. 242; *Robinson's Est.*, 149 Pa. 418.

of disinheritation of the divorced wife of the father of the first taker.²⁷

9. Limitation over on death without "heirs."

"Heirs" as applied to the first taker will be construed according to the context and there will be an executory devise created according to whether or not the will imports a definite or an indefinite failure.²⁸ Lowrie, J., said: "The law never raises an executory devise out of a substitutionary clause that can be construed as giving a remainder, and never out of a simple devise, even on the failure of issue."²⁹ Where an estate tail is created the limitation over is a remainder and not an executory devise.³⁰ A good executory devise may be created in the following form: I devise, etc., to my sons "but if either of my sons die having no child or children, after the decease of such son or sons the land I have given him shall be equally divided among all my other children or their heirs."³¹ If the first taker survives the testator, he takes absolutely.³²

10. Limitation over on death during minority, etc.

A will which devises land to a son when he arrives at the age of 21, but in case he should die before, it should go to the testator's daughters gives the son a fee defeasible only by his death before arriving of age.¹ A provision as to death before he marries is good as an executory devise if he dies unmarried at any time.² It has been held that where the will gives a fee simple in the first taker it cannot be cut down by a provision over on his dying intestate,³ nor without his having conveyed,⁴ nor by subsequent language which is ambiguous or merely precatory.⁵ These provisions are inoperative and create no executory devise.⁶

11. Limitation in future without particular estate.

Where a devise is made to go into effect at some future time upon the happening of a contingency and no intermediate disposition is made, it is executory, with the heir in possession by descent meantime.⁷ The heirs have a right to entry by descent.⁸

¹ *Reinoehl v. Shirk*, 119 Pa. 108.

²⁸ See P. & L. Dig., vol. 7, cols. 12289-92. See also *Berg v. Anderson*, 72 Pa. 87; *Miller's Est.*, 145 Pa. 561; *Coles v. Ayres*, 156 Pa. 197.

²⁹ *Wall v. Maguire*, 24 Pa. 248. (See *Moody v. Snell*, 81 Pa. 359.)

³⁰ *Carter v. M'Michael*, 10 S. & R. 429; P. & L. Dig., vol. 7, col. 12293.

³¹ *Neave v. Jenkins*, 2 Yeates, 414; *Ralston v. Truesdell*, 178 Pa. 429.

³² *Biddle's Est.*, 28 Pa. 59; *McCormick v. McElligott*, 127 Pa. 230; *King v. Frick*, 135 Pa. 575.

¹ *Cassell v. Cooke*, 8 S. & R. 268.

² *Jessup v. Smuck*, 16 Pa. 327. (For various applications of these principles see P. & L., vol. 7, cols. 12300-3.)

³ *Karker's Ap.*, 60 Pa. 141; *Fisher v. Wister*, 154 Pa. 65; *Coles v. Ayres*, 156 Pa. 197.

⁴ *Rea v. Bell*, 147 Pa. 118.

⁵ *Gillmer v. Daix*, 141 Pa. 505.

⁶ *Bellas' Est.*, 176 Pa. 122.

⁷ *Ashton v. Ashton*, 1 Dallas, 4; *Chambers v. Wilson*, 2 Watts, 495.

⁸ *Morton v. Funk*, 6 Pa. 483; *Rupp v. Eberly*, 79 Pa. 141.

12. Limitation when particular estate is ineffectual.

If a particular estate created is prevented from becoming effectual in the lifetime of the first taker and before the contingency has happened, it will become executory without a previous freehold.⁹

13. Incidents of executory devises.

An executory devise is such a tangible estate as may be levied upon and sold, during the continuance of the previous estate upon which it is grafted.¹⁰ It will also pass in a general deed of assignment for the benefit of creditors.¹¹ A widow of one to whom an estate in fee with devise over has been given has a dower right in the estate.¹² Likewise curtesy attaches to a fee subject to a conditional limitation over;¹³ but if the wife died before the time without issue she was not seised of any descendible estate.¹⁴

14. Failure and destruction of executory devises.

When the conditions fail upon which the estate was limited over the executory devise falls *ex necessitate rei*.¹⁵ This may also result, when an estate tail becomes a fee simple under the act of 1855, and the failure of issue is indefinite.¹⁶ But if predicated upon failure of issue at the death of the first taker, it comes to fruition.¹⁷ The devise may be defeated by a power of sale given the first taker when he exercises it;¹⁸ but not by conveyance when the first taker has no such power.¹⁹ A deed to bar an entail, under the act of January 16, 1799, 3 Sm. L. 338, will extinguish either a contingent remainder or an executory devise limited after an estate tail.²⁰ Estoppel may produce the same consequence where a common recovery was suffered;²¹ also a release by the devisee.²²

⁹ Way v. Gest, 14 S. & R. 40; Carlyle v. Cannon, 3 Rawle, 489; Goddard v. Goddard, 10 Pa. 79.

¹⁰ De Haas v. Bunn, 2 Pa. 335.

¹¹ Rash's Est., 2 Parsons, 160.

¹² Evans v. Evans, 9 Pa. 190.

¹³ Thornton v. Krepps, 37 Pa. 391; Buchannan v. Sheffer, 2 Yeates, 374.

¹⁴ McMasters v. Negley, 152 Pa. 303.

¹⁵ Wentz's Ap., 106 Pa. 301.

¹⁶ Hackney v. Tracy, 137 Pa. 53.

¹⁷ Nicholson v. Bettie, 57 Pa. 384.

¹⁸ Barnet v. Deturk, 43 Pa. 92.

¹⁹ Boyd v. Bigham, 4 Pa. 102.

²⁰ Linn v. Alexander, 59 Pa. 43; Taylor v. Taylor, 63 Pa. 481; Cochran v. Cochran, 127 Pa. 486; Ralston v. Truesdell, 178 Pa. 429.

²¹ Toman v. Dunlap, 18 Pa. 72.

²² Coates Street, 2 Ashmead, 12.

CHAPTER XLVII

REMAINDERS, VESTED AND CONTINGENT.

1. Definition of a limitation of a remainder.
2. Definition of freehold estate.
3. Remainders distinguished from future bequests.
4. Contingent *quasi*-remainder.
5. Remainders distinguished from conditional limitations.
6. A vested remainder.
7. A contingent remainder.
8. Fundamental distinction.
9. Classes of contingent remainders.
10. Contingent may become vested remainders.
11. Vested remainder defined by our courts.
12. Contingent remainders defined by our courts.
13. Remainders to a class.
14. The rule in Wild's case.
15. Who are within a class.
16. How heirs as a class are determined.
17. Time when remainder accrues.
18. Accruing by implication.
19. Construction of "or" and "and."
20. Substitutionary limitation.
21. Designation of remainderman.
22. Condition subsequent.
23. Cross-remainders.
24. Remainders distinguished from executory devises.
25. Examples of vested and contingent remainders.
26. Concurrent contingent remainders.
27. Presumption of vesting a remainder.
28. Remainder to class, contingent upon birth.
29. Vesting in interest and vesting in possession.
30. "When," "then" and similar expression.
31. "Then living" and similar phrases.
32. Implications of gift from direction to pay.
33. Substitutionary limitations.
34. Effect of substitution on remainder.
35. "Survivor" construed as "other."
36. Who may take as "other," or "others."
37. Alienation of remainders and reversions.
38. Destruction of remainders.

1. Definition of a limitation of a remainder.

"A limitation of a remainder, strictly so-called, is a clause creating or transferring an estate or interest in lands or tenements, which is limited, either directly or indirectly, to take effect in possession, or in enjoyment, or in both, subject only to any term of years or contingent interest that may intervene, immediately after the regular expiration of a particular estate of freehold previously created together with it, by the same instrument, out of the same subject of property."¹

2. Definition of freehold.

A freehold estate is either of inheritance or not of inheritance: Two things are necessary to a freehold not of inheritance:

¹ Smith on Fearne, section 159.

1. Immobility, as land or interest in land. 2. Sufficient legal indeterminate duration.

It is such an interest in frank-tenement as may endure not only for the life of the owner, but is cast at his death upon the persons who successively represent him.²

3. Remainders distinguished from future bequests.

"Every future bequest of personal property, whether it be preceded or not preceded by a prior bequest, or limited on a certain or uncertain event, is an executory bequest and falls under the rules by which that mode of limitations is regulated."³ "And if such future bequest is preceded by, and is to take effect in defeasance of a prior bequest, it is a conditional limitation. But if such future bequest is not preceded by a prior bequest; or if it is preceded by a prior bequest, but yet it does not affect such prior bequest, it is a limitation of a springing interest."⁴

4. Contingent quasi-remainder.

"An exception occurs, however, in those cases where a future bequest is analogous to a vested remainder in real estate; in which cases, though it is executory as regards the possession, it is not an executory bequest, as regards the property or ownership, but confers a vested interest, and may for convenience be termed a vested *quasi* remainder. And a future bequest which is analogous to a contingent remainder in real estate, though strictly and properly an executory bequest of a springing interest, as regards the property or ownership, may for convenience be termed a contingent *quasi* remainder."⁵

5. Remainders distinguished from conditional limitations.

"A remainder as above described is limited to take effect, in possession, or in enjoyment, or in both, after the regular expiration of another estate. For, a vested remainder has already taken effect in right or interest; and therefore it has only to take effect in possession or enjoyment, or in possession and enjoyment. And a contingent remainder must, in many cases, take effect in interest, if at all, before the expiration of the particular estate. But, as regards the possession or enjoyment, or both, a remainder, whether vested or contingent, can only take effect, except by the operation of merger, after the expiration of the particular estate; because it would otherwise be something more than a mere residue or remnant of the seisin, property or ownership. In this respect a limitation of a remainder differs most essentially from a conditional limitation. A conditional limitation, as stated in the second of the foregoing definitions thereof, operates in defeasance and exclusion of a prior interest, whereas there is no instance in which a remainder operates in exclusion of a prior interest, either by force of the limitation itself, or by construction of law."⁶

² Wharton's Law Dictionary.

³ Fearne on Remainders, 401, n. e.

⁴ Smith on Fearne, section 159 a.

⁵ Smith on Fearne, 159 a.

⁶ Smith on Fearne, section 160.

6. A vested remainder.

A. "A vested remainder, if defined without reference to the right of possession or enjoyment, or the possession or enjoyment itself. * * * may be defined to be a portion of the seisin, property, or ownership, of the measure of freehold, next after a preceding freehold estate, and actually acquired by, and residing in, the person who is said to have such vested remainder."

B. "If defined with reference to the right of possession or enjoyment (which is the mode adopted by Fearne) it may be defined to be, one that is so limited to a person in being and ascertained, that (subject to any such chattel or other interest collateral to the seisin, property, or ownership, as extends to the possession or enjoyment), it is capable of taking effect, in possession or enjoyment, on the certain determination of the particular estate, without requiring the concurrence of any collateral contingency."

C. "A vested remainder, if defined with reference to the possession or enjoyment itself, may be defined to be, a remainder which, as regards the possession or enjoyment, or both (subject to any such chattel or other interest collateral to the seisin, property or ownership, as extends to the possession or enjoyment), does not strictly depend on any uncertainty at all, or any other uncertainty than that of its enduring beyond the present interest."⁷

7. A contingent remainder.

A. "A contingent remainder, on the other hand, may be defined to be a portion of the seisin, property or ownership, of the measure of freehold, which is next after a preceding freehold estate, and is not yet acquired by the person who is said to have such contingent remainder, but is appointed, by the terms of the grant or devise, to be acquired by, and to reside in him, in a contingent event."

B. "A contingent remainder on the other hand, is one that is so limited as not to be capable of taking effect in possession or enjoyment, on the certain determination of the particular estate, without the concurrence of some collateral contingency."

C. "A contingent remainder, on the other hand is one which, as regards the possession or enjoyment, does strictly depend on a contingency irrespective of its own duration."⁸

8. Fundamental distinction.

"The non-existence, in a vested remainder and the existence in a contingent remainder, of a contingency irrespective of its own duration, on which the possession or enjoyment strictly depends, is that which constitutes the fundamental distinction between them, as regards the mode of their creation, and that which forms a true, tangible, and practical criterion for determining to which of the two species a remainder belongs."⁹

⁷ Smith on Fearne, sections 171, 173, 175.

⁸ Smith on Fearne, sections 172, 174, 176.

⁹ Smith on Fearne, section 177.

9. Classes of contingent remainders.

Having thus given the definitions of remainders, let it be noted that Fearne gives four distinct kinds of contingent remainders:¹⁰

A. "Where the remainder depends entirely on a contingent determination of the preceding estate itself; as if A makes a feoffment to the use of B till C returns from Rome, and after such return of C, then to remain over in fee."

B. "Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate; as if a lease be made to A for life, remainder to B for life and if B die before A remainder to C for life."

C. "Where a remainder is limited to take effect on an event, which, though sure to happen some time or other, yet may not happen till after the determination of the particular estate: as if a lease be made to J. S. for life, and after the death of J. D. the lands to remain over to another in fee."

D. "Where a remainder is limited to a person not ascertained, or not in being, at the time when such limitation is made: as if a lease be made to one for life, remainder to the right heirs of J. S. who is living; or remainder to the first son of B., who has no son then born; or if an estate be limited to two for life, remainder to the survivor of them in fee."

10. Contingent may become vested remainder.

"Every kind of interest which is a contingent remainder in relation to the preceding estate, may become a vested remainder in relation to that estate, except the first of the four kinds of contingent remainders. For, in the three last kinds, the event on which the remainder depended, being unconnected with the preceding estate, may happen during the continuation of that estate, so as to remove the contingent character of the remainder dependent thereon and convert it into a vested remainder. But, in the first kind, as the event forms the limit of the preceding estate itself, no sooner does that event happen, than the preceding estate ceases, and the interest which was to take effect on such event, immediately becomes an estate in possession, or in enjoyment, or both in possession and enjoyment."¹¹

11. Vested remainder defined by our courts.

Chief Justice McKean said:¹² "Wherever there is a particular estate which does not depend on an uncertain event for its continuance, and a remainder is limited thereon absolutely to a person *in esse*, notwithstanding a contingent remainder intervenes between the particular estate and the limitation over to such person, if such intervening limitation does not vest the fee absolutely, it is a remainder vested in interest."

"If there is a present right to future possession, though the right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate. An unpossessed estate is vested, if it

¹⁰ Fearne, 5, 7, 8, 9.

¹¹ Smith on Fearne, section 195.

¹² Roe v. Davis, 1 Yeates, 332.

is certain to take effect in possession, by enduring longer than the precedent estate."¹³ "It is the present capacity of taking immediate possession, if the life tenant were dead, and not the certainty of outliving him that makes the remainder vested."¹⁴ "An estate is said to be vested in interest when there is a present fixed right in someone, of future enjoyment of it; it is not vested but contingent, when either the person who is to enjoy it, or the event upon which the estate is to arise is uncertain."¹⁵ A remainder is always considered vested rather than contingent, if the words of the will creating it are capable of such construction.¹⁶

When the enjoyment of an entire fund is given in fractional parts, at successive periods which must eventually arrive, the distinction betwixt time annexed to payment and time annexed to the gift, becomes important and all the interests vest together. So the legacy to a child was held to be vested and, when it died before its mother, the fund went to its executor.¹⁷

12. Contingent remainder defined by our courts.

A contingent remainder has already been defined by antithesis, above. Thompson, J., said: "A contingent remainder is a remainder limited so as to depend on an event which may never happen or be performed, or which may not happen or be performed till after the preceding estate."¹⁸ Gibson, Ch. J., described an "expectancy" as "a bare hope of succession to the property of another, such as may be entertained by the heir apparent."¹⁹ "Such a hope is inchoate; it has no attribute of property; is without appreciable value, and the interest to which it relates is non-existent and may never exist. A contingent interest, on the other hand, is an actual creation whose existence may be cut off by few or many contingencies but whose very existence gives it a possible value."²⁰ "Wherever the remainder is limited to a person not *in esse*, or not ascertained; or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, the remainder is contingent."²¹

13. Remainders to a class.

A devise to the children of one, directing that their parent shall

¹³ *Manderson v. Lukens*, 23 Pa. 31; *Lowrie, J.*; *Ritter's Est.*, 190 Pa. 102; *Safe, Etc., Co. v. Wood*, 201 Pa. 420.

¹⁴ *Boyer v. Smith*, 1 Del. Co. 93; *Sager v. Galloway*, 113 Pa. 500, *Trunkey, J.*; *Mergenthaler's Ap.*, 15 W. N. C. 441; *Schweikert's Est.*, 16 Phila. 194; *Churchman's Est.*, 4 C. C. 237. *Penrose, J.*, *affd.*, 22 W. N. C. 131.

¹⁵ *Johnston's Est.*, 135 Pa. 179; *Gerber's Est.*, 196 Pa. 366.

¹⁶ *Long's Est.*, 39 Supr. C. 323; *affirmed*, 225 Pa. 39; *Ridgway's Est.*, 18 D. R. 137.

¹⁷ *Waln's Est.*, 228 Pa. 260. (See as to vested and contingent interests, *McKinley v. Martin*, 226 Pa. 550; *Adams v. Johnson*, 227 Pa. 454.

¹⁸ *Womrath v. McCormick*, 51 Pa. 504.

¹⁹ *De Haas v. Bunn*, 2 Pa. 335.

²⁰ *Ashman, J.*, in *Robbins' Est.*, *affd.*, 199 Pa. 500.

²¹ *Trunkey, J.*, in *Sager v. Galloway*, 113 Pa. 500.

have the use of the property for life, creates a life estate in the parent and a remainder to the children as a class;²² also where the division is to be made among the children of another;²³ but a bare privilege to a person to reside on the land does not vest a life estate and create a remainder.²⁴ Under a devise for life, with remainder to a class, the remainder rests upon the birth of a member of the class and opens to let in all other members of the class born during the life tenancy.²⁵ A devise to a widow and children during the life of the widow and the privilege of residing on the land, with a provision that if the children should all die before her, then over, creates a life estate *pur autre vie* in the children during the life of the widow, with a remainder to the survivors.²⁶ The principles are the same with respect to a deed as a will, and where a deed is to husband and wife, "her heirs and assigns," the husband and wife have a life estate as tenants by entireties with remainder to the heirs of the wife.²⁷

14. The rule in Wild's case.

The rule in Wild's case was stated in the preceding chapter, but reference is again made here to further elucidate its application. The rule in that case is not strictly followed here. If a devise is made to one and his children not yet in being, it is an estate tail; but if the children are in being then it is not a tenancy in common to them, as under the rule, but a life estate to the parent and remainder to the children as a class.²⁸ But, if the children are those of a different person than the life tenant the rule as to tenancy in common might hold good.²⁹ A conveyance of land by one to his wife, "her and my heirs and assigns," gives a life estate to her and a remainder over.³⁰

15. Who are within a class.

Where the devise is to a class, only those in being at the death of the testator are included,¹ unless a particular interest is carved out, with the devise following such interest, then all who come into being during the continuance of this particular estate are included.² The

²² Rudebaugh v. Rudebaugh, 72 Pa. 271.

²³ Haskins v. Tate, 25 Pa. 249.

²⁴ Calhoun v. Jester, 11 Pa. 474.

²⁵ Wehner's Est., 21 Lanc. L. R. 121.

²⁶ McKeehan v. Wilson, 53 Pa. 74; 53 Pa. 79. (See Babcock's Est., 18 D. R. 453, where the estate was held not to be one *pur autre vie*. For a case of annuity *pur autre vie*, see Hildebrant v. Hildebrant, 42 Supr. C. 190.)

²⁷ Ambler's Est., 12 Montg. 117.

²⁸ White v. Williamson, 2 Grant, 249; Fox v. Dunmon, 4 Phila. 323; Coursey v. Davis, 46 Pa. 25; Wolford v. Morgenthal, 91 Pa. 30; List v. Rodney, 83 Pa. 483; Hague v. Hague, 161 Pa. 643; Lutton's Est., 43 Pitts. L. J. 255.

²⁹ Hague v. Hague, 161 Pa. 643.

³⁰ Ackerman v. Ackerman, 34 Supr. C. 162.

¹ Calhoun v. Jester, 11 Pa. 474; Landwehr's Est., 147 Pa. 121.

² Minnig v. Batdorff, 5 Pa. 503; Chew's Ap., 37 Pa. 23; Coggins' Ap., 124 Pa. 10.

remainder vests in the children first born, opening from time to time, as others are born.³ The rule above stated does not apply to a conveyance, only those members in being when the conveyance is made, having the right to come in.⁴ But it does apply where the remainder is to the life tenant living at his death⁵ and where it is of a charge on land to be paid when the devisee attains a certain age.⁶ Where the life tenant dies before the testator and the remainder is contingent, the class is determined as at the death of the testator.⁷ If there are no children when the remainder is created the life estate is subject to a possible contingent remainder as long as it exists.⁸

16. How "heirs" as a class are determined.

The class of remaindermen who are entitled as "heirs," "right heirs," or words of equivalent import, are generally those who answer the description at the time of the death of the testator.⁹ Also, where an intestacy results by reason of the failure of remaindermen or a contingent remainder to take effect, the same rule applies.¹⁰ But the rule must yield to the manifest intention of the testator to have them take at the death of the life tenant, when the remainder is called contingent;¹¹ as where the life tenant was the sole heir;¹² or in similar cases.¹³ Generally the use of the word "then" in relation to a remainder is not enough to postpone the determination of the class until the time when the life tenancy ends.¹⁴ Where there is a devise to the children of the testator and their issue and in default thereof to "the right heirs" of the testator, the remainder is intended to go to ascendants and collaterals only.¹⁵

The rule that fixes the date of the death of the testator does not apply where the remainder is given to others than the heirs of the testator, as, for example, of the life tenant or someone else.¹⁶

17. Time when remainder accrues.

Where a devise creates a joint tenancy of two the remainder does

³ Keene's Est., 16 D. R. 538; 221 Pa. 201; Gest v. Way, 2 Wharton, 445; Rudebaugh v. Rudebaugh, 72 Pa. 271; Holmes v. Woods, 168 Pa. 530; Holmes v. Fulton, 193 Pa. 270; P. & L. Dig., vol. 17, col. 30262.

⁴ Brink v. Michael, 31 Pa. 165; Newman's Ap., 35 Pa. 339.

⁵ List v. Rodney, 83 Pa. 483.

⁶ Young v. Stoner, 37 Pa. 105.

⁷ Goddard v. Goddard, 10 Pa. 79.

⁸ Westhafer v. Koons, 144 Pa. 26; Eshelman's Est., 191 Pa. 68.

⁹ Stewart's Est., 147 Pa. 383; Crawford's Est., 17 Supr. C. 170; Gross' Est., 14 D. R. 137; Riehle's Ap., 54 Pa. 97; Buzby's Ap., 61 Pa. 111; Lefever's Est., 16 D. R. 918.

¹⁰ Bell's Est., 147 Pa. 389; Snyder's Est., 180 Pa. 70; Lancaster v. Flowers, 198 Pa. 614.

¹¹ Wood v. Schoen, 216 Pa. 425.

¹² Merrefield's Est., 5 D. R. 463.

¹³ McKee's Est., 198 Pa. 255.

¹⁴ Stook's Ap., 20 Pa. 349.

¹⁵ Walker v. Dunshee, 38 Pa. 430. In such case "right heirs," descendants being excluded could only mean those who would inherit under the intestate laws.

¹⁶ Gibson's Est., 3 D. R. 83; Gerber's Est., 196 Pa. 366; Breese's Est., 2 D. R. 364.

not accrue until both tenants are dead.¹⁷ Where the widow and her daughters were given the occupancy of the house, the former during life and the latter as long as they remained unmarried, both tenancies were terminated by the death of the widow.¹⁸ Where a remainder was given to the children of each member of a class upon his death, and if one or more should die without issue his share of the fund should be divided among the survivors, on the death of one without issue, the whole fund was ripe for distribution.¹⁹

18. Accruing by implication.

A remainder may accrue by implication before the death of the life tenant where the tenancy is alternative during life or until re-marriage,²⁰ although there is no express limitation, in case of re-marriage.²¹ So where the widow elects to take against the will, such election operates as an acceleration.²²

19. Construction of "or" and "and."

Since the law favors a vested rather than a contingent remainder, as well as to carry out the intention of the testator, "and" and "or" will be construed "or" or "and" when necessary.²³

20. Substitutionary limitation.

Where a devise is made for life and remainder to the children of the life tenant, and in default of issue over, it will take effect at the death of the life tenant without issue, although it occurs after the death of the testator. This is required to avoid intestacy²⁴ and has been called "substitutionary limitation." It extends the time only to the close of the precedent estate.²⁵ Where the will creates a vested remainder with a limitation over in case the remainderman dies under age and without issue, or after arriving at age, intestate and without issue, the limitation refers only to the death of the remainderman in the lifetime of the testator and if she survived the testator the estate vested in her indefeasibly.²⁶ Where the provision was that if the donee should die "without an heir" before she became twenty, "heir" was construed to mean "child," and the first taker having died before she arrived at twenty years, the substitution became effective.²⁷

¹⁷ *Jones v. Cable*, 114 Pa. 586; *Stahl's Est.*, 22 Lanc. L. R. 270. (See *Smith's Est.*, 226 Pa. 304, as to time of payment of gifts to children as a class.)

¹⁸ *Kearns v. Kearns*, 107 Pa. 575; *Huston v. Hamilton*, 2 Binney, 387, as to husband.

¹⁹ *Reilly's Est.*, 200 Pa. 288. (See *McGuigan v. Christy*, 10 Pa. 161, for distribution at the end of a time limited.)

²⁰ *Bruch's Est.*, 185 Pa. 194.

²¹ *Goodman's Ap.*, 199 Pa. 1; *Klapp's Est.*, 203 Pa. 198; *Fletcher v. Hoblitzell*, 209 Pa. 337.

²² *Coover's Ap.*, 74 Pa. 143.

²³ *Menoher's Est.*, 18 Supr. C. 335; *Kelley v. Kelley*, 182 Pa. 131; *Tripp's Est.*, 202 Pa. 260.

²⁴ *Fetrow's Est.*, 58 Pa. 424; P. & L. Dig., vol. 17, col. 30277.

²⁵ *Umstead's Ap.*, 60 Pa. 365.

²⁶ *Stehman's Ap.*, 45 Pa. 398.

²⁷ *Jackson's Est.*, 200 Pa. 520.

21. Designation of remainderman.

Where the "heirs" of the life tenant are designated as remaindermen the word means those who would take under the laws of distribution and not in its "Shelley" sense, and the widow or surviving husband can come in,²⁸ even where the real estate was converted into personalty.²⁹ It is the same in a conveyance.³⁰ "Children" does not include "grandchildren," unless the will manifests such intention.³¹ "Children" will be construed in its ordinary sense.³² Where there is a provision that in case of death of the remainderman, it shall go to his "heirs" it means, at common law, and the widow is excluded.³³ So of "heirs and legal representatives."³⁴ But "heirs" has also been construed to mean "issue."³⁵ Where the life estate is given to the testator's intended wife and the remainder to the heirs of the testator, upon division, the widow is not entitled to claim both as heir and widow.³⁶ As to real estate the courts incline to give "heirs" its common-law construction.³⁷ "Children" does not include adopted ones;³⁸ but it does such as are after-born.³⁹ "Issue" will be held to include all the descendants of the first taker unless an intent appears to the contrary.⁴⁰ "Male issue" includes the male descendants, through females as well as males.¹ "Widow" of the life tenant means the wife he had when the will was made, not a future one.²

22. Condition subsequent.

If a devise for life, followed by a contingent remainder, be made subject to a condition subsequent, the failure of the condition by impossibility of performance does not affect the remainder.³ If such condition be annexed to a vested remainder and it becomes impossible by the death of the remainderman in the lifetime of the life tenant, the estate passes in remainder freed from the condition.⁴ A devise to a widow for life with a limitation over in case she re-marries, followed by a remainder after her death, the remainder being subject to

²⁸ Eby's Ap., 84 Pa. 241; Boyd's Est., 199 Pa. 487; Zoller's Est., 18 Montg. 176; Neely's Est., 155 Pa. 133.

²⁹ Ashton's Est., 134 Pa. 390.

³⁰ Ackerman v. Ackerman, 34 Supr. C. 162.

³¹ Scott's Est., 37 Supr. C. 342.

³² Hager's Est., 17 D. R. 1015; McKeehan v. Wilson, 53 Pa. 74; Craige's Ap., 126 Pa. 223; Snyder's Est., 180 Pa. 70.

³³ Raleigh's Est., 206 Pa. 451.

³⁴ Tucker's Est., 209 Pa. 521.

³⁵ Smith's Est., 189 Pa. 587. (See Bell's Est., 5 D. R. 312, for "issue then surviving.")

³⁶ Keys' Est., 4 D. R. 281; McCrea's Est., 180 Pa. 81.

³⁷ Dodge's Ap., 106 Pa. 216; Lesieur's Est., 205 Pa. 119; Ivin's Ap., 106 Pa. 176; Phillips' Ap., 93 Pa. 45.

³⁸ Schafer v. Enue, 54 Pa. 304.

³⁹ Barker v. Pearce, 30 Pa. 173.

⁴⁰ Bacon's Est., 202 Pa. 535.

¹ Wistar v. Scott, 105 Pa. 200.

² Anshutz v. Miller, 81 Pa. 212.

³ Louck's Est., 203 Pa. 278.

⁴ McCall v. McCall, 161 Pa. 412.

an executory limitation, vests the remainder immediately in event of the re-marriage of the widow.⁵

23. Cross remainders.

The implication of a cross remainder to defeat intestacy as to a share is not generally favored, except where the interests are contingent, strictly so; therefore, on the death of one of two remainderman without issue it will not be implied as to a vested remainder.⁶ In case there is a bequest of a life estate in trust for two persons, with cross-remainders of the interest of each upon his death without children, and both die without children, there is a failure to provide for this contingency, and a reversion therefore takes place to the residuary estate.⁷ Cross-remainders may be restricted within the family lines where a trust deed effects life estates to nieces and remainder to their issue, then over in default.⁸

24. Remainders distinguished from executory devises.

Where a contingent remainder can be supported from the context of the will an executory devise will be excluded.⁹ If the life estate is followed by a limitation in fee to the life tenant in case he have issue, but in default thereof, then over, the limitations at the death of the life tenant will be construed as a contingent remainder.¹⁰

25. Examples of vested and contingent remainders.

If the remainder be devised to the "heir" of one (meaning, under the inheritance laws), the same is contingent, because unascertainable until the ancestor's death);¹¹ so, also a remainder to testator's next of kin or heirs, or children, or their heirs.¹² A codicil, enlarging the estate of the remainderman to a fee does not have the effect of changing a contingent to a vested remainder.¹³ A vested remainder will not be made contingent by things required to be done by the remainderman, unless the contrary clearly appears, but it may amount to a condition subsequent, which may also become void because of impossibility to perform it.¹⁴

⁵ Langfeld's Est., 4 C. C. 82. Ashman, J.

⁶ Penna. Co. Etc., Ap., 109 Pa. 489.

⁷ Waln's Est., 7 D. R. 499; 189 Pa. 631. (See Simpson v. Coon, 4 S. & R. 368.)

⁸ Bacon's Est., 202 Pa. 535. (See Turner v. Fowler, 10 Watts, 325, for a case of joint life estates with cross-remainders for life.)

⁹ Lord Hale, in Purefoy v. Rogers, 1 Saunders, 380; Ch. J., Tilghman, in Dunwoodie v. Reed, 3 S. & R. 435; McCullough v. Fenton, 65 Pa. 418. (See Executory Devises, *supra*; Wall v. Maguire, 24 Pa. 248.)

¹⁰ Waddell v. Rattew, 5 Rawle, 231. (See P. & L. Dig., vol. 17, col. 30293.)

¹¹ Bennett v. Morris, 5 Rawle, 9.

¹² Wood v. Schoen, 216 Pa. 425; Blaney v. Sinclair, 216 Pa. 258; Ritter v. Knerr, 214 Pa. 279; Shelmerdine's Est., 16 D. R. 222; Byerly's Est., 16 D. R. 185; Brook's Est., 17 Phila. 476.

¹³ Fife v. Miller, 165 Pa. 612.

¹⁴ Roe v. Davis, 1 Yeates, 332; McCall v. McCall, 161 Pa. 412.

26. Concurrent contingent remainders.

"Two or more several contingent remainders in fee may be limited, the one to be substituted for the other, instead of being dependent and to take effect in succession."¹⁵ Said Gibson, J.,¹⁶ "From all the cases, the rule seems to be this: where both limitations are to take effect, the latter can do so only as an executory devise; for a remainder originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but where both are limited alternately on the same event, by the happening of which, one is to vest in exclusion of the other, then both are contingent remainders." Concurrent contingent remainders are created under a devise for life, and if the life tenant dies leaving issue, then to the issue in fee, and if he dies without issue, then over;¹⁷ also, under a limitation for life and if the life tenant shall have issue, then to the life tenant, his heirs and assigns, and in default of issue, then over;¹⁸ also a grant for life, and if the life tenant dies without children, then to his heirs, and if he leaves children then to such children, creates concurrent contingent remainders to the children of the life tenant or heirs, according whether he shall die with or without children.¹⁹

27. Presumption of vesting a remainder.

The law favors vested rather than contingent remainders, as above stated, and this will be presumed rather than to allow intestacy as to any portion of the estate.²⁰ It favors the vesting of the estate, also, at the earliest possible time.²¹

28. Remainder to class, contingent upon birth.

Where there is a remainder to a class as children, the rule is that it is contingent until the birth of a member of the class. It then vests in such member, subject to be opened to let in successive members born during the life estate preceding the remainder;²² and this is so whether or not a child survives the life tenant;²³ also where she is

¹⁵ Luddington v. Kime, 1 Lord Raymond, 203.

¹⁶ Dunwoodie v. Reed, 3 S. & R. 435.

¹⁷ Stump v. Findlay, 2 Rawle, 168; Peirce's Ap., 4 W. N. C. 439.

¹⁸ Waddell v. Rattew, 5 Rawle, 231. (See for discussion of the features of such remainders: Buzby's Ap., 61 Pa. 11; Stewart v. Neely, 139 Pa. 309; Woelpper's Ap., 126 Pa. 562; Goddard v. Goddard, 10 Pa. 79; Westhafer v. Koons, 144 Pa. 26.)

¹⁹ Melsheimer v. Gross, 58 Pa. 412.

²⁰ Freeman's Est., 35 Supr. C. 185; Robinson's Est., 13 Phila. 299; Phillips' Est., 205 Pa. 504.

²¹ Chess' Ap., 87 Pa. 362; Letchworth's Ap., 30 Pa. 175; Reed's Ap., 118 Pa. 215; Thomman's Est., 161 Pa. 444; Siddall's Est., 180 Pa. 127; Thran v. Herzog, 12 Supr. C. 551; P. & L. Dig., vol. 17, col. 30302-3.

²² Harris v. McElroy, 45 Pa. 216; Jordan v. McClure, 85 Pa. 495; Westhafer v. Koons, 144 Pa. 26; Eshelman's Est., 191 Pa. 68; High's Est., 136 Pa. 222.

²³ Wetherill's Est., 214 Pa. 150; Keene's Est., 16 D. R. 538; 221 Pa. 201.

enciente at the time of the limitation.²⁴ Once vested, it cannot become contingent by the fact of letting in after-born children.²⁵

29. Vesting in interest and vesting in possession.

There is no absolute necessity that the remainderman must be living when the precedent estate ends; so that if he dies before and has made a will the vested interest passes over under it in due course, and if he has not made a will his heirs and legal representatives immediately succeed to the vested interest, without having been reduced to possession.²⁶ This rule applies whether the person be named;²⁷ or the gift is to a class, as "children,"²⁸ although subject to let in after-born members;²⁹ or whether it be vested in "issue";³⁰ or "nephews and nieces";³¹ or "nearest relatives."³² The rule applies to a legacy charged upon a vested remainder in favor of an ascertained person, who dies before the death of the one in the first estate.³³ A remainder in fee tail is vested and not contingent upon the survival of the remainderman, at the failure of issue of the tenant in tail.³⁴ The death of the remainderman before that of the life tenant does not affect the right of their beneficiaries, heirs or personal representatives to take, where the remainder is liable to be defeated merely by the death of the life tenant leaving issue;³⁵ or the recovery of the life tenant from insanity;³⁶ or by exercise of the power of appointment by the life tenant.³⁷ The word "vest" when used in connection with an estate means to give a fixed right of present or future possession and enjoyment,³⁸ and when the will provides that the interest shall not "vest" until the first estate ends, if by its other terms the interest is clearly vested, the word "vest" will be

²⁴ Wells v. Ritter, 3 Wharton, 208.

²⁵ Anthracite Sav. Bk. v. Lees, 176 Pa. 402.

²⁶ Kerlin v. Bull, 1 Dallas, 175; Patterson v. Hawthorn, 12 S. & R. 112; Candler v. Dinkle, 4 Watts, 143; Burd v. Burd, 40 Pa. 182; Comth. v. Hackett, 102 Pa. 505; Lawrence's Est., 136 Pa. 354; Eckert's Est., 157 Pa. 585; Foltz's Est., 19 Lanc. L. R. 133; Macalester's Est., 3 D. R. 103; P. & L. Dig., vol. 17, col. 30308.

²⁷ Price v. Watkins, 1 Dallas, 8.

²⁸ Grunewald v. Lerch, 5 Lanc. L. R. 293; Weeter's Est., 21 Supr. C. 241; Chew's Est., 13 D. R. 130.

²⁹ Minnig v. Batdorff, 5 Pa. 503; Chew's Ap., 37 Pa. 23; Boyer v. Smith, 1 Del. Co. 93; Hubbert's Est., 6 D. R. 96; Sperring's Est., 10 Kulp, 135; Carstensen's Est., 196 Pa. 325; Daley v. Koons, 90 Pa. 246; Rankin's Est., 13 C. C. 617.

³⁰ Smith's Est., 189 Pa. 587.

³¹ Mitchener's Est., 30 Leg. Int. 336; Dennett's Est., 20 Montg. 204.

³² Krause's Est., 14 D. R. 765. (See P. & L. Dig., 2 C. R. A., col. 3998, for a variety of applications of the principle to particular facts.)

³³ Maxwell v. McClintock, 10 Pa. 237.

³⁴ Clark v. Baker, 3 S. & R. 470; Irwin v. Dunwoody, 17 S. & R. 61; Bassett v. Hawk, 118 Pa. 94.

³⁵ Kelso v. Dickey, 7 W. & S. 279; Hopkins v. Jones, 2 Pa. 69; Passmore's Ap., 23 Pa. 381; Chess' Ap., 87 Pa. 362; Pennock v. Eagles, 102 Pa. 290; P. & L. Dig., vol. 17, col. 30315.

³⁶ Montgomery v. Petrikin, 29 Pa. 118; Kirk's Est., 6 Phila. 73.

³⁷ Collins v. Stork, 16 Phila. 21.

³⁸ Boyer v. Smith, 1 Del. Co. 93.

held to be equivalent to "vest in possession."³⁹ Though a remainder in fee be contingent, if the person entitled is certain, the estate will descend at his death before the contingency happens.⁴⁰ A legacy bequeathed in default of appointment vests in the legatee on the death of the testator, subject to be divested by the exercise of the power of appointment.⁴¹ "Have" will not be construed "leave" so that the interest of a child would be divested by death before the life tenant.⁴² In a devise in remainder and over on the death of devisee before "becoming possessed" of it, the phrase was held to mean actual enjoyment, not the right to enjoy.⁴³

30. "When," "then" and similar expressions.

The making of the will is the important thing, and so that it may be made right, the correct use of words is essential. Its construction may turn upon a particle, so the details of this chapter may be justified; for, it was well said by Tilghman, C. J.:¹ "There is no part of the law more abstruse, none which requires a more laborious exertion of thought, than that of contingent remainders and executory devises. Of course it has given birth to many nice distinctions, and occasioned no small difference of opinion"; the proof of which is imbedded in that very case, since Chief Justice Gibson filed a dissenting opinion. Because the subject is abstruse, however, should not lead to the incorrect use of words. It has been held that the use of "when," "then" and similar expressions as leaders of a clause creating a remainder, does not, in itself, show an intention in the mind of the testator as to whether it is absolute or otherwise.² A provision like the following confers a contingent and not a vested estate:³ "In case either of my above children shall die before the division of my estate * * * having lawful issue, such issue shall receive the deceased parent's share, but if there be no such issue then such share shall fall into the general fund, to be divided among the survivors."

31. "Then living" and similar phrases.

Whenever there is an express qualification annexed to the class of remaindermen who are to take, those only are entitled who come within the class so qualified; therefore under a gift for life, and at the life tenant's death to the testator's children "then living," the class of remaindermen is limited to those who survive the life tenant.⁴

³⁹ Phillips' Est., 205 Pa. 504.

⁴⁰ Brooke's Est., 214 Pa. 46; Wagner's Est., 16 D. R. 184.

⁴¹ Freeman's Est., 35 Supr. C. 185.

⁴² Wetherill's Est., 214 Pa. 150. (See as to conveyance, Ackerman v. Ackerman, 34 Supr. C. 162.)

⁴³ Young's Est., 16 D. R. 656.

¹ Dunwoodie v. Reed, 3 S. & R. 435.

² Reed's Est., 10 D. R. 162. (See Smith on Fearn, p. 281. Frame v. Stewart, 5 Watts, 433; Womrath v. McCormack, 51 Pa. 504; Manderson v. Lukens, 23 Pa. 31; Richardson's Ap., 19 W. N. C. 175; Crawford's Est., 17 Supr. C. 170; P. & L. Dig., vol. 17, cols. 30320-1.)

³ Blaney v. Sinclair, 216 Pa. 258; Hager's Est., 17 D. R. 1015.

⁴ Mulliken v. Earnshaw, 209 Pa. 226. (For the earlier cases see P. & L. Dig., vol. 17, cols. 30324-5.)

The intention of the testator from the whole context must control.⁵ The rule above applies when the remainder is given to life tenant's children;⁶ or to the testator's children;⁷ or nephews and nieces "living at the time" of life tenant's death;⁸ or cousins.⁹ Under a devise to a widow for life, with direction to sell after her death, and divide the surplus among the children "that may be then living," the interests of the children are contingent until the sale.¹⁰ It depends largely in what connection the modifying words are used in the will.¹¹ Where the qualification of time attaches to the death of the life tenant, if the latter had a child which predeceased, the gift over becomes effective.¹²

32. Implication of gift from direction to pay.

A rule has been established termed "subtle"¹³ and which admittedly often defeats the intention of the testator;¹⁴ that where there is no direct gift but a mere implication of a gift from a direction to pay before or at a certain time, only those donees or remaindermen in existence at that time can take.¹⁵ "The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent."¹⁶ "To determine whether a legacy is vested or contingent, it is a matter of great moment in the first place to ascertain whether the time is annexed to the gift or to the payment of the legacy. If the former, it is vested; if the latter, contingent."¹⁷ Where the use or income, subject to the life estate is given to the remainderman the rule above stated is modified and all the legatees or remainderman take vested interests at the time of the gift, with a postponed right of possession.¹⁸ This modification does not apply where the gift of income or maintenance is distinct from the remainder, as in the case of an annuity.¹⁹

33. Substitutionary limitations.

The words "or their heirs" following a gift in remainder, do not

⁵ Schuldt's Est., 199 Pa. 58; Reilly's Est., 200 Pa. 288, P. & L. Dig., vol. 17, col. 30326; Scott's Est., 37 Supr. C. 342; Hood v. Penna., Etc., C., 221 Pa. 474.

⁶ Schneider's Est., 4 Leg. Op. 634.

⁷ Morris' Est., 2 W. N. C. 522.

⁸ Cowden's Est., 2 Montg. 177.

⁹ Bacon's Est., 12 D. R. 370.

¹⁰ Scott's Est., 37 Supr. C. 342.

¹¹ Wood v. Schoen, 216 Pa. 425.

¹² McDaniel v. McDaniel, 219 Pa. 371. (See Humphreys v. Humphreys, 10 Del. Co. 124. For various cases illustrating the rule see P. & L. Dig., vol. 17, cols. 30327-30333.)

¹³ Adams' Est., 12 D. R. 307; 208 Pa. 500.

¹⁴ Ashman, J., in Man's Est., 2 D. R. 830; 160 Pa. 609.

¹⁵ Man's Est., 160 Pa. 609; Kountz's Est., 213 Pa. 390.

¹⁶ Williams, J., in McClure's Ap., 72 Pa. 414.

¹⁷ Rogers, J. Seibert's Ap., 13 Pa. 501; Rogers' Est., 2 Del. Co. 253; Reichard's Ap., 116 Pa. 232; Cascaden's Est., 153 Pa. 170; Thomman's Est., 161 Pa. 144; Pyle's Est., 10 Del. Co. 475.

¹⁸ Kinsey v. Lardner, 15 S. & R. 192; Provenchere's Ap., 67 Pa. 463; Peterson's Ap., 88 Pa. 397; Safe, Etc., Co. v. Wood, 201 Pa. 420.

¹⁹ Pleasanton's Ap., 99 Pa. 362; Ashhurst's Est., 18 Phila. 37.

create a substitutionary limitation in favor of the children or heirs of those of the remaindermen who die during the continuance of the life estate and thus render the remainder contingent upon the death of a remainderman during such period; the term is one of limitation and signifies only what the law would imply.²⁰ It also applies to an express limitation to their "heirs" if any of the remaindermen should die;²¹ unless it appears that "heirs" is used in the sense of children";²² it applies to a remainder to a class "or their legal representatives";²³ and to a class and "issue," unless issue be used as a word of purchase.²⁴ A remainder to children "or their heirs" will not prevent it from becoming contingent if no children are ever born;²⁵ nor to cause it to inure to the benefit of children of deceased children.²⁶

34. Effect of substitution on remainder.

A substitutionary remainder which will divest the interests of any of the remaindermen, will be strictly construed and the vested remainder will not be affected unless all the elements necessary to effectuate the substitution are present.²⁷ The fact that there is a limitation over to the children of deceased remaindermen impliedly negatives the idea of a limitation over in the case of those who die without children or issue.²⁸ If there be a limitation over upon the death of the life tenant without "issue" living at his death, the remainder will vest in the children of the life tenant upon birth, subject to be divested only by their death without issue before the death of the life tenant.²⁹ A remainder given in default of appointment will, if the power be only partially exercised, be defeated only in part.³⁰ Where the substitution was as follows: "And if any of my children should die before the decease of their mother, leaving issue, then such issue shall take the share their parent would take if living, *per stirpes*," it was held that the children took vested interests, subject to be divested by death leaving issue, during the life estate.³¹

35. "Survivor" construed as "other."

When there is a provision that upon the death of one of a class,

²⁰ Patterson v. Hawthorn, 12 S. & R. 112; King v. King, 1 W. & S. 205; Sebastian's Est., 4 Phila. 236; McGill's Ap., 61 Pa. 46; Muhlenberg's Ap., 103 Pa. 587; Breese's Est., 2 D. R. 364.

²¹ Mull v. Mull, 81 Pa. 393; Bowlby's Est., 4 D. R. 108.

²² Raleigh's Est., 11 D. R. 165; 206 Pa. 451; Mayer v. Walker, 214 Pa. 440; Algaier's Est., 16 D. R. 913.

²³ Fleck's Est., 1 Parsons, 126.

²⁴ Bloodgood's Est., 8 C. C. 546; Abbott v. Jenkins, 10 S. & R. 296.

²⁵ High's Est., 136 Pa. 222; Keim's Ap., 125 Pa. 480.

²⁶ Jarden's Est., 3 Phila. 438; Muhlenberg's Ap., *supra*.

²⁷ Carstensen's Est., 196 Pa. 325; Grier's Est., 10 D. R. 354; Macalester's Est., 3 D. R. 103; Evans' Est., 10 D. R. 261.

²⁸ Chew's Ap., 37 Pa. 23; Richardson's Ap., 19 W. N. C. 175; Barker's Est., 159 Pa. 518.

²⁹ Lantz v. Trusler, 37 Pa. 482.

³⁰ Freeman's Est., 35 Supr. C. 185.

³¹ Abbott's Est., 15 D. R. 412; Sutmeyer's Est., 54 Pitts. L. J. 369. (See Young's Est., 16 D. R. 556.)

or his death without children, his share shall go to the "survivor" or "survivors," etc., the term will be generally construed as "other" and will be referable to the date of the death of the testator, so as to validate the remainder or limitation over in favor of those persons or members of the class who outlive the testator but die before the period of enjoyment; such shares will pass under the will or go to the heirs or personal representatives.¹

In a deed the limitation is as of the date of the grant.² This rule, being one of construction, when it applies to a will must give way to the actual intent of the testator.³ Controlled by such intention, the survivorship may be fixed as of the expiration of the life estate or at the happening of some other event.⁴ The above words will be construed "other" to prevent intestacy or to preserve equality in the distribution;⁵ or to carry out the general intent of the will.⁶ Lamorelle, J., commented upon the danger of using the word "survivor" or "surviving," as being indefinite and liable to be misconstrued in its application to the objects embraced in a will.⁷ The fact that the remainder to the surviving members of a class is by way of substitution for a contingent remainder to the children of the member dying without children is evidence from which an intent may be inferred to determine the time of the survivorship as of the death of the life tenant.⁸

36. Who may take as "other" or "others."

Under the terms "survivor" or "surviving," it has been held, that if all of a class are dead at the time of distribution, children or issue may take as other or others.⁹ Such children or issue will take *per stirpes* the share their parent would have taken.¹⁰ The intention of the testator to the same effect will be regarded.¹¹ A limitation in a will, upon the death of one of a class without issue, to the survivors thereof creates an absolute estate in remainder in them, not limited to that of the first taker,¹² and it passes to the heirs and legal representatives of such survivor after his death.¹³

¹ Lapsley v. Lapsley, 9 Pa. 130; Johnson v. Morton, 10 Pa. 245; Passmore's Ap., 23 Pa. 381; Ross v. Drake, 37 Pa. 373; Barker's Ap., 3 Atl. 377; Shallcross' Est., 200 Pa. 122, P. & L. Dig., vol. 17, col. 30354; Lewis' Est., 203 Pa. 219.

² Ringwalt v. Ringwalt, 4 Penny. 276.

³ Johnson v. Morton, 10 Pa. 245; Woelpper's Ap., 126 Pa. 562.

⁴ Bartholomew's Est., 155 Pa. 314; Pleasanton's Ap., 99 Pa. 362; Reiff's Ap., 124 Pa. 145; Schuldt's Est., 199 Pa. 58.

⁵ Fox's Est., 222 Pa. 108.

⁶ Vogdes' Est., 16 D. R. 377. (For a case where survivorship was held to be fixed at the death of testator see Gilmer's Est., 17 D. R. 59, following Vance's Est., 209 Pa. 561.)

⁷ Gilmer's Est., 17 D. R. 59. (See also Moore's Est., 15 D. R. 39; Fox's Est., *supra*; Barker's Est., 33 Pitts. L. J. 17.)

⁸ Steinmetz's Est., 194 Pa. 611; Woelpper's Ap., 126 Pa. 562.

⁹ Lewis' Ap., 18 Pa. 318; Bacon's Est., 202 Pa. 535.

¹⁰ Bacon's Est., *supra*.

¹¹ Patrick's Est., 162 Pa. 175.

¹² Curran v. McMeen, 55 Pa. 487.

¹³ Masden's Est., 4 Wharton, 428; Phila., Etc., v. Wall, 44 Pa. 353.

37. Alienation of remainders and reversions.

Vested remainders in real estate may be aliened in any form allowed by the statute of uses.¹⁴ Parties having a vested remainder, subject to a conditional limitation, may bind their heirs by an amicable partition.¹⁵ A conveyance of a contingent remainder, however, operates only as an estoppel.¹⁶ By devise, it passes, although made in the lifetime of the life tenant;¹⁷ such interest also passes by an assignment for the benefit of creditors¹⁸ or a voluntary assignment in bankruptcy.¹⁹ The reversion, after a life estate, passes under the residuary clause of the will;²⁰ or, there being no residuary clause, under a devise of the remaining lands of the testator;²¹ also where the reversion occurs by reason of a contingency which fails to happen.²²

38. Destruction of remainders.

A common recovery suffered by the life tenant destroys a contingent remainder depending upon the freehold of the life tenant.²³ This, too, is a relic of barbarism which we hug fondly with the other sacred relics of the Dark Ages.²⁴ This doctrine does not apply to a trust estate.²⁵ The contingent remainder may be extinguished by merger of the precedent estate with the consequent estate and the reversion.²⁶ The conveyance of the consequent remainder to the precedent tenant does not destroy the intervening contingent remainder, it seems.²⁷ But a decision against the validity of the will destroys it necessarily;²⁸ so, also, where the devise upon which it is predicated is revoked by codicil.²⁹

¹⁴ Moser v. Dunkle, 1 Woodward, 388.

¹⁵ Montgomery v. Petriken, 29 Pa. 118.

¹⁶ Stewart v. Neeley, 139 Pa. 309. (But see Richards v. Lawrence, 13 D. R. 203; 12 D. R. 673.)

¹⁷ Comth. v. Hackett, 102 Pa. 505.

¹⁸ Eckert's Est., 157 Pa. 585; Musser's Est., 12 York, 145; Robbins' Est., 199 Pa. 500; Barker's Est., 2 D. R. 571; 159 Pa. 518; Stallman's Est., 2 D. R. 265.

¹⁹ Churchman's Ap., 22 W. N. C. 131.

²⁰ Brown v. Boyd, 9 W. & S. 123.

²¹ McCay v. Hugus, 6 Watts, 345.

²² High's Est., 136 Pa. 222.

²³ McCay v. Clayton, 119 Pa. 133.

²⁴ Stewart v. Neeley, 139 Pa. 309, *obiter*.

²⁵ Barclay v. Lewis, 67 Pa. 316; Harris v. McElroy, 45 Pa. 216.

²⁶ Bennett v. Morris, 5 Rawle, 9; Barclay v. Lewis, 67 Pa. 316; Jordan v. McClure, 85 Pa. 495. (But see Stewart v. Neeley, *supra*.)

²⁷ Stewart v. Neeley, *supra*.

²⁸ McCay v. Clayton, 119 Pa. 133.

²⁹ Reichard's Ap., 116 Pa. 232.

CHAPTER XLVIII.

CONDITIONS IN A WILL—RESTRAINT UPON ESTATES, LIFE ESTATES, ETC.

1. Conditions in a will.
2. Conditions precedent.
3. Effect of annexing condition.
4. Particular conditions.
5. Conditions subsequent.
6. Forfeiture how effected.
7. Conditions in restraint of marriage.
8. Forfeiture for contesting will.
9. Deductions from devises and legacies.
10. Legatees claiming by representation or substitution.
11. Legacies and devises to widows.
12. Estoppel by election to take under the will.
13. Agreements or promises to devise or bequeath.
14. Will referring disputes to persons named.
15. Agreements as to construction of wills, etc.
16. Compromise of contests.
17. When gift of income carries the corpus.
18. Implied gifts.
19. Words necessary to pass an absolute estate.
20. Creation of life estate or interest.
21. Leasehold *pur autre vie*.
22. Relation of life tenant to remainderman.
23. Right to corpus or chattels in specie.
24. Power over real estate.
25. Dividends, etc., from stock.
26. Apportionment of income.
27. *Falsa demonstratio*.
28. Gifts of the same class.
29. Appurtenances, fixtures, etc.
30. Goods, chattels, movables, etc.
31. Income, rents, profits, etc.
32. What passes as money.
33. Interest in partnership.
34. Directions to sell — exclusion of gifts.
35. "Inclusive" and "exclusive" — applied.
36. Restriction of the widow's interest.
37. Provisions for maintenance, etc.
38. Estate, portion, etc.
39. Devises subject to charges.
40. Life estate without a devise over.
41. Absolute bequests of personalty.
42. Cutting down of absolute gift.
43. Precatory and explanatory words.
44. Estate not cut down by restraint or alienation.
45. Definite failure of issue.
46. Estates tail and failure of issue.
47. The rule against perpetuities.
48. Power of appointment in a will.

I. Conditions in a will.

In order to create a condition positive words must be used in a will. It cannot be created by merely precatory words.¹ A direction to trustees to retain a house as a residence and home for a beneficiary until he comes of age, and then if he wishes, to be his permanent home, becomes vested and indefeasible when the beneficiary makes his election to retain it.² Whilst "provided" is an apt word to create, it does not necessarily import a condition; it is often used

¹ Keen's Est., 1 D. R. 166.

² King's Est., 205 Pa. 416; Hanna's Ap., 31 Pa. 53.

by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause.³ In a bequest, "in case" implies a condition as much as "if" or "upon."⁴ In a gift of the residuary estate "upon the same conditions," as a previously given legacy, the word "conditions" was held to be used in a technical sense, but no mere "provisions" or "in the same manner," although there was a provision in the gift of the legacy cutting it down in the event of the legatee's marrying without the consent of the testator.⁵ A limitation by condition, where the testatrix is aware of the condition broken in her lifetime and apparently acquiesces, will not be enforced after her death, when she had ample time and opportunity to change her will.⁶ A provision called "conditions" in the will, for keeping a burial lot in good order does not amount to a "condition" in law, but is a good charge on the land.⁷ A legacy to a servant "provided she remains with me until my death," is a condition which will be broken by the servant's leaving although caused by illness, and by consent of the testator.⁸

2. Conditions precedent.

A condition precedent is such a state of facts as must first concur, before the estate or interest is vested. So, a charge on land devised, of an annual "ground rent" payable in perpetuity, with a provision that if the devisee should not consent to pay the charge, then the devise to become void, has been held not to be a condition precedent;⁹ but a provision that if one should be desirous and capable of entering into business for himself, he should have a fixed sum for that purpose creates a condition precedent to the legacy.¹⁰ A trust for a son, with a provision if he became sober and industrious he should have all the rents, etc., of the real estate, creates as a condition precedent, his becoming sober and industrious.¹¹ A provision that legatees shall accept their gifts in full satisfaction of all claims against the estate and execute releases does not convert a vested into a contingent legacy, but it operates rather as a condition precedent to receiving the legacy, and if the legatee died before distribution his executor can fulfill the condition and execute the release.¹² A legacy given, provided legatee presents proofs of his identity in the county of the domicil of the testator, within a given time, has a condition precedent affixed.¹³

³ Hawkins, P. J., in Jacoby's Est., 48 Pitts. L. J. 343.

⁴ Roberts' Ap., 59 Pa. 70; Kloh's Est., 2 Woodward, 225.

⁵ Keene's Est., 221 Pa. 201.

⁶ Donaldson v. Pettit, 31 Supr. C. 567.

⁷ Herr v. Groff, 17 D. R. 478.

⁸ Heller's Est., 16 D. R. 306. (See Teller's Est., 215 Pa. 263, for effect of condition imposed upon an absolute gift, by a codicil.)

⁹ Kennedy's Ap., 60 Pa. 511. (See also Painter's Est., 14 D. R. 861.)

¹⁰ Davidson's Est., 17 Phila. 424.

¹¹ Donohue v. McNichol, 61 Pa. 73. (See Hess v. Hess, 67 Pa. 110, for a condition precedent that the donee marry and have issue; also Turns v. Hoover, 30 C. C. 508, for a condition to live with testator as long as he lived.)

¹² Little's Ap., 117 Pa. 14.

¹³ Campbell v. McDonald, 10 Watts, 179. (See also Fairfax's Ap., 103 Pa. 166, where the legacy was held to be contingent.)

3. Effect of annexing condition.

Where a condition is clearly annexed to the gift itself and not merely to the time of payment, the legacy will not vest until the condition is performed.¹⁴ A legacy which does not vest until condition performed is not affected by the want of a bequest over. If it does not vest it falls into the residue.¹⁵ A letter written by a beneficiary asking when he may expect his share is a sufficient demand to comply with a condition.¹⁶ Having made his demand in time, the condition is performed, and his interest is vested and may be validly assigned.¹⁷ And where the condition was for the prodigal daughter's return, when she returned, it was fulfilled, regardless of any moral question connected with her elopement.¹⁸ "Before" a certain date has been held satisfied by death on that date.¹⁹

4. Particular conditions.

A legacy given to a son of the widow on condition that she should not take against the will is not *in terrorem*, and if she elects to take against the will, it falls into the residue.²⁰ If a provision couples a remainder to the daughter with a devise to the widow for life in lieu of dower, the election of the widow against the will does not affect the provision for the daughter, if it can stand independently.²¹ Legacies conditioned upon election against the will, when the widow takes under the will, fall with the condition.²² When the condition is annexed to the time of payment the legacy is vested.²³ If the condition is performed before the testator's death the legacy vests immediately upon his death.²⁴ Where the condition is not complied with, the limitation being of an executory devise, the estate meantime descends to the heirs.²⁵ But if the legatee is not in default he is entitled to his legacy;²⁶ as where the condition becomes impossible by *Vis Major*.²⁷

¹⁴ Gilliland v. Bredin, 63 Pa. 393; Singerly's Est., 14 Phila. 313; Stover's Ap., 77 Pa. 282; McClure's Ap., 72 Pa. 419; Lewisburg Boro' Overseers v. Augusta Twp. Overseers, 2 W. & S. 65. (See Lardner's Ap., 4 Walker, 57.)

¹⁵ Gilliland v. Bredin, *supra*.

¹⁶ Little's Ap., *supra*.

¹⁷ Martin's Est., 178 Pa. 416.

¹⁸ Kern's Est., 2 Woodward, 272. (See also Kieszling's Est., 16 Phila. 370, as to a prodigal son. See Kuhn's Est., 203 Pa. 17, as to what complies with a condition of "living with me at the time of my death." For a case of condition of being "single" see Davison's Ap., 1 Mona. 185.)

¹⁹ Scheffer v. Fritchey, 14 Lanc. L. R. 326. (See P. & L. Dig., vol. 23, col. 41288, for other applications of the principle. See also Stevens' Est., 164 Pa. 209.)

²⁰ Carr's Est., 138 Pa. 352.

²¹ McIntosh's Est., 158 Pa. 528.

²² Lynch's Est., 13 Phila. 322.

²³ Schwartz's Ap., 119 Pa. 337.

²⁴ Schleppi v. Kochler, 10 W. N. C. 443.

²⁵ Chambers v. Wilson, 2 Watts, 495.

²⁶ Adams' Est., 35 Pitts. L. J. 285.

²⁷ Culin's Ap., 20 Pa. 243.

5. Conditions subsequent.

It is said that conditions subsequent reducing or divesting interests are disfavored by the law.²⁸ A condition subsequent is a condition affecting the use only and not the acquisition of the interest and it does not prevent the bequest from vesting.²⁹ It only can have the effect of divesting it by non-performance;³⁰ or reducing the legacy, if so predicated.³¹ A condition is not too general which predicates a failure of the bequest when the beneficiary gives aid or support to the "pernicious fallacy of prohibition or its bantling local option."³² A condition subsequent to a legacy upon the breach of which the legacy is forfeited, is valid when there is a limitation over upon breach of condition.³³ The rule *in terrorem* comes to us from the civil law, which held a condition subsequent void, when against public policy, public decency and good manners, unless there was a specific devise over, thus preventing partial or entire intestacy. Our policy has excluded "good manners," as a nonessential element of the law.³⁴ If the condition be contrary to law,—the rule against perpetuities, the estate to which it is annexed, is invalid.³⁵ But if void for uncertainty, or rendered impossible by Vis Major, the legacy has been held valid.³⁶

6. Forfeiture, how effected.

The courts will be loath to decree a forfeiture on slight grounds, and the condition upon which a forfeiture is predicated must be clearly shown to have been completely broken. Otherwise the interest will be preserved as given.³⁷ A renunciation however will be taken to have the same effect as a judicial forfeiture.³⁸

7. Conditions in restraint of marriage.

The common law rule has been considered, *supra*, under "Devises." There is a distinction between a gift or devise during widowhood, maidenhood or celibacy, generally and one conditioned upon the party's not marrying, as already pointed out. A devise to one "so long as she remains my widow," is valid without a limitation over;³⁹

²⁸ Jackson's Est., 179 Pa. 7; Dean v. Winton, 150 Pa. 227; White's Est., 163 Pa. 388.

²⁹ Newell's Ap., 24 Pa. 197, Woodward, J.; Wahl's Est., 3 C. C. 309.

³⁰ Singerly's Est., 14 Phila. 313.

³¹ Fleming's Est., 14 D. R. 152. (See Downer v. Downer, 9 Watts, 60. as to conditional devise; and McFait's Ap., 8 Pa. 290, as to a devise unconditional.)

³² White's Est., 174 Pa. 642; P. & L. Dig., vol. 23, cols. 41297-8.

³³ Mickey's Ap., 46 Pa. 337.

³⁴ Over, J. Carr's Est., 138 Pa. 352.

³⁵ Kountz's Est., 213 Pa. 390.

³⁶ Streib's Est., 48 Pitts. L. J. 346; Dandt v. Templin, 2 Montg. Co. 33.

³⁷ White's Est., 163 Pa. 388; Penn-Gaskell's Est. (No. 2), 208 Pa. 346.

³⁸ White's Est., 174 Pa. 642. (See Bell v. Fulton, 1 Atl. 579, where forfeiture was decreed on withdrawal from the family.)

³⁹ Fox's Case, 1 Pearson, 437; Bruch's Est., 185 Pa. 194. (For a complete academic discussion of the evolution of this policy of the law see Holbrook's Est., 213 Pa. 93. Comth. v. Stouffer, 10 Pa. 350; McCullough's Ap., 12 Pa. 197.)

but if there be a condition in restraint of marriage, the devise is good, when there is a limitation over to support it.⁴⁰ A different shading has been given to annuities and gifts of personalty, the courts holding such void, if in restraint of marriage, unless there is a limitation over in case of marriage.⁴¹ It is held to be a condition subsequent.⁴² There being a gift over, the provision is valid,⁴³ whether it relates to a widow;⁴⁴ the widow of another,⁴⁵ or a single woman.⁴⁶ It is not the form of a provision but the intent which determines whether there is a condition or a limitation.⁴⁷ Where the gift is so long as the woman remains a widow, or remains single it is not a condition but a limitation;⁴⁸ and in that case it is valid with or without a limitation over.¹ But the same kind of a limitation by a woman upon her husband has been held void, on the ground that the gift over was not "distinct, unmixed and unqualified."² A condition attached to a bequest or devise tending to separate married folks will be void.³

8. Forfeiture for contesting will.

A clause in a will that if any of the beneficiaries contest it, they shall not take under it and shall forfeit what is given them, coupled with a devise or bequest over, in such event is valid and enforceable.⁴ But this has been held not to be the case where there are reasonable grounds for a contest.⁵ Courts consider such conditions in a will *in terrorem* and do not favor ousting their jurisdiction in this way.⁶

9. Deductions from devises and legacies.

A statement in a will that a legatee is indebted to him in a certain sum, with an implication or direction that it is to be deducted from his legacy is conclusive on distribution;⁷ also where the will refers to accounts or memorandum books, those who accept legacies are bound by them.⁸ An intention to equalize shown by the will and a

⁴⁰ Lancaster v. Flowers, 198 Pa. 614; Schaeffer v. Messersmith, 10 C. C. 366.

⁴¹ Cook's Est., 3 Phila. 60; Hoopes v. Dundas, 10 Pa. 75.

⁴² Stroud v. Bailey, 3 Grant, 310; McIlvaine v. Gethen, 3 Wharton, 575.

⁴³ Cornell v. Lovett, 35 Pa. 100; Bondbright's Ap., 9 W. N. C. 475; Walker v. Quigg, 6 Watts, 87; Wilbert's Ap., 31 Pitts. L. J. 229.

⁴⁴ Cornell v. Lovett, 35 Pa. 100.

⁴⁵ Hotz's Est., 38 Pa. 422.

⁴⁶ Holbrook's Est., 213 Pa. 93; Kloh's Est., 2 Woodward, 225.

⁴⁷ Morton's Est., 14 D. R. 121.

⁴⁸ Bennett v. Robinson, 10 Watts, 348; Bruch's Est., 185 Pa. 194; P. & L. Dig., vol. 23, col. 41309.

¹ Kromer's Est., 22 C. C. 327.

² Gast's Est., 20 Lanc. L. R. 42.

³ Mayer v. McGraw, 10 York, 5.

⁴ Owens' Est., 49 P. L. J. 257; Finegan's Est., 14 D. R. 297; Chew's Ap., 45 Pa. 228; Van Dyke's Ap., 60 Pa. 481.

⁵ Lynn's Est., 48 Pitts. L. J. 164; Friend's Est., 209 Pa. 442.

⁶ Hunter's Est., 6 Pa. 97; McCahan's Est., 221 Pa. 188.

⁷ Eichelberger's Est., 135 Pa. 160; Keener's Est., 19 Lanc. L. R. 313; Souder's Est., 169 Pa. 239.

⁸ Schell's Est., 3 D. R. 495; Falk's Est., 22 Lanc. L. R. 331.

statement that certain children are indebted to the testator, will be construed to mean that such sums shall be deducted from their shares.⁹ A discharge of obligations in the will may be revoked by codicil.¹⁰

The proper mode of deduction is to treat such debts or advancements as part of the estate; then after division of the whole estate, deduct such sum from the child's share.¹¹ If the will provides the manner of deduction it must be pursued.¹²

10. Legatees claiming by representation or substitution.

Under a gift to sons living and their heirs and to the heirs of a son deceased the latter take directly and not by representation, and therefore the debt of their father cannot be deducted from their share.¹³ But where the children take by representation they take only what is left after the debts of their parent to the estate have been deducted.¹⁴ Where a bequest to a son was revoked by codicil, it was held that his wife took an equal share with the other children, under the peculiar circumstances created.¹⁵ If the wife, however, has been substituted for her husband the share will be diminishable by the amount he owed to the estate;¹⁶ so where a grandson is substituted for a son.¹⁷ Where a testator gave persons mentioned the option of buying the business from the executors at a fixed sum, this included no assumption of the debts;¹⁸ but under different conditions the purchaser would assume the debts.¹⁹ The estate cannot be held for debts contracted after the legacies are paid.²⁰ Where the testator directed his business to be carried on for a term of years, the life beneficiaries were held to be entitled to their proportion of the net profits without diminution on account of improvements made.²¹

Where the testator has directed that all indebtedness due from a legatee at the time of his death shall be deducted the legatee cannot set up the statute of limitations.²²

11. Legacies and devises to widows.

A provision for a wife of "one equal third part of the clear annual income, etc.," means that she shall take one-third of the balance of rents after payment of debts.²³ The widow will not be-

⁹ Eichelberger's Est., *supra*; Bowers' Est., 13 D. R. 48; Albitz's Est., 49 Pitts. L. J. 379; Roberts' Est., 163 Pa. 408.

¹⁰ Walls v. Walls, 182 Pa. 226. (See P. & L. Dig., vol. 23, col. 41322.)

¹¹ McConomy's Est., 170 Pa. 140.

¹² Simes' Ap., 12 Atl. 87. (See P. & L., vol. 23, col. 41324, for particular cases.)

¹³ Carnahan's Est., 30 Pitts. L. J. 31.

¹⁴ Krug's Est., 15 York, 1.

¹⁵ Bartholomew's Ap., 75 Pa. 169.

¹⁶ Buehler's Ap., 100 Pa. 385.

¹⁷ De Haven's Est., 207 Pa. 147, 152.

¹⁸ Smith's Est., 11 D. R. 375.

¹⁹ Fleming's Est., 184 Pa. 88.

²⁰ Flemming v. Flemming, 204 Pa. 648.

²¹ Weschler's Est., 212 Pa. 508.

²² Gillingham's Est., 220 Pa. 353; Schwartz's Est., 20 York, 149.

²³ Laughlin's Ac., 1 Pa. 338; Renz's Est., 8 D. R. 328.

barred from the provisions in the will for her maintenance because she has become personally liable to the estate as endorser for some of the remaindermen.²⁴

12. Estoppel by election to take under the will.

When a legatee gives directions concerning a chattel bequeathed, it amounts to an acceptance and he is estopped from disputing it.²⁵ Because of implied benefit acceptance will be presumed.²⁶ But an election of an heir to take under his ancestor's will, in order to estop him, must be intelligently made, with full knowledge of his rights,²⁷ and must be proved by unequivocal declarations or acts from which it may be inferred.²⁸ A partial election under a will that is not positive and clear will not be construed as an abandonment of other rights given by it.²⁹ When an election is made to take land in lieu of money it will be treated as a devise.³⁰ The beneficiary cannot accept a benefit without the burden attached by the testator.³¹ So an order to burn a note held against testator on acceptance under his will is binding upon the acceptant.³²

If a beneficiary accepts a provision which is beneficial, as a rule, he is estopped from disputing the validity of one that is burdensome to him. He cannot split the will, but must elect to take or refuse as a whole;¹ nor can he set up an independent title, and where there is a dispute of fact the case is for the jury.² Although a devise under the New Jersey law is void without two subscribing witnesses, Judge Sharswood held that the Pennsylvania Court was not precluded from reading the whole will both as to real estate and personalty, in order to ascertain the testator's intention in reference to the bequests of personalty, and since it was his intention that the daughters should take the personalty and the sons the realty, the daughters could not take the personalty and still share in the realty, as under the intestate laws. They must elect,³ and having elected to take part, they are estopped from contesting the remainder.⁴ But where the testator devises land in which he has only a life estate and also makes bequests of personalty, the legatees who join in a conveyance of the title paramount are not thereby estopped from claiming their legacies.⁵ If parties defeat the

²⁴ Winter's Est., 26 Supr. C. 643.

²⁵ Wonsetler v. Wonsetler, 23 Supr. C. 321.

²⁶ Tarr v. Robinson, 153 Pa. 60; Bryce's Est., 194 Pa. 135.

²⁷ Miller's Est., 159 Pa. 562; Fulton v. Moore, 25 Pa. 468; Getz's Will,

³ York, 50; Brownfield v. Brownfield, 151 Pa. 565.

²⁸ Bryce's Est., 194 Pa. 135.

²⁹ Sunderland's Est., 203 Pa. 160.

³⁰ Ross v. Drake, 37 Pa. 373.

³¹ McKibbin's Est., 21 Supr. C. 578.

³² Haskell's Est., 212 Pa. 469. (But see Shubart's Est., 154 Pa. 230, for changed conditions.)

¹ Wonsetler v. Wonsetler, 23 Supr. C. 321; Callahan's Est., 5 Lack L. N. 105; Plummer v. Neile, 6 W. & S. 91.

² Duffey v. Congn., Etc., 48 Pa. 46; Stump v. Findlay, 2 Rawle, 168.

³ Van Dyke's Ap., 60 Pa. 481.

⁴ Devine's Est., 199 Pa. 250.

⁵ Thompson v. Thompson, 7 Pa. 78.

main purposes of the legacy they can claim nothing under the will.⁶

13. Agreements or promises to devise or bequeath.

This subject has been adverted to *supra*. Promises to remember one in his will, or to take care of one in his will, for services rendered are usually of a loose nature and to sustain them as binding requires the clearest and most convincing proof.⁷ Mere indefinite declarations will not suffice to sustain a contract.⁸ But when the proof is by three credible witnesses and the promise is definite in its character, it will be sustained.⁹ Agreements to dispose of one's estate in consideration for support for the remainder of one's life are not against public policy, if fair and conscionable.¹⁰ But a promise without consideration will not be enforced.¹¹ The sufficiency of the consideration will not be determined by the soundness of the original claim of either party.¹² A devisee having been put into possession by anticipation, and having executed the contract in the lifetime of the testator, the devise is irrevocable.¹³ If a will devises land in pursuance of a parol contract although it does not set forth the possession by the devisee or that there was a contract, these facts may be proven by parol.¹⁴ If a contract of the character herein considered be rescinded or broken the disappointed person may recover on the *quantum meruit*.¹⁵ Sections 15 and 16 of the act of February 24, 1834, P. L. 70, have been liberally construed so as to cover cases of contract of decedent to devise or bequeath in consideration of support.¹⁶

14. Will referring disputes to persons named.

A provision in a will which refers disputes concerning it to persons named cannot impose upon the beneficiaries finality, so that the jurisdiction of the courts will be ousted.¹⁷ But, generally, where a discretionary power is given in a will the courts will not control it when exercised in good faith.¹⁸

⁶ Sparr's Est., 12 D. R. 245; Armstrong v. Walker, 150 Pa. 585; Whelen v. Whelen, 11 D. R. 14; Zimmerman v. Zimmerman, 47 Pa. 378; Eyre's Ap., 106 Pa. 184; P. & L. Dig., vol. 23, col. 41345.

⁷ Wiley's Est., 11 D. R. 416; Black's Est., 12 D. R. 720; Purves' Est., 196 Pa. 438.

⁸ Eldred's Est., 9 D. R. 420; Hook's Est., 207 Pa. 203; Wright's Est., 155 Pa. 64; Dunn's Est., 19 Lanc. L. R. 225.

⁹ Harper's Est., 196 Pa. 137.

¹⁰ Logan v. McGinnis, 12 Pa. 27; Taylor v. Mitchell, 87 Pa. 518. (See also Carson v. New Bellevue Cemetery Co., 104 Pa. 575.)

¹¹ McClure v. McClure, 1 Pa. 374; Kesler's Est., 143 Pa. 386; Parker's Est., 4 D. R. 221.

¹² Lewallen's Est., 27 Supr. C. 320.

¹³ Smith v. Tuit, 127 Pa. 341.

¹⁴ Shroyer v. Smith, 204 Pa. 310. (See also these cases analogous: Johnson v. McCue, 34 Pa. 180; Black v. Black, 89 Pa. 383; Major's Ap., 126 Pa. 109.)

¹⁵ Moorhead v. Fry, 24 Pa. 37; Stem's Est., 10 Kulp, 174.

¹⁶ Brinker v. Brinker, 7 Pa. 53. (See P. & L. Dig., vol. 23, col. 41359.)

¹⁷ Drennan's Est., 33 Pitts. L. J. 338; Rea's Ap., 13 W. N. C. 546; Reilly's Est., 200 Pa. 288. (But see Phillips' Est., 10 C. C. 374.)

¹⁸ Elkins' Est., 13 D. R. 211; Ingles' Est., 76 Pa. 430.

15. Agreements as to construction of wills, etc.

Where the parties in interest come together and, being *sui juris*, agree upon a construction of the will, and the estate is distributed accordingly, courts will not disturb it¹⁹ after a lapse of years,²⁰ although it be manifestly erroneous.²¹ An agreement is binding in the absence of plain mistake or fraud.²² But an agreement without consideration, which would cut out an heir under the intestate laws, is invalid.²³ An agreement to destroy the will has been held valid, under the circumstances of a case;²⁴ and, so also, to set it aside and equalize the distribution, and the executor has no standing to object, when his sole interest is that of prospective commissions.²⁵ An agreement to set aside a clause as to survivorship has also been sustained.²⁶ But when a legatee is left out of the agreement, he is not bound by it.²⁷ The parties being competent may adopt by agreement an unexecuted codicil.²⁸ Such agreements are encouraged when fair and conscionable and especially where the widow elects to take against the will, and the testator's scheme of distribution requires remodeling.²⁹ As to the widow, who signs an agreement in ignorance of her rights, such agreement will be considered only as an argument.³⁰

16. Compromises of contests.

A compromise of a contest will be encouraged and sustained unless good reasons are shown why it should be overthrown.³¹ Relinquishing a contest is sufficient consideration for an assignment of a part of a legacy to the contestant.³² The parties named in a feigned issue have no control of the action so as to bind those not consenting to a verdict which they assent to.³³ The compromise between the beneficiaries equalizing the distribution does not let in others who would have taken under the intestate laws, but were not parties to the contest.³⁴ Where the contest is settled without an agreement of distribution, each of the parties in interest will receive his distributive share only.³⁵

¹⁹ Morris' Est., 16 Phila. 343; 42 Leg. Int. 395.

²⁰ McDonald v. Dunbar, 2 Mona. 483; Stetson v. Rosenberger, 196 Pa. 534.

²¹ Follmer's Ap., 37 Pa. 121.

²² Pearson's Est., 10 D. R. 189; Santee v. Santee, 64 Pa. 473; Brenne-
man's Est., 17 Supr. C. 75; Johnson's Est., 8 C. C. 1.

²³ Patterson's Ap., 116 Pa. 8.

²⁴ Phillips v. Phillips, 8 Watts, 195.

²⁵ Lloyd's Est., 10 D. R. 207; Alburger's Est., 8 D. R. 114.

²⁶ Ralston's Est., 172 Pa. 104.

²⁷ Bracken's Est., 138 Pa. 104.

²⁸ Hart's Est., 203 Pa. 492.

²⁹ Batione's Est., 136 Pa. 307; Hess' Est., 27 Supr. C. 498.

³⁰ Schultz's Est., 21 Lanc. L. R. 301; Sturgeon v. Ely, 6 Pa. 406;
Cooper's Est., 147 Pa. 322.

³¹ Gould's Est., 11 Kulp, 45.

³² Craig's Est., 10 D. R. 755.

³³ Whitaker's Will, 13 Phila. 22.

³⁴ Bartholomew's Est., 155 Pa. 283.

³⁵ Pepper's Case, 4 D. R. 101.

17. When gift of income carries the corpus.

A devise of the rents, profits, income or proceeds of land is a devise of the land itself¹ for the period for which they are devised,² and if there be no limitation of time, it is a gift for all time;³ which is equivalent to a fee simple.⁴ If the period is for life it is a life estate.⁵ But the rule does not apply where a power over the estate, as to sell, is vested in another;⁶ or where the executors were empowered to alter and improve the estate, such reserved powers being inconsistent with the concept of absolute control.⁷ Where land is devised in trust without limitation of time, the interest and income to be given to a person, it is a gift of the fund itself.⁸ This is especially so construed where there is no limitation over.⁹ This, however, is a rule of implication which must yield to intent apparent from the residuary clause, or the general scheme of the will itself.¹⁰ So where there is a gift over, properly made, the first taker has only a life estate.¹¹

18. Implied gifts.

A gift may be implied from the will, if there be a sufficient designation of a donee.¹² Any fair implication will be made to avoid intestacy.¹³ A bequest to persons "share and share alike" evinces an intention to make an equal distribution.¹⁴ Where the residue is given to nephews and nieces as a class, with a gift over to the survivors on the death of any one of them without issue, there is no substitutionary gift to issue of them apparent, and a child of

¹ *Schuldt v. Herbine*, 3 Supr. C. 65; *Beilstein v. Beilstein*, 194 Pa. 152; *France's Est.*, 75 Pa. 220; *Engle's Est.*, 180 Pa. 215; P. & L. Dig., vol. 23, col. 40778.

² *Cooper v. Pogue*, 92 Pa. 254; *Weaver's Est.*, 2 Lanc. L. R. 114; *Weiss' Ap.*, 3 Walker, 399.

³ *Bergdoll's Est.*, 11 D. R. 699; *McCullough v. Johnetta Coal Co.*, 52 Pitts. L. J. 78.

⁴ *Saxton v. Mitchell*, 78 Pa. 479; *Scheifler's Est.*, 18 Phila. 71.

⁵ *Carlyle v. Cannon*, 3 Rawle, 489; *Schreyer's Est.*, 7 Phila. 477; *Lare's Est.*, 3 D. R. 741.

⁶ *Kline's Ap.*, 117 Pa. 139.

⁷ *Joyce's Est.*, 5 C. C. 179.

⁸ *Millard's Ap.*, 87 Pa. 457; *Silkknitter's Ap.*, 45 Pa. 365; *Roberts' Ap.*, 59 Pa. 70; *Parker's Ap.*, 61 Pa. 478; *Keene's Ap.*, 64 Pa. 268; *Peters' Est.*, 7 D. R. 52; P. & L. Dig., vol. 23, col. 40781.

⁹ *Fall's Est.*, 6 Supr. C. 192.

¹⁰ *McKee's Est.*, 17 C. C. 548; *Livezey's Ap.*, 106 Pa. 201; *Hoffman's Est.*, 15 D. R. 524; *Gibbons v. Connor*, 220 Pa. 395; *Baeder's Est.*, 24 Montg. 57; *Pearson's Est.*, 8 Northam. 23; *Sheaffer's Ap.*, 8 Pa. 38; *Bentley v. Kauffman*, 86 Pa. 99; *Schortz's Est.*, 10 Northam. 287; *Shower's Est.*, 211 Pa. 297; *Davis' Ap.*, 100 Pa. 201; *Middleton's Ap.*, 103 Pa. 92.

¹¹ *Weiser v. Zeigler*, 192 Pa. 394; *Keene's Ap.*, 64 Pa. 268. (But see *Shearer's Est.*, 13 Montg. 98; *Paff v. Smith*, 3 Lack. Jur. 393.)

¹² *Dale v. Dale*, 13 Pa. 446; *Graham v. Graham*, 3 Clark, 212; *Kraemer v. Guarantee, Etc., Co.*, 1 Supr. C. 4; *Christy v. Christy*, 162 Pa. 485; *Weaver's Est.*, 2 Lanc. L. R. 114.

¹³ *Striewig's Est.*, 169 Pa. 61; *Schultz's Est.*, 21 Lanc. L. R. 301; *Miller's Est.*, 16 York, 119.

¹⁴ *Gantz v. Tyrrell*, 7 Supr. C. 249.

a nephew who died before the date of the will cannot come in for a share.¹⁵ For implied gifts to issue or children see note.¹⁶ A devise to one and his heirs, subject to a life estate to his father, without other words, creates a life estate in the father impliedly.¹⁷

19. Words necessary to pass an absolute estate.

Under section 9 of the act of April 8, 1833, P. L. 249, words of inheritance are not necessary to pass an estate in fee, unless the will provides otherwise.¹⁸ The intention of the testator as drawn from the whole will must govern.¹⁹ But no words prefatory will carry the fee when the intention of the testator is otherwise manifested to give a less estate.²⁰ A devise to his wife "and her heirs and assigns forever, so long as she remains my widow," is a defeasible fee.²¹ A reservation in a deed for the widow, without more, gives her a fee in the property reserved.²² A restriction upon a life estate that the devisee may not sell or incumber is good and a power of appointment added as to the remainder only authorizes a disposition after her death by her will.²³

20. Creation of life estate or interest.

In the creation of a life estate whether by deed or will the intention of the grantor or deviser, if ascertainable, is the controlling factor in determining whether only a life estate is conferred or a fee.¹ A devise to the widow during widowhood is at most a life estate, which is curtailed at remarriage.² This status is not changed by a power to sell given to the devisee;³ or a subsequent gift of the residue to the widow and children.⁴ Such an estate ends with remarriage;⁵ notwithstanding, a provision that it shall be taken in lieu of dower.⁶ The devise of a house to a person for life "for a home," does not necessarily require him to occupy it, in order to

¹⁵ Todd's Est., 33 Supr. C. 117. (See, also, Abbott's Est., 15 D. R. 412.)

¹⁶ Cox's Est., 180 Pa. 139; Beilstein v. Beilstein, 194 Pa. 152; P. & L. Dig., vol. 23, col. 40790.

¹⁷ Lindsay v. Lindsay, 4 W. N. C. 358, P. & L. Dig., vol. 23, col. 40793, for other cases of implication.

¹⁸ Schuldt v. Herbine, 7 C. C. 630; Hartman v. Herbine, 7 C. C. 630; P. & L. Dig., vol. 23, col. 40796.

¹⁹ Shirey v. Postlethwaite, 72 Pa. 39, P. & L. Dig., vol. 23, col. 40797; McCullough v. Gilmore, 11 Pa. 370; Schriener v. Meyer, 19 Pa. 87.

²⁰ Long v. Hill, 29 Supr. C. 606.

²¹ Scott v. Murray, 218 Pa. 186.

²² Birkbeck v. Wadsworth, 222 Pa. 154.

²³ Schoyer v. Kay, 217 Pa. 32. (See also Feuerstein v. Bertels, 221 Pa. 425; O'Malley v. Loftus, 220 Pa. 424; Early v. Coleman, 34 Supr. C. 267; Fox's Est., 16 D. R. 349.)

¹ Criswell v. Grumbling, 107 Pa. 408.

² Cooper v. Pogue, 92 Pa. 254; Sheaffer's Ap., 8 Pa. 38; Long v. Paul, 127 Pa. 456; Redding v. Rice, 171 Pa. 301; Rohrbach v. Sanders, 212 Pa. 636.

³ Long v. Paul, 127 Pa. 456; Palethorp v. Bergner, 52 Pa. 149; P. & L. Dig., vol. 23, col. 40810.

⁴ Patton v. Church, 168 Pa. 321.

⁵ Irvine v. Sibbetts, 26 Pa. 477.

⁶ Fox's Est., 1 Pearson, 437; P. & L. Dig., vol. 11, col. 18646.

effectuate it.⁷ The remainderman cannot enter the property by offering to pay the rent to the life tenant.⁸

21. Leasehold *pur autre vie*.

A leasehold interest *pur autre vie*, in realty is a freehold, and cannot be sold in execution, except as by the method provided by law for life estates.⁹ But a devise of the right to occupy a house "rent free," during the life of one and of other persons does not make such a one a tenant *pur autre vie*, and liable for taxes or interest upon a mortgage.¹⁰ An estate *pur autre vie* may postpone a vested legacy;^{10a} and it may result from purchase of land, as between parent and child.^{10b}

22. Relation of life-tenant to remainderman.

The life tenant is not a trustee for the remainderman, in such a sense, that the latter may by action in the Common Pleas, under the act of June 16, 1836, P. L. 784, compel the executor of such life tenant to apply assets in his hands towards the extinguishment of ground rent arrears.¹¹

23. Right to corpus or chattels in specie.

Where personal property is bequeathed with an express right to consume, or one to be fairly implied from the will, the tenant for life is entitled to the specific chattels, or the fund itself if it consists of money, without giving security.¹² If the income of an estate is given to one for life, charged with the maintenance of other persons, he is entitled to receive the corpus of the fund.¹³ The life tenant has a right to use such property according to its nature, though he must consume it in the natural use of it.¹⁴ If the bequest be general, he should convert the property into money and save the principal for the remainderman.¹⁵ Where the remainder over is of only what is left at the end of the precedent estate the life tenant may consume it all;¹⁶ and having so disposed of it, he is not bound to account for it to the remainderman.¹⁷ But if

⁷ McCalla's Est., 16 Supr. C. 202. (See also Jackson's Est., 15 Supr. C. 238.)

⁸ McCall v. McCall, 2 Walker, 202.

⁹ Comth. v. Allen, 30 Pa. 49; vol. 2, Johnson's Pr., 392.

¹⁰ Daly's Est., 11 W. N. C. 514.

^{10a} Bennett's Est., 41 Supr. C. 579.

^{10b} O'Neill v. O'Neill, 227 Pa. 334; Hiester v. Hiester, 228 Pa. 102.

¹¹ Mackinson v. Mackinson, 2 Grant, 286. (See also Reiff's Ap., 124 Pa. 145; Fidelity, Etc., Co. v. Dietz, 132 Pa. 36. See P. & L. Dig., vol. 11, col. 18658.)

¹² Straub's Ap., 1 Pa. 86; Hambright's Ap., 2 Grant, 320; Stout's Est., 13 Montg. 167; P. & L. Dig., vol. 11, col. 18660.

¹³ McCoskey's Est., 11 Phila. 95; Buist's Est., 8 Phila. 190.

¹⁴ Holman's Ap., 24 Pa. 174; German v. German, 27 Pa. 116; Runner's Est., 3 Del. Co. 395.

¹⁵ Bunnell v. Bacon, 6 Lanc. L. R. 33; P. & L. Dig., vol. 11, col. 18662.

¹⁶ Scholl's Ap., 18 W. N. C. 91; Markley's Est., 132 Pa. 352; Gold's Est., 133 Pa. 495.

¹⁷ Proctor's Est., 2 D. R. 168.

he has not consumed it, he cannot dispose of it by will; it then goes to the remainderman, or what is left of it.¹⁸ Whatever use the life tenant puts to the *corpus*, she is not obliged to account to the children, for whose use it was given her.¹⁹

A will which gives to the widow testator's entire estate, "for her sole use and benefit during the term of her natural life, to use, expend, sell and convey as she may desire and think proper," and upon her decease the residue to certain persons, gives her absolute power to use, consume or dispose of it.²⁰ But where the use is restricted to maintenance and support she is not entitled to a transfer of the *corpus* absolutely, unless it is necessary to her support.²¹ There being no specification of the use, the gift is general and the power to dispose of absolute.²² Only what is left goes to the remainderman.²³ As to the residue, the life tenant, without a power of appointment, cannot dispose of it by will.²⁴

24. Power over real estate.

The foregoing principles apply to personalty in particular. But when the estate is both real and personal, it will not apply to the real estate by implication.²⁵ But an express power to use, enjoy and consume, gives the wife a power to dispose of it by a deed in fee simple.²⁶ A devise for support with power of sale enables the widow to convey a fee indefeasible.²⁷ The right is in her to determine her style of living and the necessity for selling.²⁸ The power, however, must be exercised honestly.²⁹

25. Dividends, etc., from stock.

Profits of a corporation made before the death of a stockholder, where the income is bequeathed to one for life must be treated as principal and those subsequently accruing as income,³⁰ and it matters not in what form the profits are divided among the stockholders.³¹ Generally an increase in the value of trust investments

¹⁸ Tyson's Est., 191 Pa. 218.

¹⁹ Cox v. Rogers, 77 Pa. 160; Paisley's Ap., 70 Pa. 153; P. & L. Dig., vol. 11, col. 18668.

²⁰ Mercur's Est., 151 Pa. 49. (See Martin's Est., 160 Pa. 32.)

²¹ La Bar's Est., 181 Pa. 1; LeJee's Est., 181 Pa. 416; Schenk's Est., 17 Lanc. L. R. 369.

²² Lininger's Ap., 110 Pa. 398.

²³ Heppenstall's Est., 144 Pa. 259; McCauley's Ap., 93 Pa. 102.

²⁴ Pinkerton's Est., 193 Pa. 275.

²⁵ Cowles v. Cowles, 53 Pa. 175; Waldhaeffer v. Folke, 3 Walker, 140; Cox v. Sims, 125 Pa. 522; Taylor v. Bell, 158 Pa. 651; Follweiler's Ap., 102 Pa. 581; Fox's Ap., 90 Pa. 382; P. & L. Dig., vol. 11, col. 18664.

²⁶ Veile v. Veile, 3 Northam. 306.

²⁷ Yetzer v. Brisse, 190 Pa. 346.

²⁸ Luckenbach v. Luckenbach, 175 Pa. 484.

²⁹ Kennedy v. Kennedy, 159 Pa. 327; Schmid's Est., 182 Pa. 267.

³⁰ Earp's Ap., 28 Pa. 368; Eastwick's Est., 15 Phila. 569; Phila., Etc., Co.'s Ap., 16 Atl. 734; Wright's Est., 5 D. R. 345; Connolly's Est., 198 Pa. 137.

³¹ Earp's Ap., *supra*. (For various cases upon this feature, see vol. 11, cols. 18679-83.)

during the life tenancy goes to the remainderman.³² This is especially the case where the investments are made from the proceeds of real estate.³³ The intention of the person who creates the life estate, however, controls the application of the rule.³⁴ As to the products of oil, coal and other leases or tenancies of minerals, see note.³⁵

26. Apportionment of income.

Whilst an annuity may not be apportionable to the death of the donee;³⁶ a bequest, annually, of a sum out of income of the testator is governed by the will;³⁷ and an annuity to the testator's widow, is apportionable to the day of her death.³⁸ Interest on the bonds of corporations, whether private or municipal, is apportionable to the date of the death of the donee.³⁹ Dividends on corporate stocks declared before a testator's death, although not payable until afterwards, belong to the principal and do not go to a donee of the income.⁴⁰

27. Falsa demonstratio.

The maxim "*falsa demonstratio*," which is derived from the civil law, as stated above, does not apply to a will where the description given by the testator fits the land devised;¹ but it does where he misapplies the sum in a distribution of stocks among grandchildren;² or where he locates the property on the wrong street—evidently a clerical error.³

28. Gifts of the same class.

When a testator enumerates various goods and chattels and couples with them "personal effects," the latter phrase passes only property of the same class called "*ejusdem generis*" by the *literati*.⁴

³² Connolly's Est., 198 Pa. 137; Hemphill's Est., 40 Leg. Int. 5.

³³ Henderson v. Buck, 2 C. C. 230; Hubley's Est., 16 Phila. 327; Thomson's Est., 153 Pa. 332.

³⁴ Park's Est., 173 Pa. 190; Boyer's Est., 174 Pa. 16; Middleton's Ap., 103 Pa. 92; Graham's Est., 47 Pitts. L. J. 371.

³⁵ Sharp's Est., 6 Kulp, 467; Shoemaker's Ap., 106 Pa. 392; Blakely v. Marshall, 174 Pa. 425; Woodburn's Est., 138 Pa. 606; Wentz's Ap., 106 Pa. 301; McClintock v. Dana, 106 Pa. 386; Bedford's Ap., 126 Pa. 117.

³⁶ Dubbs v. Watson, 3 Northam, 135; Bailey's Est., 23 C. C. 139.

³⁷ Bayard's Est., 7 D. R. 279; Powers' Est., 10 D. R. 165.

³⁸ Gheen v. Osborn, 17 S. & R. 171; Fisher v. Clark, 5 Clark, 178; Blight v. Blight, 51 Pa. 420; P. & L. Dig., vol. 23, col. 18692.

³⁹ Phila. Trust Co.'s Ac., 13 Phila. 44; Wilson's Ap., 108 Pa. 344; P. & L. Dig., vol. 11, cols. 18693-4.

⁴⁰ Earp's Will, 1 Parsons, 453; Earp's Ap., 28 Pa. 368; McKeen's Ap., 42 Pa. 479. (For the duties and liabilities of life tenants see P. & L. Dig., vol. 11, 18696, *et seq.*)

¹ Nixon v. Nixon, 50 Pitts. L. J. 209.

² Clarke's Est., 82 Pa. 528.

³ Morgan v. Russo, 51 Pitts. L. J. 382. (For other cases see Coleman v. Eberly, 76 Pa. 197, 203; Drinker's Est., 13 Phila. 330; Metzger's Est., 222 Pa. 276.)

⁴ Lippincott's Est., 173 Pa. 368; Golz's Est., 8 D. R. 647; Hurley's Est., 12 Phila. 47; Walton v. Spaulding, 9 D. R. 383; Parry's Est., 188 Pa. 33; Gibbon's Est., 17 D. R. 627.

29. Appurtenances, fixtures, etc.

A devise of "a grist mill and appurtenances" carries with it all that the testator in his lifetime used as appurtenant and if that can not be ascertained the jury must discover it the best it can.⁵ In a deed, land cannot be appurtenant to land, unless necessary to its enjoyment.⁶ The unmanufactured materials but not the finished product has been held to pass, under a will.⁷

30. "Goods," "chattels," "movables," etc.

These words and the distinctions, when used in a will, have already been explained. "Personal effects," unless restricted by use with a class in a will, means "personal property."⁸ "Household furniture" covers furniture used by testatrix to run a boarding school.⁹ "Goods or movables" have been held to include bonds, but not when such interpretation would defeat the will's intent and scheme.¹⁰ "All my money and movables" will not carry a chose in action.¹¹ "Any other investment" has been held to carry cash in order to prevent intestacy.¹² "Wearing apparel" usually means clothing and does not embrace jewelry.¹³ Under "trunk and contents," a savings fund will not pass, by an account book found in the trunk.¹⁴ "Books" in a library covers books in manuscript form.¹⁵ Forge land and "forge property" do not cover tools, book accounts, etc.;¹⁶ but a devise of a blacksmith shop specifically carries with it all the personalty, tools, scraps, and accounts—the entire business.¹⁷ Household furniture and other effects carries jewelry and money in bank.^{17a}

31. Income, rents, profits, etc.

Where the sole source of profit consists in mines the word "income" includes the right to reap it by working the mines.¹⁸ "Proceeds" is equivalent to "income" in the provision for maintenance of a *cestui que trust*.¹⁹ Where the will made no disposition of rents and profits, they were held to accumulate, and as to them there was an

⁵ Blaine v. Chambers, 1 S. & R. 169.

⁶ This topic is considered under "Eminent Domain," vol. 4.

⁷ Spark's Ap., 89 Pa. 148.

⁸ Reimer's Est., 159 Pa. 212; Dowdel v. Hamm, 2 Watts, 61, where Rogers, J., discusses the distinctions.

⁹ Hoopes' Ap., 60 Pa. 220. (See discussion by Sharswood, J., in this case.)

¹⁰ Jackson v. Robinson, 1 Yeates, 101.

¹¹ Finney v. Finney, 1 Pearson, 70.

¹² Pearson's Est., 10 D. R. 189.

¹³ Fox's Est., 6 Lack. Jur. 261, 30 Supr. C. 393.

¹⁴ Magoohan's Ap., 117 Pa. 238.

¹⁵ Beecher's Est., 4 D. R. 677, 5 D. R. 154.

¹⁶ Gries v. Coleman, 1 Woodward, 413.

¹⁷ Flanagan's Est., 52 Pitts. L. J. 204.

^{17a} Brown's Est., 54 Pitts. L. J. 101 Gibbon's Est., 17 D. R. 627. (See these cases as to particular facts: Markmann's Est., 16 D. R. 55; Hill v. Hill, 17 D. R. 746; Shoemaker's Est., 25 Lanc. L. R. 283.)

¹⁸ Wentz's Est., 15 Phila. 585.

¹⁹ Thomson's Ap., 89 Pa. 36.

intestacy.²⁰ "Income" has been construed to mean "product" of a sale directed by testator.²¹ "Accretions" have been held to pass with the rest of the property when mentioned in the description.²² "Rents and income" given to the wife have been held payable out of proceeds of the sale of timber and coal rights.²³

32. What passes as "money."

"Money" may mean "cash," or personal estate that may be turned into money, according to the context;²⁴ which, however, must clearly show that it was so intended.²⁵ It very seldom covers real estate,²⁶ but when nothing could pass under the will except it include realty, the court will so hold in order to prevent intestacy.²⁷ "Money, stock and farming utensils" exclude land.²⁸ "All the money coming from all the lodges, etc.," carries a death benefit.²⁹ "Moneys received" has been held to mean securities as well as cash.³⁰ "All money in bank or on hand," does not impinge upon a partnership fund in bank;³¹ but it does include moneys collected by the agent of the testator.³² "All cash moneys whatsoever" covers money on deposit in a bank.³³ But if it be clear that the testator meant "money" in its ordinary use, it will be so construed.³⁴

33. Interest in partnership.

The bequest of a partnership interest passes it just as it is, subject to debts and liabilities when it is accounted for and closed.¹ It does not cover the individual right or interest of testator outside the partnership, though flowing from the same source;² nor does "a share of the profits that are subject to division at the time of my death," cover profits on new construction, or increased value of the real estate, or profits for years before the year of his death.³

²⁰ Holloway's Est., 1 D. R. 58. (See Henson's Est., 13 D. R. 288, as to the effect of "received.")

²¹ Bredlinger's Ap., 2 Grant, 461.

²² Wilkins' Est., 49 Pitts. L. J. 55.

²³ Fahnestock's Est., 22 Supr. C. 63. (For other cases see P. & L. Dig., vol. 23, cols. 40749-52. See also Conley's Est., 197 Pa. 291; Stout's Est., 16 D. R. 74; Crowley's Est., 22 Montg. 9.)

²⁴ Smith v. Davis, 1 Grant, 158.

²⁵ Levy's Est., 161 Pa. 189; Metz v. Metz, 7 D. R. 194.

²⁶ Widener v. Beggs, 118 Pa. 374.

²⁷ Jacobs' Est., 140 Pa. 268; Strawbridge's Est., 5 D. R. 692; Burr's Est., 14 D. R. 298.

²⁸ Bonsall v. Bonsall, 4 Del. Co. 31.

²⁹ Gentner v. Free Masons, Etc., 11 Phila. 252.

³⁰ Fleming's Est., 14 D. R. 152.

³¹ Wilkinson's Est., 192 Pa. 127.

³² Cobia's Est., 5 Phila. 214.

³³ Gilchrist's Est., 9 D. R. 249. (See Stewart's Est., 31 Pitts. L. J. 124.)

³⁴ Carr's Est., 13 C. C. 643.

¹ Earp's Will, 1 Parsons, 453.

² Miller's Est., 48 Pitts. L. J. 355.

³ Zug's Est., 52 Pitts. L. J. 115.

34. Directions to sell — Exclusion of gifts.

In a direction to sell "personal property" bequeathed, in case the testator should survive the donee, the term does not include debts due the testator.⁴ "Articles" directed to be sold by the executor do not include money.⁵ Under "real and personal estate" with a direction to sell the same, bonds, etc., are not included but go in the gift of the residuary estate by necessary implication, or there would be no residue.⁶ Cash accruing after the date of the will has been held to go with a gift of the residue.⁷ "The proceeds of all sales of my personal property" excludes the legatee from other personal property than that sold.⁸

35. "Inclusive" and "exclusive" applied.

Where the will bequeathes a certain amount, inclusive of a note due the testator it does not mean in addition to such amount;⁹ but "exclusive of" is equivalent to "in addition to";¹⁰ so, also, the phrase "together with her interest in my estate."¹¹ An exception of a judgment against a son, from deduction, means that the judgment belongs to the estate.¹²

36. Restriction of the widow's interest.

Where the widow is restricted to what she would be entitled to under the intestate laws, her share will be measured by them;¹³ and if the third is intended to be given her absolutely out of the proceeds of the sale, it will be awarded her.¹⁴

37. Provisions for maintenance, etc.

If the will provides for maintenance generally so that the whole of the interest may be exhausted, the legatee is entitled to the surplus.¹⁵ A desire expressed in a will that the family should live together in the homestead for a certain period, etc., does not fix the estate for the household expenses of thus living.¹⁶ A comfortable home and support for the widow for life includes the expenses of her funeral.¹⁷ "Incidental expenses" have been construed, in connection with other language, to be for the personal use of a legatee.¹⁸

⁴ McGlaughlin v. McGlaughlin, 24 Pa. 20.

⁵ German v. German, 27 Pa. 116.

⁶ Hunter's Est., 6 Pa. 97.

⁷ United Presb., Etc., Ap., 91 Pa. 507. (But see Bredlinger's Ap., 2 Grant, 461.)

⁸ Heineman's Ap., 92 Pa. 95.

⁹ Pepper's Est., 154 Pa. 340.

¹⁰ Coale v. Smith, 4 Pa. 376.

¹¹ Rodgers v. Rodgers, 7 Watts, 15.

¹² Butz v. Butz, 2 Penny. 270.

¹³ Wagner's Est., 15 D. R. 710; Dull's Est., 222 Pa. 208; Shirk's Est.,

¹⁵ Lanc. L. R. 124; Suplee's Ap., 16 W. N. C. 378.

¹⁴ Williams v. Williams, 1 W. N. C. 54.

¹⁵ Bayard v. Atkins, 10 Pa. 15.

¹⁶ Walker's Ap., 116 Pa. 419.

¹⁷ Shield's Est., 2 Chester Co. 473.

¹⁸ Haddock's Ap., 28 Pa. 63. (See P. & L. Dig., vol. 23, col. 40769.)

38. "Estate," "portion," etc.

"Estate" in a devise carries a fee simple without words of inheritance;¹⁹ so, also, "my leasehold estate," where the estate is a fee.²⁰ "Share" is sufficient, with a proper context, to pass a fee;²¹ and so is "portion."²² The devisee cannot transfer his devise to the executor by release.^{22a}

39. Devises subject to charges.

A devise of land subject to the payment of legacies, vests a fee.²³ The rule applies to lands whether improved or unimproved.²⁴

40. Life estate without a devise over.

Although there be no devise over, if the testator has aptly expressed a clear intent to create a life estate only, it must so stand,²⁵ and the remainder will pass under the intestate laws;²⁶ though the widow has been held to be given a fee.²⁷ Where a life estate was created and at the end of that, "the property to be sold for the benefit of the heirs," it was held that this troublesome word meant the "heirs" of the testator and not the "heirs" of the son — thus the life estate was kept intact as a distinct legal entity.²⁸

41. Absolute bequests of personalty.

The general rule is that a bequest of personal property for life, without a limitation over is absolute, unless a valid trust is created.²⁹ If there be a gift over and it fails, then there is an intestacy;³⁰ but where the only child died in the lifetime of the widow she was held to take the corpus absolutely.³¹ The rule, being one of construction must necessarily yield to a different intention expressed in the will.³² A life tenancy may be given in the will to the same person with an absolute gift of other property.³³ The bequest of the interest upon

¹⁹ Shippen, P. J., in *Busby v. Busby*, 1 Dallas, 226 P. & L. Dig., vol. 23, col. 40804.

²⁰ *Saylor v. Kocher*, 3 W. & S. 163.

²¹ *McClure v. Douthitt*, 3 Pa. 446; 6 Pa. 414.

²² *Hallowell v. Phipps*, 2 Wharton, 376.

^{22a} *Horst's Est.*, 27 Lanc. L. R. 181.

²³ *Lobach's Case*, 6 Watts, 167; P. & L. Dig., vol. 23, cols. 40814-16.

²⁴ *Holmes v. Pattison*, 25 Pa. 484.

²⁵ *Nevins' Est.*, 192 Pa. 258.

²⁶ *Reynolds' Est.*, 175 Pa. 257; *Bell v. Fulton*, 1 Sadler, 200; *Shaner v. Wilson*, 207 Pa. 550.

²⁷ *Muhlheiser's Est.*, 35 Pitts. L. J. 444.

²⁸ *Abel v. Abel*, 201 Pa. 543; *Abel's Est.*, 23 Supr. C. 531. (See P. & L. Dig., vol. 23, col. 40818, *et seq.*)

²⁹ *Brownfield's Est.*, 8 Watts, 465; *Drennan's Ap.*, 118 Pa. 176; *Natl. Live Stock Bank v. Hartman*, 8 Supr. C. 170; *Merkel's Ap.*, 109 Pa. 235; *McCauley v. Harmon*, 21 Lanc. L. R. 133; P. & L. Dig., vol. 23, col. 40830.

³⁰ *Penrose's Est.*, 17 C. C. 283; *Kane's Est.*, 185 Pa. 544; *Craige's Est.*, 14 D. R. 888.

³¹ *Markey's Est.*, 8 York, 95. (See also *Hardaker's Est.*, 204 Pa. 181.)

³² *Freeman's Est.*, 35 Supr. C. 185; 220 Pa. 343.

³³ *Stephenson's Est.*, 30 Supr. C. 97.

a sum annually during life to a son and at his death the principal to be paid to his heirs gives but a life estate to the son.³⁴

42. Cutting down of absolute gift.

The control of the testator of his estate continues to the end of his last will or to the last codicil of it and he may in the first part carve out an absolute estate and before he finishes his work reduce it, cut it down and limit it, as he chooses, so long as he does it with words which show his clear intent,¹ nor fractures the rules of law as to alienation, accumulation or perpetuities.² But the rule will not apply, and an absolute estate given in the first instance will not be cut down, by doubtful language, or words expressive of no positive intent to cut it down.³ An absolute gift cannot be cut down except by subsequent words which show an unequivocal intention to reduce the quantity of the estate;⁴ or from which a necessary implication arises of such intention.⁵ This rule applies especially to a gift of personalty.⁶

43. Precatory and explanatory words.

When an absolute devise has been made it will not be defeated by subsequent precatory words⁷ which if standing alone would constitute a will, but when used in connection with absolute disposing words fade into a mere desire or request.⁸ The same applies to words of explanation;⁹ or permission;¹⁰ or desire;¹¹ or request;¹² or confidence that the first taker will make a certain disposition of it.¹³

³⁴ Dull's Est., 217 Pa. 358. (See Styer's Est., 22 Montg. 45 and Keisel's Est., 17 D. R. 476. (See also P. & L. Dig., vol. 23, cols. 40833 — 36, *et seq.*)

¹ Urich v. Merkel, 81 Pa. 332; Urich's Ap., 86 Pa. 386; Livezey's Ap., 106 Pa. 201; Krebs' Est., 184 Pa. 222; Pinkerton's Est., 193 Pa. 275; Bouvier's Est., 12 D. R. 149; Painter's Est., 14 D. R. 861; Dickinson's Est., 209 Pa. 59; Boyd's Est., 17 D. R. 393; Styer's Est., 22 Montg. 45.

² Shalters v. Ladd, 141 Pa. 349; Good v. Fichthorn, 144 Pa. 287; Krebs' Est., 184 Pa. 222; Sanders v. Mamolen, 213 Pa. 359; Taylor v. Martin, 20 W. N. C. 27; France's Est., 75 Pa. 220; McCoy's Est., 17 Phila. 482; Hoffman's Est., 2 Pearson, 317.

³ Good v. Fichthorn, *supra*, P. & L. Dig., vol. 23, col. 40852; Sanders v. Mamolen, 213 Pa. 359; Smyser v. Shindel, 19 York, 142; Stout v. Sharps, 6 Lack. Jur. 354.

⁴ Jeremy's Est., 178 Pa. 477; Yost v. McKee, 179 Pa. 381; Sands v. McKee, 179 Pa. 386; Keating v. McAdoo, 180 Pa. 5; Peters' Est., 7 D. R. 52; Devine's Est., 199 Pa. 250; Ruch's Est., 12 D. R. 519; Sharpless' Est., 209 Pa. 409; Cruzen v. Boughner, 196 Pa. 12; P. & L. Dig., vol. 23, col. 40856.

⁵ Schmidt's Est., 185 Pa. 579; Flick v. Forest Oil Co., 188 Pa. 317; Richards v. Bentz, 212 Pa. 93; Jackson's Est., 179 Pa. 77.

⁶ Heck's Est., 170 Pa. 232.

⁷ Boyle v. Boyle, 152 Pa. 108.

⁸ Buchanan v. Eshelman, 13 Lanc. L. R. 89.

⁹ Ahl v. Bosler, 175 Pa. 526.

¹⁰ Bonwill's Est., 10 D. R. 98.

¹¹ Schwab's Est., 22 C. C. 218.

¹² Hoeveler v. Hune, 138 Pa. 442.

¹³ Pennock's Est., 20 Pa. 268; Billington v. Canerin, 49 Pitts. L. J. 172; Kinter v. Jenks, 43 Pa. 445.

It depends upon the connection and position in which "desire" is employed, because if used equipotently with "will" and in such a collocation that it means "will," it is not a precatory word;¹⁴ for precatory means the antithesis of direction, command. Words of recommendation, request and desire with reference to the estate are *prima facie* testamentary and not secondary.¹⁵ Even "wish" may be used in a mandatory sense.¹⁶

44. Estate not cut down by restraint or alienation.

Having first given an estate in fee simple a later provision in restraint of alienation will not cut down the fee.¹⁷ A restraint on alienation of a fee, passing under a devise is void, when inconsistent with a reasonable enjoyment of the fee.¹⁸ A general restraint on alienation, except to a particular person, is void.¹⁹ A devise in fee with a condition annexed that the devisee shall will it in a certain way is void for inconsistency;²⁰ or that it shall be employed in a certain way or for a particular purpose.²¹ A restraint may be void for uncertainty, as well;²² but a partial restraint is not necessarily so.²³ "A restraint upon the alienation of a contingent or vested interest prior to its coming into possession, or during a limited period not transgressing the rule against perpetuities is valid."²⁴ Directions in restraint of alienation, being against the policy of the law will be strictly construed against such conditions.²⁵ A restriction excluding the husband of a daughter from any share in the estate is valid.²⁶

45. Indefinite failure of issue.

The act of July 9, 1897, P. L. 213, given *supra*, has been commented upon in a preceding chapter. Although it is ambiguous, it is not unconstitutional.¹ It was intended to change the common law rule, so that now, if words are used in a will which leave a doubt

¹⁴ Dickinson's Est., 209 Pa. 59; Reynold's Est., 7 Lack. L. N. 256.

¹⁵ Presby., Etc., v. Culp, 151 Pa. 467; Byer's Est., 186 Pa. 404; Mutter's Est., 38 Pa. 314; Oyster v. Knull, 137 Pa. 448; Fox's Ap., 99 Pa. 332.

¹⁶ Carey's Est., 14 D. R. 891.

¹⁷ Brown v. Bonnell, 4 Walker, 271.

¹⁸ McCullough v. Gilmore, 11 Pa. 370; Walker v. Vincent, 19 Pa. 369; Jaureche v. Proctor, 48 Pa. 466; Conrow's Ap., 3 Penny. 356; Kaufman v. Burgert, 195 Pa. 274; Huber v. Hamilton, 211 Pa. 289; Kepple's Est., 53 Pa. 211; Devine's Est., 199 Pa. 250; Bowen's Est., 14 D. R. 157.

¹⁹ Rea v. Bell, 147 Pa. 118.

²⁰ Sprankle v. Comth., 2 Walker, 420; Gillmer v. Daix, 141 Pa. 505; Good v. Fichthorn, 144 Pa. 287.

²¹ Keen's Est., 1 D. R. 166; Elmslie's Est., 11 D. R. 186; Rogers' Est., 179 Pa. 602.

²² McCullough v. Gilmore, 11 Pa. 370. (See P. & L. Dig., vol. 23, cols. 40882-3, for particular cases.)

²³ Hartman v. Herbine, 7 C. C. 630.

²⁴ Penrose, J. Barker's Est., 2 D. R. 571; Affid., 159 Pa. 518.

²⁵ Brothers v. McCurdy, 36 Pa. 407; McIntyre v. McIntyre, 123 Pa. 329; Rea v. Bell, 147 Pa. 118; Bailey v. Pitts., Etc., R. Co., 208 Pa. 45; P. & L. Dig., vol. 23, col. 40887.

²⁶ Tucker's Est., 209 Pa. 521.

¹ Dilworth v. Schuylkill, Etc., Co., 219 Pa. 527.

as to whether a definite or indefinite failure of issue was intended, the doubt shall be resolved in favor of a definite failure.² In the absence of words definitely indicating a contrary intent, a definite failure of issue must be presumed.³

46. Estates tail and failure of issue.

In order to create an estate tail it is necessary that the heirs shall be limited to be procreated by, or begotten on, some body certain, male or female. Therefore a conveyance by a man to his wife, "her and my heirs and assigns," does not constitute an estate tail, and only a life estate is given to the first taker.⁴ But the words, "her heirs and assigns," and further, "her personal children and no other," creates an estate tail, which under the act of 1855, becomes a fee.⁵ Such an estate cannot be cut down to a life estate by a limitation over, upon indefinite failure of issue.⁶ The words "unto her children and their heirs and assigns forever," in a will create an estate tail which becomes a fee.⁷ "To be divided equally among her children, should she have any living, and in case she should die without living issue, then the property to revert," means a definite failure of issue and confers only a life estate.⁸

When the devise over, on failure of issue, is by express words or necessary implication, limited to a life or lives in being and twenty-one years thereafter, it contemplates a definite failure of issue.⁹

47. The rule against perpetuities.

The case of *Thellusson v. Woodford*¹⁰ supported an unconscionable trust, which carried a large estate away from the testator's relatives for a period of more than one hundred years according to Lord Hargrave. It held, among many other points, that there was no limitation upon the number of lives for the purpose of vesting an executory interest and that every executory devise is good that does not tend to perpetuity; i. e., that does not tend to make an estate inalienable beyond the period allowed by law as to legal estates. This, at that time, was laid down,¹¹ to be that a remainder was good, when limited upon a contingency that was to happen within two lives; or, "a term limited to one for life with twenty remainders successively, and all the persons *in esse* and alive at the time of the limitation of their estates," was held good.

It was further decided in the same case that a child *in ventre sa mere* is a life in being to all intents and purposes except in the case

² *Dilworth v. Schuylkill, Etc., Co.*, *supra*.

³ *Lewis v. Link Belt Co.*, 222 Pa. 139.

⁴ *Ackerman v. Ackerman*, 34 Supr. C. 162.

⁵ *Smith v. Lindsey*, 37 Supr. C. 171.

⁶ *Wilson v. Heilman*, 219 Pa. 237.

⁷ *Sechler v. Eshelman*, 222 Pa. 35. (See also *Hannon v. Flidner*, 216 Pa. 470.)

⁸ *West v. Vernon*, 215 Pa. 545.

⁹ *Todd v. Armstrong*, 213 Pa. 570. (See also *King v. Savage Brick Co.*, 30 Supr. C. 582.)

¹⁰ *Thellusson v. Woodford*, 4 Vesey, Jr., 227.

¹¹ *Wood v. Saunders*, 3 Chancery Cases, 29, 52.

of a descent at common law.¹² In the same case the period of "lives in being and twenty-one years," was discussed as a *dictum*, and Sir Richard Pepper Arden, Master of the Rolls, said, in his opinion, "that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant or *en ventre sa mere*."¹³ This decision sustaining the erratic Frenchman's will, caused the passage of the statute of 39 and 40 George III, Ch. 98, "restraining dispositions by way of accumulation to the life of the settlor, or twenty-one years after his decease, or the minority of any party living at the time of his decease." This was Lord Loughborough's act.

The rule against perpetuities, as recognized in our system of law was stated by Stewart, J., in a recent case, in the court below.¹⁴ He held that the rule is directed against future contingent interests only and has no reference whatever to vested estates. His able and exhaustive opinion in the case was adopted by the Supreme Court as its own and contains every feature of the law. He followed the law as laid down in *Philadelphia v. Girard Heirs*, 45 Pa. 26, which is summarized as follows:

(A.) Perpetuities are grants of property wherein the vesting of an estate or interest is unlawfully postponed; and they are called perpetuities not because the grant, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or its vesting.

(B.) The law allows the vesting of an estate or interest, or the power of alienation to be postponed for the period of lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently, the estate or interests dependent upon them are void, and nothing is denounced by the law as a perpetuity that does not transgress this rule.

(C.) An interest is not obnoxious to the rule, if it begin within a life in being and twenty-one years thereafter though it may extend beyond. "The remoteness against which the rule is directed is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period, may be so limited as to be determined on the happening of any event, however remote."¹⁵ When the rule is impinged the offending devise falls and the heirs at law are entitled to immediate possession of the estate.¹⁶

¹² *Thellusson v. Woodford*, 4 Vesey, Jr., 335; *Basset v. Basset*, 3 Atkyns, 203. (Does not apply under our laws.)

¹³ Citing *Beard v. Westcott*, 5 Taunton, 393.

¹⁴ *Johnstone's Est.*, 185 Pa. 179. (See *Weinbrenner's Est.*, 173 Pa. 440; *Bender v. Bender*, 225 Pa. 434.)

¹⁵ Citing *Lewis on Perpetuities*, p. 144. (See *Goddard's Est.*, 198 Pa. 454, which did not impinge the rule; and see also *Gerber's Est.*, 196 Pa. 366, which did.)

¹⁶ *Johnstone's Est.*, 185 Pa. 179; *Gerber's Est.*, 196 Pa. 366; *Kountz's Est.*, No. 1, 213 Pa. 390.

48. Exercise of power of appointment in a will.

"The long line of cases in England and in Pennsylvania, establishing that where a donee is given a power to appoint a fee simple and exercises it only partially as by appointing a life estate, the exercise is good *pro tanto*," is erased by *Roger's estate*, 218 Pa. 431, where Justice Mestrezat, delivering the opinion of the majority of the court (Mitchell, Fell and Stewart dissenting) tersely states the legal proposition thus:

"The donee of a power is simply a trustee for the donor to carry into effect the authority conferred by the power. In exercising the power, he must observe strictly its provisions and limitations. The estate appointed is that of the donor and not of the donee, and in making the appointment the intention of the donor and not that of the donee must prevail. In case of a restricted power, the donee's discretion in exercising the power is defined by the will and the limit thereby placed upon it must be observed." This strips the subject of all legal refinements and encyclopedic verbiage. A power of appointment must be exercised as given or not at all, subject to be patched up with equitable shreds by the courts. Of the majority opinion affirming the Superior Court, Mitchell, C. J., says thus more forcefully than elegant: "This is such a manifest travesty of justice and common sense that I cannot be persuaded it is law."

Penrose, J., in *Freeman's Est.*, 17 D. R. 472, whilst accepting the authority of *Rogers' Est.*, *supra*, distinguishes it and limits it to the facts upon which it was predicated.

Further in explanation of the exercise of powers of appointment he says:

"There is no mystery in the principles relating to the exercise of powers; on the contrary they are simple and logical and only such as are suggested by reason and the plainest dictates of common sense. Moreover, they are so well settled by decision as to have become textbook law. The power is of course measured by the terms of the instrument by which it is conferred; but its exercise is not looked upon with suspicion or hostility, and so long as the donee confines his appointment to the property made subject to it and to the class of objects to which it is limited—if in this respect it be limited—his will and his will alone is the point of consideration, to be regarded in the light of the principle *ut res magis valeat quam pereat*. Manifestly, if the subject of the power is severable or divisible, the failure to appoint as to the whole cannot impair the validity of the appointment of part, if the objects to whom it is made are of the class designated by the donor of the power:—*Omne majus in se minus continet*. In such case the donee simply dies intestate as to that part which he has not appointed, and it—and it alone—goes to the persons entitled under the donor's will in default of an appointment. An appointment to one not of the limited class is simply a nullity—precisely the equivalent of a failure, to this extent, to appoint at all."

This statement of the law, where "the subject of the power is severable or divisible" is not the least in conflict with *Rogers' Est.*, where "the subject of the power" was not divisible. The doctrine in *Russell v. Kennedy*, 66 Pa. 248, and *Boyd's Est.*, 199 Pa. 487, remains unscathed, says Judge Penrose.

CHAPTER XLIX.

FORMS OF WILLS.

1. Common form.
2. Attestation.
3. Attestation when will is signed by another at direction of testator.
4. Attestation of execution by mark.
5. Bequeathing all to wife.
6. With residuary clause.
7. With power to sell.
8. Devising realty with life estate and remainder over, with executory devise.
9. Clause in restraint of remarriage.
10. Clause providing in case of failure of issue.
11. Clause appointing a guardian.
12. Devise for life, with remainder.
13. Devise in lieu of dower.
14. Limitation over on failure of issue.
15. Power of sale and conversion of residue.
16. Spendthrift trust.
17. Separate use trust.
18. Power of appointment.
19. Clause in trust complying with the rule against perpetuities.
20. Clause with trust and power to convey.
21. Clause avoiding the rule in Shelley's case.
22. Clause charging a legacy on land devised.
23. Old-time will charging legacies on land devised, reserving manor for widow and charging her maintenance on the land.
24. Life-estate to wife and remainder to children in equal shares.
25. Directing conversion and division.
26. Disposing of realty for life, etc., and personalty in trust.
27. A codicil giving power to sell and convey, and to complete land contracts.
28. Clause on condition that wife does not re-marry.
29. Clause of sole and separate use to daughter.
30. Clause of spendthrift trust.
31. Clause charging land with support of widow.
32. Clause of devise directing the payment of a legacy, without charging the land.
33. Age of competency to make a will.

1. Common form of will.

In the name of God, Amen!

I, Catharine B. Reed of Lycoming Township, Lycoming County, State of Pennsylvania, being of sound and disposing mind, memory and understanding, do make, publish and declare the following to be my last will and testament, hereby revoking all former wills by me at any time heretofore made:

1. I give, devise and bequeath unto my son, Willis Reed, all my real estate consisting of one hundred acres, more or less, situate in said Lycoming Township on Beauty Run, where I now reside.

2. I give and bequeath to my daughter, Catharine Reed, all my personal property (not including money) whereof I shall die seized.

3. Of the money I have saved, I direct that my executor hereinafter named, shall expend as much as may be necessary to pay all just debts by me owing, doctor's bills, medicine and attendance during my last

illness, the moderate expenses of my funeral, a suitable monument for my grave on my lot in the Williamsport cemetery, and the necessary expenses of his execution of my will; and if there be any balance left, I direct that he shall pay the same to my son, John W. Reed.

4. I hereby nominate and appoint my lifelong friend, Enoch Polhemus, as executor of this my will.

Witness my hand this — day of —, A. D. 19—.

[Signed.] — —.

2. Form of attestation.

Signed, published and declared by the above named — —, as and for her last will and testament, in the presence of us, who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Michael Sanders,
Robert Reed.

3. Form of attestation when will is signed at direction of testator by another.

Signed by the said John Reynolds by the hand of George Gross, by the direction of said John Reynolds, he being physically unable to sign, which request he made in our presence and called us to witness, and did publish and declare that it was his last will and testament in our presence.

John Hartzel,
James Stover.

4. Form of attestation of execution by mark.

Signed by Henry Royer above named, by making his mark in our presence, the same having been first read over to him in our hearing, and declared the same to be his last will and testament and requested us to subscribe the same as witnesses.

Samuel Gramly,
Samuel Bierly.

5. Form of will bequeathing all to wife.

I, John Short of Slabtown, Pa., hereby give all my property, at my death, to my wife, Godiva Short, and appoint her my executor of this my will.

Date: —, A. D. 19—.

John Short.

[Attestation.]

6. Form of will with residuary clause.

I, Gertrude Nass, wife of James Nass, being of disposing mind and memory, give and bequeath to Jessie Bonham the sum of \$500 to be paid her by my executor within six months after my death.

I give and bequeath one thousand dollars to my dear husband, James Nass, to be in lieu of any and all claims which he may have upon my estate of whatever kind, to be paid him out of the money I have in bank, within thirty days after my death.

I give, devise and bequeath the house and lot where we now live in Nescopeck, Pa., to my son, Willis Nass, during his natural life, and after his death to his children, Henry Nass and Bessie Ness, or the survivor of them should either die without having a child or

children. All the rest and residue of my estate of whatsoever kind, whereof I may die seized, I give, devise and bequeath to my husband, James Nass.

I hereby nominate and appoint James S. Comp executor of this my will.

In witness whereof I have hereunto set my hand this — day of —, A. D. 19—.

[Attestation.]

Gertrude Nass.

7. Form of will with power to sell.

[After introduction.]

I order and direct that all my property, real, personal and mixed, shall be sold by my executor, hereinafter named, as soon as practicable after my decease, and I also direct that the proceeds thereof, after payment of my just debts, be by him divided and distributed as follows: [Here specify the beneficiaries.]

I appoint James H. Bosard as executor of this my will.

Date: —, A. D. 19—.

Norman Cilley.

[Attestation.]

8. Form of will of real estate with fee and also life estate.

[After introduction.]

I give and devise unto my beloved wife, Grace Louise McKay, the dwelling house and lot of ground upon which it stands at No. 1007 North Twelfth Street, Reading, Pa., where I now reside, with the appurtenances, to occupy and enjoy the use thereof during the period of her natural life, and at her death I give and devise the same to her and my son, James McKay, and his heirs in fee simple. But should he die without issue living or children of said issue, before the death of my said wife, Grace Louise, then and in that event alone, I give and devise the said house and lot and appurtenances to my brother, Donald McKay, and his heirs.

I give and devise my farm of two hundred acres, be the same more or less, situate in Alsace Township, Berks County, to my son, Bruce McKay, absolutely.

The rest and residue of my estate of whatever kind I direct my executor to sell and convert into money, and after the payment of all just debts and expenses of this trust, I do further direct him to distribute the balance among those who may be legally entitled thereto under the intestate laws of Pennsylvania.

I hereby nominate and appoint Morris Ritzman executor of this my will.

In witness whereof, etc.

James McKay.

[Attestation.]

9. Clause in restraint of re-marriage.

[After introduction.]

I give and devise to my husband, Anthony Wayne, the mansion house and tract of land situate on the Paoli road, in which we reside, consisting of the messuage and about thirty acres of land and appurtenances, to hold, use and enjoy the same and the rents and profits thereof, for and during his natural life or so long as he does

not re-marry; and upon his death or re-marriage, I give and devise the same to [here name those who are to take in remainder].

[Conclusion and attestation, as *supra*.]

Similar form for re-marriage of widow.

10. Clause providing when children die without issue.

I give and bequeath in trust to my executor the sum of \$25,000, which I direct him to invest in securities authorized by law, and further that he divide the annual income thereof, less five per cent. for his commission and less the taxes thereon, if any, between my two daughters, Pearl and Lizzie, until they have both attained the age of twenty-one years, when he is hereby directed to give to each of them her half absolutely. But if either of my said daughters should die without lawful issue, before arriving at the age of twenty-one, then I direct him to pay over to the survivor or her legal representative the entire sum; and if both should die, without lawful issue before arriving at the age of twenty-one, I direct my executor to distribute the same to my lawful heirs then living, that is to say, when the survivor shall have died without lawful issue.

I hereby nominate and appoint my friend, William A. Magee, executor of this my will.

[Conclusion and attestation same as above.]

11. Clause appointing a guardian.

[Introduction as above.]

I also appoint my said executor, William A. Magee, to be the guardian of the persons and estate of my two children, Philip Sidney and Jessica Berry, during their respective minority; and in case he should decline to act as such, I do hereby appoint Uriah Myers to be their guardian. It is further my desire that the said minors be brought up in the faith of the Lutheran Church.

12. Devise for life with remainder over.

I give and devise to my wife Sara Louise, to be held and enjoyed by her during the term of her natural life and immediately at her decease I give and devise the same to the children of my sister, Mary Victoria Nichols, their heirs, share and share alike.

13. Devise in lieu of dower.

I give and bequeath to my dear wife Pearl Irene the sum of ten thousand dollars, this bequest, however, upon acceptance by her to be in lieu of dower or any other claim of inheritance from my estate by her.

14. Limitation over on failure of issue.

If either of my said children should die before the distribution of my estate as herein directed, if such child or children shall leave lawful issue, they shall in each case take their parents' share *per stirpes*; but if any of them shall have died without lawful issue, then the share of such deceased child shall be distributed to the survivors [or shall go into the residue to be distributed as herein directed as to the residue of my estate].

15. Sale and conversion of residue.

I hereby direct that as soon after my death, as convenient, my executor shall convert all the residue of my estate of whatsoever kind into cash and I do empower him hereby to make sale thereof, at public or private sale, and grant and convey the same by good and sufficient deed or deeds, to the purchaser or purchasers thereof, in form according to law.

16. Spendthrift trust.

I give and bequeath to my executor in trust for my son Harry the sum of ten thousand dollars, which I direct him to invest in lawful securities, and to pay the annual interest thereon to my said son Harry in sums of not exceeding forty dollars per month (reserving the balance, if any, not as an accumulation, but to be expended for him in case of sickness or dire need), during my son's life, and at his death, the principal sum shall be paid to his children, if he have any then living, or the children of his deceased children, if any, *per stirpes*; and in the event that he leaves no children, the said principal shall be equally divided among my other children who would be entitled to take under the intestate laws.

17. Clause of separate use trust.

I bequeath and devise, in trust, to my executors the sum of ten thousand dollars, for the sole and separate use of my daughter, Alice Flora Barnes, who married against my will and whose husband would dissipate her share, and I do direct that my said executors, acting as trustees thereof, invest the same in lawful securities, and pay to her alone the annual income thereof, free from all demands of her husband, Milo Barnes, or the claims of his creditors, as long as she shall live, and at her death, I do direct that they or their successors in the trust pay the principal sum to her children, if she have any then living; if not, then to those of my next of kin entitled thereto under the laws of this commonwealth.

18. Clause with power of appointment.

I do give, devise and bequeath to my wife Pearl Irene during her natural life all the real estate whereof I shall die seized including "The Grange" or country seat, to be used by her as she deems fit and enjoy the income and profits thereof; and I do further direct that immediately upon her death the same shall go to and vest in such person or persons, as my said wife Pearl Irene shall by writing under her hand, duly executed in the presence of two credible and disinterested witnesses, designate and appoint, and in default of such appointment, I direct that the said remainder shall then go to [name the beneficiaries here, or the class].

19. Clause in trust will complying with the rule against perpetuities.

I devise and bequeath to my son, James W. Maynard, and my daughter, Grace L. Orvis, each a house and lot as hereinafter provided. I direct that my executor hereinafter named shall invest twenty thousand dollars of the income of my estate to buy the lots

and houses as aforesaid, and convey the legal title to James Gamble and Henry H. Martin as trustees for my said children, the legal title to be vested in said trustees and by them held in ~~trust separately~~ for each of my said children, during their natural lives, and during the natural lives of the wife or husband of each, and the remainder in trust for the lawful issue of each child named, until the youngest living of such issue shall attain the age of twenty-one years, when this trust shall cease and the title to such lots and houses shall be conveyed by my said trustees or their lawful successors, in fee to such issue as tenants in common; and in default of issue as aforesaid the remainder shall go to my grandchildren or their issue.

20. Clause with trust and power to convey.

I hereby empower my said trustee fully to hold and manage said estate, to let and demise the same, to receive and collect the rents, interest, income and profits, and in his discretion, to sell and convey the same or any part thereof as trustee aforesaid, and make and execute a deed or deeds in fee simple, with warranty, to the purchaser and to invest the proceeds thereof in other land, or in indefeasible securities, bearing interest, either in whole or in part at his discretion, and to collect the income, interest and profits in like manner and apply the same as hereinbefore directed, during the continuance of this trust; and for such services he shall receive five per centum of such income, annually, as his compensation.

And at the expiration of said period of twenty years my said trustee shall make proper and legal conveyance and delivery of the title of any real estate or personalty into which he may have converted it, to my legal heirs herein nominated, as aforesaid. But in case my said trustee should die before the end of said period, then his successor in this trust for the period aforesaid, shall be the one named by him as his executor, or such other person or persons as shall be lawfully appointed administrator of his estate, who shall have and perform the same powers and duties in like manner as herein declared and directed by me, upon security by him or them given to the court having jurisdiction, and such person or persons are hereby substituted by me, upon the happening of such contingency.

21. Clause avoiding the rule in Shelley's case.

I devise to my wife, Gladys Rowe, all my real estate of which I shall die seized, for and during her natural life and at her death I devise the same, share and share alike, to my son, Willis Rowe, and my daughter, Evelyn Rowe, and to their children, if either or both be deceased; and I will and direct that should any of said children be dead, leaving issue, such issue shall take *per stirpes* their deceased parent's share.

22. Form of clause charging a legacy on land devised.

I devise to my oldest son, Clarence Racine, all the messuage and tract of land situate in Miles Township, Centre County, State of Pennsylvania, known as "The Grange," consisting of fifty acres, more or less, and the improvements and appurtenances, in fee simple, upon condition, however, that he the said Clarence Racine does within two years after my decease pay to my son, Philip Sidney,

five hundred dollars; to my son, Karl Reed, two hundred dollars; to my son, Ernest Peter, two hundred dollars; to my son, Robert Bell, one hundred dollars; to my daughter, Jessica Berry, intermarried with Arthur M. Blaisdell, two hundred dollars; to my daughter, Grace Louise, intermarried with James S. McKay, one hundred dollars.

All the residue of my estate, after the payment of my just debts and expenses of administration, I bequeath to Pearl Irene Clemmer absolutely.

23. Form of old-time will charging legacies on land and reserving manor and maintenance for widow.

Following is a form of a will made nearly a century ago:

In the name of God. Amen! I, Anthony Biehrly of Miles Township, in the county of Centre and Commonwealth of Pennsylvania, considering the uncertainty of this mortal life and being of sound and perfect mind and memory (Blessed be God for the same!), do make and publish this my last will and testament in manner following, to-wit:

Principally and first of all, I commend my immortal soul into the hands of God who gave it, and my body to the earth, to be buried in a decent, Christianlike manner, in the discretion of my executor hereinafter named. And,

As to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to-wit:

I give, devise and bequeath to my eldest sons, Nicholas Biehrly and John Biehrly, all my plantation in Miles Township aforesaid (purchased by me from General Miles), except such parts as shall be hereinafter excepted, out of which they shall pay to their brothers and sisters according to seniority, as hereinafter mentioned, the sum of twenty dollars per acre (said plantation consisting of two hundred acres), with the usual allowance of six per cent. for roads.

The said Nicholas Biehrly is to have one hundred and fifty dollars in advance of his legacy and the said John Biehrly is to have one hundred and thirty-five dollars in advance of his legacy; And the residue shall be divided into twelve equal annual payments, and one year after my decease they shall begin to pay one of my children annually beginning with Margaret, and in this order: Catharina, Elizabeth, Sarah, Rosina, Anthony, Anna, Eve, Mary and Barbara; but they shall each have their own and equal share, in turn, in the order of seniority. It is understood that my plantation shall be divided from north to south and the said Nicholas and John Biehrly shall each have an equal half part of the land. But if they should sell the land before all the heirs are paid out, they shall give sufficient bail for the remainder of the money to be paid.

And as touching the reservation for my beloved wife Mary, it is my will and desire that she remain in the house in which I now dwell and which she shall have for her use during her natural life, as well as two acres of land including the dwelling-house and garden. She shall also have the present cow-stable with free passage to and from it, and if they shall see cause not to allow her the said stable, they shall then build one for her convenience on her land. They shall also give her out of my present stock, one cow and two sheep which

they shall keep in pasture with their own cattle in summer, and for the winter they shall deliver unto her annually one ton of good hay besides what is made on her two acres, and also sufficient good straw. They shall also deliver her a constant supply of good fire-wood ready cut at the door. She shall also keep all the household and kitchen furniture which she shall see cause to keep for her use during her natural life. My two sons aforesaid shall annually give her twelve bushels of good wheat, six bushels of good rye, and three bushels of buckwheat, all of which they shall deliver to her, ground or chopped if she requires it. They shall also deliver her annually the flax from a quarter acre of ground. They shall annually deliver her one hundred pounds of good pork and fifty pounds of good beef, one bushel of salt, ten pounds of sugar, one pound of pepper and four dollars in cash. She shall also have the liberty annually to choose two rows of apple trees in the orchard on said plantation for her use of the fruit thereof; and if it should happen that she take sick, it shall be the duty of my executor hereinafter named and he is hereby bound to take care of her, and if necessary he shall get her a housemaid and employ a physician; and, at her death, to pay all the funeral expenses, all of which shall be paid by him out of my personal estate.

I do also give to my son Anthony four acres of land, of which Nicholas is to give two acres and John Biehrly is to give two acres of land each from his share, where my dwelling-house now stands and Anthony has his blacksmith shop. The said four acres shall be thirty rods in length along the line between Nicholas and John Biehrly, and as broad as required to make up the four acres; but the said Anthony shall let my beloved wife have all the privileges of the use of the two acres of land where my dwelling-house stands during her natural life; and for the said four acres of land said Anthony is to pay twenty dollars for each and every acre, to be taken from his legacy before mentioned.

All the net products of my bonds, notes and book debts, together with such parts of my real and personal estate as will not be kept by my beloved wife, shall be divided equally among all my children by my executor.

It is also my will and desire that my son, Nicholas Biehrly, shall give unto my other two sons, John Biehrly and Anthony Biehrly, a sufficient water right for the water as it now runs in pipes, that is to say, for the one-third of the water which comes from the spring in the pipes and that John and Anthony Biehrly pay him the said Nicholas Biehrly twenty dollars each for the same. But if he will not agree to give the said water right then he shall not have the one-half of the plantation aforesaid, but that he shall have his hundred and fifty dollars in advance only, and shall have an equal share in money with his sisters and brothers, and that my son Anthony shall then have his part of the land, subject to the same payments, and then the four acres aforesaid shall not come to Anthony but that the same shall fall into the two plantations and that my son Anthony be bound to make such payments to his brothers and sisters and pay my beloved wife such payments or parts of her annuities as before mentioned for my son Nicholas to make. The widow's reservation shall come out of the whole estate. My children who

are indebted to me shall pay no interest to my estate. Michael Ketner shall have Eve's share until her children arrive at the age of twenty-one years, then he shall pay the said amount to said children in equal shares as they come of age. If any of my children should die without heirs, then in that case, the one who is intermarried with such an one, shall pay the one-half back to my estate, the same to be divided in equal shares by them who survive.

And lastly, I do hereby nominate and appoint my son, John Biehrly, as my executor of this my last will and testament, and I do hereby utterly disallow and revoke all former testaments, wills, legacies and executors, ratifying and confirming this and no other to be my last will and testament, hereby empowering my said executor to settle all bonds, notes and book accounts, to give deeds and all other instruments of writings in my name and stead the same as I myself would or could do if I were myself present.

In witness whereof I have hereunto set my hand and seal the tenth day of July, in the year of our Lord, eighteen hundred and twenty-four.

Anthony Biehrly. [Seal.]

Signed, sealed and published by the said Anthony Biehrly to be his last will and testament in the presence of us, who have hereunto subscribed our names as witnesses in the presence of the testator and at his request.

Joseph Gerbrich,
George Bear.

24. Giving the wife the whole personal estate and the use of the whole real estate, and at her death, if anything be left, to go in equal shares to children.

I, John Roe, of the city of Wilkesbarre, in the county of Luzerne, Pennsylvania, being in good health and of sound mind, do make and declare this to be my will and testament in manner following, to-wit:

First. I direct that all my just debts and funeral expenses be paid by my executor as soon after my decease as possible.

Second. After the payment of the debts and expenses above mentioned I give and bequeath to my wife Mary the residue of my personal property absolutely, and the use of all my real estate while she lives. And should my executor find the personal property insufficient to furnish my said wife a comfortable support, I direct in that case that he may, at his discretion, sell on such terms and for such prices as he may deem best any real estate that I may leave, so far as it may be necessary for her support, and for such purpose I authorize him to make a deed to the purchaser thereof.

Third. I give to my children, namely, John and Susanna, in equal shares, all the real estate or the proceeds of the sale thereof that may be left after the death of my wife, excepting that the debt which my son John owes me on a note, dated the first day of June, 1880, for one hundred dollars, with interest, shall be deducted from his share.

And lastly, I constitute and appoint P. C. Wadsworth executor of this my will, hereby revoking and making void all former wills by me at any time heretofore made.

In witness whereof I, the said John Roe, have hereunto set my hand and seal, this — day of —, A. D. 19—.

John Roe. [Seal.]

Signed, sealed, published, and declared by the said testator, John Roe, as and for his last will and testament, in the presence of us who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as the witnesses thereto.

Darien W. Dodson,
Lizzie Y. Wadsworth.

25. Directing all property to be converted into money and dividing the proceeds.

This is my last will and the only one I ever made.

After my death I direct that all my property, real and personal, shall be sold, and after the payment of my debts and the charges of my funeral and of settling my estate, I direct that the money shall be divided as follows: My wife, Mary, shall have one-third thereof, to be hers absolutely, and the balance I direct to be divided into *ten* equal parts; *one part thereof* shall go to my son Henry; *two parts thereof* shall go to my son John; *three parts thereof* shall go to my youngest daughter Emma; *two parts thereof* shall go, in equal shares, to such of the children of my deceased daughter Harriet as may be living at my death; and the remaining *two parts thereof* shall go in equal shares to such of the children of my deceased daughter Amanda M., as may be living at my death.

I appoint my son Henry executor of this my will, and direct that his *compensation for settling my estate* shall be one hundred dollars and no more, but this shall not include the expenses connected therewith.

Witness my hand and seal this — day of —, 19—.

26. Disposing of real estate for life, etc., and personal estate in trust.

H. M. Smith. [Seal.]

I, Augustus C. Myers, of Philadelphia, do make and publish this my last will and testament.

First. I direct that my wife, Mary, shall have the sole use, rents, income and profit of the premises where we now live on Franklin Street, so long as she shall live.

Second. I give and bequeath all my household goods, furniture, pictures, silver-plate and books, and generally, all the goods and chattels contained in my said dwelling-house, to my said wife Mary. But in case she should die before me, I give and bequeath the same to my daughter, Elizabeth V. Maffit.

Third. I direct that the interest of my wife, in my estate, shall be the same as though I had died intestate: except that the provisions and bequests in her favor, as above set forth, shall be in addition thereto.

Fourth. I give and bequeath the sum of ten thousand dollars (\$10,000) unto the Pennsylvania Company for Insurance on Lives and Granting Annuities, in the City of Philadelphia: to have and to hold the same *in trust*, as follows:

(A.) *In trust* to invest the same on good, lawful securities, to collect and receive the annual income or profit arising therefrom, and to pay the same in half-yearly installments, less all proper costs and charges, to my son John Myers, during his natural life, free and clear

from all liability for any debts of the said John, and not subject to anticipation.

(B.) *In trust*, upon the death of the said John, leaving him surviving a child or children, or the issue of any deceased child or children, to pay the said moneys to the said child or children, and the issue of any deceased child or children in equal shares: such issue taking by representation the share which the parent would have received, if living, at the time of the death of the said John.

(C.) And lastly, in the event of there being no such child or children, or the issue of any deceased child or children, living at the time of the said John's death, then *in trust* to pay over the said money to my daughter, Elizabeth V., or her heirs. And as to such trust I order and direct that the said trustee may, in lieu of money, accept from my executors, in liquidation of the said bequests, and each or any of them, such good securities belonging to my estate as shall amount in value to the sum bequeathed; that the said trustees shall have full power to reinvest the trust moneys whenever and so often as they deem it to be of advantage to their *cestuis que trust* so to do; that any addition to the principal sum of any of the said bequests which may accrue from reinvestments or in any other manner shall be held upon the same trusts and for the same uses as the said principal sum is itself held; and that the said bequests shall be paid at the convenience of my executors and without interest.

Fifth. All the rest and residue of my estate, real, personal, and mixed, I give, devise, and bequeath unto my said daughter, Elizabeth V. Maffit, her heirs and assigns, forever.

Sixth. I nominate and appoint my son-in-law, George C. Maffit, and my friend, Edward P. Davis, of Philadelphia, the executors of this my last will and testament.

Seventh. And I do hereby authorize and empower my said executors, and the survivor of them, to carry out and complete all *contracts for the sale of real estate* which shall be outstanding at the time of my death, and, upon the payment in full of the moneys due thereon, or upon the payment thereof being properly secured, to convey the lands in such contracts described by good and sufficient deeds to the purchasers thereof severally.

Lastly, I do hereby revoke all other wills heretofore made by me.

In testimony whereof I have, unto this my last will and testament, written upon two sheets of paper connected together by eyelets, and upon pages numbered 1, 2, 3, and 4, set my hand and seal, this — day of —, A. D. one thousand nine hundred and —.

A. C. Myers. [Seal.]

Signed, sealed, published and declared by the above-named testator, as and for his last will and testament, in the presence of us, who at his request and in his presence and in the presence of each other, have hereunto subscribed our names as the witnesses thereof.

George Lewis,
Edmund G. Bell.

27. A codicil giving power to sell and convey real estate and to complete land contracts.

I, John Thomas, do hereby make and publish this codicil to my

foregoing last will and testament, dated the — day of —, 19—, and executed in presence of —, —.

1st. I do hereby unite my beloved wife, Ellen E., in the executorship of my will and this codicil, with like force and effect as though she had been originally named in said will as executrix with my son Isaac M., executor.

2d. I do hereby give and grant to my said executor and executrix *full power and authority to grant, bargain, and sell at their discretion as to time, manner and terms, any and all real estate*, of which I may die seized, possessed, or in any manner entitled to, and the same to *convey* by good and sufficient *deed or deeds* to the purchasers thereof, and to complete the *contracts* which I have made for the sale of lots by making deeds therefor on the payment of the purchase-money.

3d. Should my said executor and executrix see fit under the power hereby given them, to sell the Main Street property, which I in my will have given to my wife for life, I do hereby authorize them to use the proceeds of such sale in the purchase of another property, or, at their option, to invest the same in good securities. Such other property or securities to be for the use of my said wife during her natural life, and upon her death to go to my six children in equal parts.

In witness whereof I have hereunto set my hand and seal this — day of —, A. D. 19—.

John Thomas. [Seal.]

Signed, sealed, published, and declared by the above-named testator as and for a codicil to his last will and testament, in the presence of us who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as the witnesses thereto.

E. G. Bell,
E. P. Davis.

NOTE.—All codicils should be attached to the will, and if not attached, the will should be carefully described.

28. A clause giving property to a wife on condition that she shall remain a widow.

I give, devise, and bequeath to my beloved wife Mary, all my estate, real, personal, and mixed, to have and to hold the same for her own use and benefit, so long as she shall remain unmarried, and if she shall marry again, then she shall be restricted to such estate therein as she would have been entitled to if I had died without having made a will.

29. A clause giving property to a daughter without being liable for the debts or contracts of either her or her husband.

I give, devise, and bequeath unto my daughter Sarah Mills, wife of Peter Mills, the entire use and income of all my real estate for her sole and separate use, so long as she shall live, without being liable for the debts, contracts, or engagements of either herself or her husband; and at her death the property shall vest absolutely in such of the children of my said daughter as shall then be living; and

if she die leaving no children, then the same, in equal shares, shall go to my other children who may be then living.

30. A clause for the protection of a bequest to a spendthrift son.

The share given to my son Levi, I bequeath *in trust* to my friend, John H. Latshaw, he to hold the same, and pay the interest at his discretion to my said son, for his maintenance and support; said yearly interest not to be subject to the debts and liabilities of the said Levi, and in case the said Levi should die without leaving issue, the principal sum and interest to be paid to the children of my son Charles.

31. A clause giving land to two sons charged with the support of the testator's widow.

I give to my loving wife Hannah two good beds and bedding, and all my household furniture; she is also to be furnished with a comfortable room wherever she may choose to reside, and sufficient maintenance during her natural life, or their equivalent in money, the same to be furnished by my two sons, Daniel and Gilbert Steele, and chargeable upon the tracts of land hereinafter devised to them.

And I give and devise to my two sons, Daniel and Gilbert, one hundred and eight acres, being part of different tracts of land composing my old farm, to be equally divided between them. And I also give to my two sons, Daniel and Gilbert, each one equal half part of thirty acres of land, to be taken off the south end of the John M. Saylor tract; the above-named messuages and tracts of land are charged and are always chargeable, nevertheless, with the bequests hereinbefore made to my loving wife Hannah.

32. A clause giving land to one and directing him to pay a legacy to another without specially charging the payment on the lands.

I give to my daughter Susan a legacy of one thousand dollars, the same to be paid by my son Christian, as hereinafter directed.

I give and devise to my son Christian Ebey, the plantation with the appurtenances thereunto belonging (on which I now reside), containing about one hundred and sixty-two acres, to him, his heirs and assigns, forever. The said Christian to pay one thousand dollars, in one year after my decease, to my daughter Susan, in satisfaction of the legacy I have given her.

33. Age of competency to make a will.

In most of the states and territories no one is competent to make a will unless of the age of 21 years. The exceptions are as follows: At eighteen — California, Connecticut, Hawaii, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah; Georgia, at fourteen; Louisiana, sixteen; Wisconsin, a married woman, at eighteen. The following states, males at twenty-one and females at eighteen: Colorado (if single female), Maryland, District of Columbia, Illinois, Missouri.

CHAPTER L.

POWERS OF EXECUTORS, PLEADINGS AND REMOVAL.

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| <ol style="list-style-type: none"> 1. Custody of property. 2. Power over the real estate. 3. Powers as to realty under the will. 4. Naked power to sell, meaning of. 5. Interpretation of power to sell. 6. Effect of power to sell. 7. Right to take land as such. 8. Execution of a power to sell. 9. Manner of sale and consideration. 10. Control of exercise of power, by the courts. 11. Discretionary power to sell. 12. Setting sale aside and resale. 13. Liability of purchaser, as to purchase money. 14. Extent of power to sell. 15. Duration of power to sell. 16. Effect of sale. 17. Conversion of realty into personalty. 18. Contract for sale of land by trustee as individual. 19. Purchase by executor for his own use. 20. Sales of life estates with limited remainders. 21. Manner of proceedings. 22. Executors or trustees may convey by attorney. 23. Executors, etc., may join in incorporation. 24. How proceeds are to be held. | <ol style="list-style-type: none"> 25. Consent in writing by <i>cestuis que trustent</i>. 26. Orphans' court given jurisdiction. 27. Discretionary power of executor, as trustee. 28. Pleas by executors. 29. Judgment against the executor's own goods. 30. Judgment at the common law. 31. Process against executor, for waste. 32. Dismissal of executor, etc., for disability. 33. Removal, when executor, etc., is lunatic, etc. 34. Proceedings when executor, etc., has removed from the state. 35. Surety of executor, etc. — protection of. 36. Security where executrix marries without securing minors' interests. 37. Decree of land at a valuation under a will. 38. Effect of decree. 39. Form of petition to ratify sale by executor. 40. Form of release by widow and heirs. 41. Form of decree. 42. Form of petition for authority to sell. 43. Form of condition in bond of nonresident executor. |
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1. Custody of property.

As already shown in preceding chapters, the executor is entitled to the actual manual possession of all personal property of decedent, even articles specifically bequeathed to a son, being trustee for the creditors first and the beneficiaries next. He may, however, deliver to the legatee a specific chattel bequeathed, on taking a refunding bond.¹ The same rule applies to an administrator c. t. a.² The

¹ Bohrer's Est., 7 D. R. 307.

² Moseley's Est., 12 Phila. 50.

legatee of a life interest in bonds does not have to account to the executor for the interest and profits when the testator left no debts.³ Where one executor, being devisee for life, and the other, being devisee in remainder, make a deed for property the purchase money does not belong to the estate, there being no debts.⁴ The burden is upon the executors to show, when they account, what became of the property of the testator, where they have been authorized to continue the business, as well as the implements of his trade.⁵ But it will not be presumed that an executrix embezzled bonds which were known to have been kept by testatrix in a tin box, since she lived with the executrix who managed her business.⁶ An executor will not be surcharged with money which decedent had some time before his death, without evidence that it was in his possession when he died. Goods of testator in the possession of another before his death may be recovered, but the executor, in order to avoid surcharge, is not compelled to show that they did not belong to the testator. The burden of proof is not upon him.⁷ The burden of proof in such cases is upon him who avers that the property belonged to the decedent and that it was the duty of the executor to recover it and account for it.⁸ But where the securities are in the hands of the executor himself and he dies, if they are not found, the presumption is that he converted them and his personal representative must account for them.⁹ In case there are two executors, one being the widow, a ground rent falling due cannot be charged to the co-executor after eleven years have elapsed, the presumption being that the widow received it.¹⁰ If executors charge themselves with cash which did not appear in the inventory the burden is upon them to show that such cash arose from sale of the property mentioned in the inventory.¹¹ If the will vests an absolute power of disposition of the personal property in the widow and she disposes of it, the executor is not chargeable with it.¹² A widow who draws money of decedent out of the bank is chargeable with it when she becomes executrix.¹³ An executor who receives personalty of the estate and sells it to his co-executor is liable to the legatees for the amount.¹⁴ But an executrix cannot be charged with property which she claimed as her own, such claim being known to the widow when the settlement was made.¹⁵

³ Marsden's Ap., 102 Pa. 199.

⁴ McKendry v. Shannon, 201 Pa. 331.

⁵ Kulp's Est., 1 Campbell, 13; Holloway's Est., 8 W. N. C. 148.

⁶ Milligan's Ap., 97 Pa. 525.

⁷ Thomas' Est., 4 Kulp, 446.

⁸ Leow's Est., 6 W. N. C. 333.

⁹ Shoch's Est., 11 W. N. C. 288.

¹⁰ Erdman's Est., 7 C. C. 306.

¹¹ Kulp's Est., 1 Campbell, 13.

¹² Lininger's Ap., 110 Pa. 393.

¹³ McLean's Est., 5 Kulp, 207.

¹⁴ Galbreath v. Rife, 2 Rawle, 143.

¹⁵ Young's Est., 202 Pa. 431. (See Bracken's Est., 15 D. R. 71, and Corson's Est., 137 Pa. 160.)

2. Power over the real estate.

It is only when the executor is required to sell the real estate for the payment of debts or where the will devises it to him upon a trust or trusts that he is concerned.¹⁶ Where it is devised to him to be sold and distributed it is done as trustee and the account in such case should be separate and not commingled with the administration account.¹⁷ But where he receives surplus money after sale of the testator's land under an execution he is accountable for it in his administration account.¹⁸ If he sells land under a power in the will and permits a legatee to take part of the proceeds, he may claim credit for it in his account.¹⁹ Whilst rents of realty due at the death of the testator are assets and must be collected by the executor, he has, ordinarily nothing to do with rents accruing afterwards which belong to the heir or devisee,²⁰ although there may be a power of sale in the will.²¹ But if the will gives a power to sell and invest to the use of the beneficiary, until the sale takes place the rents are assets of the estate;²² and if the executor himself occupies the land and prevents an income he will be guilty of a devastavit and be surcharged.²³ Where by mistake the executor sells land belonging to another, though suffered to do so by said owner, being ignorant of his rights, the fund belongs to the owner of the land.²⁴ An executrix and sole legatee, when the estate is insolvent, will be surcharged with the crops raised on the land which she appropriated, thinking they belonged to her.²⁵

3. Powers of executors as to realty under the will.

Section 12 of the act of February 24, 1834, P. L. 70, defines the powers of executors under the will, as to real estate, as follows:

"All powers, authorities and directions, relating to real estate, contained in any last will, and not given to any person by name or description, shall be deemed to have been given to the executors thereof; but no such power, authority or direction shall be exercised or carried into effect by them, except under the control and direction of the Orphans' Court having jurisdiction of their accounts."

A power to sell land expressly given in a will, without appointing the executors to do so, nevertheless authorizes them to sell, under the control and direction of the court.¹ A naked power to sell confers no power to collect rents accruing after the death of the

¹⁶ Dundas' Est., 18 Phila. 79.

¹⁷ Aston's Est., 5 Wharton, 228.

¹⁸ Guier v. Kelly, 2 Binney, 294.

¹⁹ Finney's Ap., 37 Pa. 323.

²⁰ Winkle v. Meany, 30 Supr. C. 339; Henson's Est., 12 D. R. 326; Wilson v. Hiestand, 21 Lanc. L. R. 329.

²¹ Wall's Est., 25 Lanc. L. R. 227.

²² Wetzel's Est., 25 Lanc. L. R. 225.

²³ Tasker's Est., 15 D. R. 166; 215 Pa. 267.

²⁴ Miller's Ap., 84 Pa. 391.

²⁵ Lau's Est., 8 York, 173.

¹ Wood's Est., 1 Pa. 368; Houck v. Houck, 5 Pa. 273; McFarland's Ap., 37 Pa. 300; Mussleman's Ap., 65 Pa. 480; Kirk v. Carr, 54 Pa. 285.

testator;² which go *eo instanti* to the devisees or heirs at law.³ If the owners make the executor their agent to rent the land, they cannot afterwards object.⁴ A power to sell the land and collect the rents *ad interim*, may be implied, however, from directions in the will and the assent of the heirs.⁵ A power to sell does not work an immediate conversion of the land, and meantime the rents go to the heir.⁶ Land converted by a positive direction to sell and blending of personalty with the real estate, is put under the control of the executor and the rents become assets. It is the duty of the executor to collect the rents, pay the taxes and insurance and keep the property in reasonable repair.⁷ A power to sell may be implied from words in the will which are equivalent to an expressed intention by the testator that the executor should sell the real estate.⁸

4. Naked power to sell, meaning of.

Section 13 of the act of 1834, *supra*, provides:

"The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interest therein, and have the same powers and authorities over such estate, for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been devised to them to be sold, saving always to every testator his right to direct otherwise." This general power does not interfere with the law of descent nor work a conversion, but leaves the intention of the testator to convert, to be drawn from the will itself, which is the law of the case.⁹ The duty imposed by this section does not include the collection of rents and if the executor fails to collect them, he is not chargeable with them.¹⁰ The executors are seized of the land for the uses declared in the will alone.¹¹ To this extent they are charged with an active trust.¹²

5. Interpretation of power to sell.

A power to sell, to pay debts and a gift and devise after payment of debts and legacies is not a contingent but an absolute power to sell;¹³ though the testator may by the terms of his will limit the

² Young's Est., 16 C. C. 54; Myers' Est., 9 Phila. 310; Hillard's Est., 8 Luz. L. R. 137; Blight v. Wright, 1 Phila. 549.

³ Howard's Est., 8 D. R. 125; Paxson's Est., 13 D. R. 78; Rementer's Est., 13 D. R. 313; Kite's Est., 12 D. R. 397.

⁴ Rosenstell's Est., 50 Pitts. L. J. 72.

⁵ Peirce v. Peirce, 195 Pa. 417, 199 Pa. 4.

⁶ Watts' Est., 168 Pa. 431; Gordon's Ap., 18 W. N. C. 23; Hallowell's Est., 9 D. R. 90; Walker's Ap., 116 Pa. 419; Straub's Ap., 1 Pa. 86.

⁷ Hinnescheidt's Est., 12 Luz. L. R. 23; P. & L. Dig., vol. 2, C. R. A., col. 2353.

⁸ Gray v. Henderson, 71 Pa. 363; Schropp v. Schaeffer, 2 D. R. 362; Arrott's Est., 9 C. C. 535; Brewer v. Taylor, 9 Atl. 515; Rose v. Quick, 30 Pa. 225; Morgan's Est., 27 W. N. C. 215.

⁹ Chew v. Nicklin, 45 Pa. 84.

¹⁰ Myers' Est., 9 Phila. 310.

¹¹ Cobb v. Biddle, 14 Pa. 444.

¹² Sheets' Est., 52 Pa. 257.

¹³ Shippen v. Clapp, 29 Pa. 265.

time of its exercise;¹⁴ and the extent of the power.¹⁵ The power once given to the executors will not be defeated by the remarriage of the widow, in consequence whereof she loses her right to the residue.¹⁶ The intent of the testator must be gathered from the whole will.¹⁷ Authority to sell coal underlying the land with the usual mining privileges does not empower the executors to waive and release the right of surface or lateral support.¹⁸ If the executors' power to sell is given "for the purpose of executing this will," they cannot sell unless there be a necessity to do so arising from the execution of the will.¹⁹ A power to sell does not mean a power to lease with the option of buying.²⁰

6. Effect of power to sell.

A power to sell the land of the testator vests the title fully in the executors for that purpose and when the purchaser has taken possession the heirs have no title upon which they can maintain ejectment for the purchase money.²¹ They have the same power as if the testator had devised the land itself to them for that purpose.²² The intention to convert must come from the will.²³ The *cestuis que trustent* have an interest in the land until the sale is consummated and the executors must account for the mesne income.²⁴ The executors may maintain an action for the recovery of arrears of ground rent accruing after testator's death,²⁵ or for mesne profits against one claiming adversely to the testator.²⁶ A power given executors to sell may be exercised by a co-executor, after the renunciation of his co-executor.²⁷ If an executor has renounced, but not of record, he must join in the deed.²⁸ A power to sell may be defeated by not being exercised when it should be done.²⁹ The parties interested may, it seems, accelerate the sale by agreeing to it.³⁰ The power of an executor to sell for the payment of debts cannot be defeated by the creditor and heirs' waiver of a part of his claim.³¹

¹⁴ *Wilkinson v. Buist*, 124 Pa. 253; *Roland v. Miller*, 100 Pa. 47.

¹⁵ *Cresson v. Ferree*, 70 Pa. 446.

¹⁶ *Livingood v. Heffner*, 21 W. N. C. 148.

¹⁷ *Kaufman v. Hollinger*, 4 W. N. C. 27. (See *Seeds v. Burk*, 181 Pa. 281; *Penna. Co., Etc., v. Leggate*, 166 Pa. 147; *Swan v. Covert*, 138 Pa. 306; P. & L. Dig., vol. 7, col. 11671.)

¹⁸ *Allshouse' Est.*, 23 Supr. C. 146. (See *McClane v. McClane*, 207 Pa. 465.)

¹⁹ *Eberly v. Koller*, 209 Pa. 298.

²⁰ *Spangler's Est.*, 12 York, 20.

²¹ *Shippen v. Clapp*, 29 Pa. 265; 36 Pa. 89.

²² *Jones' Ap.*, 3 Grant, 250; *Dundas' Ap.*, 64 Pa. 325; *Chew v. Chew*, 28 Pa. 17; *Silverthorn v. McKinster*, 12 Pa. 67.

²³ *Chew v. Nicklin*, 45 Pa. 84; P. & L. Dig., vol. 7, col. 11675.

²⁴ *Jordan v. Headman*, 61 Pa. 176.

²⁵ *Cobb v. Biddle*, 14 Pa. 444.

²⁶ *Blight v. Ewing*, 26 Pa. 135.

²⁷ *McDowell v. Gray*, 29 Pa. 211.

²⁸ *Neel v. Beach*, 92 Pa. 221.

²⁹ *Sweigart v. Frey*, 8 S. & R. 299; *Gast v. Porter*, 13 Pa. 533.

³⁰ *Hamlin v. Thomas*, 126 Pa. 20; *Harrah's Est.*, 7 D. R. 170; *Styer v. Freas*, 15 Pa. 339.

³¹ *Adams' Est.*, 148 Pa. 395.

7. Right to take land as such.

In case the will directs the land to be sold and the proceeds to be divided, the legatees may elect to take the land itself and thus avoid a sale.³² But such election must be made by some unequivocal act and all the parties interested must join in it.¹ A conveyance by the parties of their shares before sale has been held to be an election to take the land instead of proceeds.²

8. Execution of a power of sale.

It is not requisite to a power of sale in a will that the will be probated before the power is executed.³ But if it should turn out not to be a valid will the case might be different. A conveyance without a reference to the power will not be deemed an execution of it unless there is evidence of an intention to execute it,⁴ or the executor has no interest in the premises and the conveyance can only be made operative by treating it as an execution of such power.⁵ A deed by the widow, without referring to the power in the will cannot be given effect so as to cut out after-born children.⁶ As a rule, a power to sell at a particular time cannot be executed until that time arrives.⁷ A conveyance individually by an executor, with power to sell and without individual interest will be an execution of the power.⁸ A provision requiring the executor to give the tenant three months' notice, etc., is not a condition precedent to a sale to the tenant.⁹ When no discretion is vested in the executor, except as to time and terms, he cannot indefinitely postpone the sale and thus defeat the intention of his testator.¹⁰ But if he was guilty of no fraud and the delay was merely due to a lack of judgment, he will not be held liable.¹¹

9. Manner of sale and consideration.

When the will directs the sale to be at "public vendue," a private sale confers no title.¹² But when the executor has full power, he may divide the land into lots and lay out streets between them and thus sell them.¹³ He may take part of the consideration in a judgment against a third party.¹⁴ The deed executed in pursuance of an absolute power is a conclusive muniment of title.¹⁵ If the

³² Reeser's Est., 4 C. C. 417.

¹ Willing v. Peters, 7 Pa. 287; Evans' Ap., 63 Pa. 183.

² Battersby v. Castor, 6 D. R. 73; 181 Pa. 555. (See Reed v. Meller, 122 Pa. 635.)

³ Miller v. Meetch, 8 Pa. 417.

⁴ McCreary v. Bomberger, 151 Pa. 323; P. & L. Dig., vol. 7, col. 11685.

⁵ Allison v. Kurtz, 2 Watts, 185; Jones v. Wood, 16 Pa. 25.

⁶ Robeno v. Maflatt, 136 Pa. 35.

⁷ Loomis v. McClintock, 10 Watts, 274.

⁸ McCauley v. Heise, 20 Lanc. L. R. 313.

⁹ Hanbest v. Grayson, 206 Pa. 59.

¹⁰ Severns' Est., 211 Pa. 68.

¹¹ Cunningham's Est., 212 Pa. 441, 451.

¹² Ross v. Coolbach, 1 Northam. 385.

¹³ Higgins v. Sharon Boro., 5 Supr. C. 92.

¹⁴ Shippen v. Clapp, 29 Pa. 265.

¹⁵ White v. Williamson, 2 Grant, 249; P. & L. Dig., vol. 7, col. 11689.

executor abuses his power and is guilty of fraud the vendee has no valid title, yet, if he conveys to a bona fide purchaser for value, without notice, such purchaser is protected.¹⁶ A parol sale without fraud has been sustained, under the necessities of the case;¹⁷ but it is an exceedingly dangerous undertaking.¹⁸

10. Control of exercise of power, by the courts.

Where a power is contained in the will the Orphans' Court will not assume jurisdiction unless it be to supply some omission in the terms of the power.¹⁹ If under the terms of the will the executors are doubtful of their power it is safest and best to apply to the court for aid.²⁰ The court will not grant an order to sell real estate to pay legacies until the executor has filed an account showing a deficit in the personalty.²¹ A widow having in pursuance of a direction in a will ordered the executor to sell and then died, her creditor has a standing to procure an order that the executor sell.²² If the testator's title is invalid the executor need not sell.²³ The act, *supra*, brings the executor within the jurisdiction of the Orphans' Court, so as to require him to account.²⁴ The court will not order a sale where there is an implied conversion, by commingling the real and personal estate, but no positive direction to sell.²⁵ It has jurisdiction to compel the specific performance of a contract for the sale of a decedent's real estate made by the agent of the executor who had full power under the will.²⁶

11. Discretionary power to sell.

When an executor is by the will given discretionary power to sell, the Orphans' Court will not as a rule interfere with it,¹ though if a sale of all the real estate would injure the rights of the life tenant the court may restrain it;² or where the interests of orphan children are concerned.³ The remedy against an executrix who fails to exercise a discretionary power to sell is in the Orphans' Court.⁴

¹⁶ Price v. Junkin, 4 Watts, 85.

¹⁷ Silverthorn v. McKinster, 12 Pa. 67.

¹⁸ Seitzinger v. Weaver, 1 Rawle, 377; Hickock v. Still, 168 Pa. 155. (See Hackett v. Milnor, 156 Pa. 1, for a case of assent by some but not all of the children. See 2 C. R. A., col. 2377.)

¹⁹ Schwartz's Est., 168 Pa. 204.

²⁰ Rogers' Est., 185 Pa. 428.

²¹ Smyth's Est., 5 W. N. C. 103.

²² Luckenbach v. Luckenbach, 175 Pa. 484.

²³ Irvine's Est., 209 Pa. 321.

²⁴ Twaddell's Ap., 81 * 221.

²⁵ Krug's Est., 9 D. R. 239.

²⁶ Hancock's Est., 9 D. R. 231; P. & L. Dig., 2 C. R. A., col. 2378.

¹ Bruner v. Naglee, 7 Phila. 384; Haslam's Est., 4 W. N. C. 526; Peterson's Est., 7 W. N. C. 507; Baum's Ap., 4 Penny. 25; Morris' Est., 16 Phila. 343; Brown's Est., 20 Lanc. L. R. 244.

² Espenship's Est., 13 C. C. 294; Hanbest's Est., 15 D. R. 234.

³ Marshall's Est., 138 Pa. 260. (See Waddell's Est., 196 Pa. 294.)

⁴ Erie, Etc., Co. v. Vincent, 105 Pa. 315.

12. Setting sale aside and resale.

An executor's sale made under a discretionary power will not be set aside for inadequacy of price unless it amounts to fraud or great improvidence.⁵ A sale has been set aside where there was not a due execution of the power.⁶ A sale cannot be set aside upon an audit; it must be done in a proceeding after due notice to the purchaser.⁷

13. Liability of purchaser to see to application of the purchase money.

The purchaser at an executor's sale under a power to sell for the payment of legacies is not protected, as is the case when he buys at a judicial sale, from misapplication of the purchase money and he may demand security before paying the balance when judgments have been obtained by creditors since the agreement of sale was made.⁸ He is bound to see to the application to the payment of scheduled debts, but not general debts, except where the power is discretionary.⁹ But it seems if the power of sale is absolute the purchaser is not required to do so.¹⁰ If the executrix be unable to furnish security, when required, the money will be ordered into court.¹¹

14. Extent of power to sell.

The power given the executor must be measured by the complete intent of the will. If a devisee whose devise is charged with the payment of legacies refuses to accept, it has been held there is no intestacy, because the Orphans' Court could compel payment of the sum charged, and the executor had no power to sell the land as undisposed-of residue.¹² Where the legal title is held subject to a trust the power of sale is subject to the intent of the trust.¹³ The administrator *d. b. n. c. t. a.* has the same power as the executor and may compromise a question of title and make a conveyance.¹⁴ A power of sale, unconditional, embraces a power to mortgage which will bind the remainderman.¹⁵ Under a general power the executor may sell after-acquired real estate,¹⁶ but not where the power is confined to a specific tract and purpose.¹⁷

⁵ Dietrich's Est., 1 Lehigh V. R. 193; Andrews' Est., 6 D. R. 21; Hauck's Est., 37 Pitts. L. J. 8; Bichsel's Est., 55 Pitts. L. J. 357; Fricke's Est., 16 Supr. C. 38.

⁶ Daily's Ap., 87 Pa. 487. (See Reel's Pet., 32 C. C. 200.)

⁷ Dundas' Ap., 64 Pa. 325; P. & L. Dig., vol. 7, col. 11701.

⁸ Hannum v. Spear, 1 Yeates, 553.

⁹ Seeds v. Burk, 181 Pa. 281; Cadbury v. Duval, 10 Pa. 265.

¹⁰ Doran v. Piper, 164 Pa. 430; Grant v. Hook, 13 S. & R. 259.

¹¹ Ives' Est., 1 W. N. C. 108. (See P. & L. Dig., vol. 7, col. 11706.)

¹² Downer v. Downer, 9 Watts, 60; Beeson v. Breeding, 77 Pa. 156.

¹³ McElroy v. Nucleus Assn., 131 Pa. 393.

¹⁴ Wetherill v. Comth., 17 W. N. C. 104; Fidelity, Etc., Co. v. Wurfflein, 15 W. N. C. 28; Shalter's Ap., 43 Pa. 83.

¹⁵ McCreary v. Bomberger, 151 Pa. 323; Guss v. Windle, 15 D. R. 324, as to power to grant an easement.

¹⁶ Roney v. Stiltz, 5 Wharton, 381.

¹⁷ Miller v. Kistler, 4 Northam. 81. (See Wilson v. Bryn Mawr Tr.

15. Duration of power to sell.

The time during which an executor is authorized to sell depends upon the will and if the sale was directed to be made for a purpose which ceases the power ends with it.¹⁸ If a sale depends upon a gift to charities which fails and produces an intestacy to that extent the power of sale also falls.¹⁹ But if the power extends to other purposes disconnected with the failed bequest, it will be exercisable, still, for that purpose only.²⁰ A direction to sell land within two years is exercisable after two years;²¹ but it is doubtful whether it may be done after seventeen years, when a mere incident of the office.²² If the power is discretionary as to time, the mere lapse of time does not affect it;²³ and if unlimited, the assistance of the Orphans' Court need not be invoked.²⁴ Where unlimited as to time in the premises, the conditions and instructions given later may fix the limit of time of exercise.²⁵ The terms of the will having wrought an equitable conversion, the failure of the executor to exercise the power within the time fixed in the will, does not destroy it.²⁶ But a discretionary power to sell within one year cannot be exercised four years later.²⁷ A power of sale exercised by selling subject to the reservation of a ground rent is exhausted.²⁸

16. Effect of sale.

A sale under a power works conversion.²⁹ If there is no express direction to sell for the payment of debts an unscheduled debt is a lien which will not be divested by the sale.³⁰ When the testator orders land to be sold and legacies to be paid thereout, the surplus goes to the heir.³¹ A sale under a power in a will for the payment of unscheduled debts, discharges their lien and they are payable out of the proceeds.³² The executor will not be permitted to deny

Co., 24 Montg. 202, as to reservation of married woman's separate use land. As to discretionary power, see *Eisenbrown v. Burns*, 30 Supr. C. 46, and *Sorkin v. Berman*, 16 D. R. 683.)

¹⁸ *Smith v. Folwell*, 1 Binney, 546; *Swift's Ap.*, 87 Pa. 502; *Fidler v. Lash*, 125 Pa. 87; *Clark v. Campbell*, 2 Rawle, 215; *Githens' Est.*, 9 D. R. 465; *Slokom v. Knight*, 20 Lanc. L. R. 9.

¹⁹ *Luffberry's Ap.*, 125 Pa. 513.

²⁰ *Evans' Ap.*, 63 Pa. 183.

²¹ *Dice's Est.*, 49 Pitts. L. J. 242; *Shalter's Ap.*, 43 Pa. 83. (See also *Fredericks v. Kerr*, 219 Pa. 365.)

²² *Henson's Est.*, 12 D. R. 326.

²³ *Paschall's Est.*, 14 Phila. 242.

²⁴ *Marshall's Est.*, 138 Pa. 260.

²⁵ *Wilkinson v. Buist*, 124 Pa. 253.

²⁶ *Fahnestock v. Fahnestock*, 152 Pa. 56; *Miller v. Meetch*, 8 Pa. 417; *Wells v. Sloyer*, 1 Clark, 516.

²⁷ *Herb v. Walther*, 6 D. R. 687.

²⁸ *Elliott's Pet.*, 5 Wharton, 524. (See *Carpenter's Est.*, 17 D. R. 170.)

²⁹ *Wharton v. Shaw*, 3 W. & S. 124; *Macer's Ap.*, 3 Walker, 107. The conversion takes place when the sale is consummated. *Holmes' Est.*, 15 D. R. 774 (Over, J., dissenting.)

³⁰ *Seeds v. Burk*, 181 Pa. 281.

³¹ *Wilson v. Hamilton*, 9 S. & R. 424.

³² *Cadbury v. Duval*, 10 Pa. 265.

his authority, in ejectment by the purchaser.³³ Where a purchaser dies after confirmation of the sale and another is substituted, the amount necessary to complete the purchase does not descend as realty, in which the widow would be entitled to a life estate only.³⁴

17. Conversion of realty into personalty.

Conversion of realty into personalty is effected:

1. By a positive direction to sell the land, which is an express declaration of intention to convert;
2. By an absolute necessity to sell in order to execute the will; and
3. By such a blending of realty and personalty by a testator in his will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath that fund as money, in both of which latter cases there is an irresistibly implied declaration of intent to convert.¹ Where the necessity of selling is apparent, it matters not that the authority is permissive rather than mandatory and the time discretionary with the executor.² The same is true when personalty and realty are blended.³ A positive direction to sell works conversion.⁴ Without a positive direction to sell in a will, the blending of realty with personalty in such a manner as shows an intention to convert both into a fund out of which bequests or devises are to be paid, works conversion.⁵ There being no positive direction to sell nor any necessity, the executor having discretion to sell, no conversion is wrought and the lands pass immediately to the devisee and he is entitled to the accruing rents.⁶ An estate may be so vested in a trustee as to work equitable conversion;⁷ so, also, where it cannot be distributed without becoming personalty.⁸ A power given to divide after the sale is exercisable by the administrator *d. b. n. c. t. a.* after the death of the executor.⁹ A power of sale does not work conversion as between the executor and the heir or legatee.¹⁰ The title remains in the heir until divested by the sale.¹¹ With it goes the right of possession.¹²

Under a will giving express power to sell, where there are debts, so that the legacies cannot be paid in full, the conversion takes place immediately and the rents accruing go to the general legatees whose legacies have been diminished by the deficit—and not to the residuary devisees, as in the case above stated.¹³ Such accretion is not

³³ Eisenbrown v. Burns, 30 Supr. C. 46.

³⁴ Brennan's Est., 220 Pa. 232.

¹ Battenfield v. Kline, 228 Pa. 91, quoting Hunt's Ap., 105 Pa. 128; Irwin v. Patchen, 164 Pa. 51; Cooper's Est., 206 Pa. 628.

² Severn's Est., 211 Pa. 65.

³ Tarrence v. Reuther, 185 Pa. 279; Laughlin's Est., 131 Pa. 333; Klapp's Est., 19 Supr. C. 150.

⁴ Miller's Est., 12 Dauphin Co. 112; Thompson's Est., 36 C. C. 289.

⁵ Ramsey v. Ramsey, 226 Pa. 249; Jones' Est., 24 York, 25.

⁶ Neumann's Est., 41 Supr. C. 279; Sax's Est., 19 D. R. 118.

⁷ Reed's Est., 37 C. C. 205.

⁸ Emig's Est., 23 York, 138.

⁹ Battenfield v. Kline, 228 Pa. 91.

¹⁰ Blight v. Wright, 1 Phila. 549.

¹¹ Williams, J., in Watts' Est., 168 Pa. 431.

¹² Erie, Etc., Co. v. Vincent Ex., 105 Pa. 315.

¹³ Scott's Est., 19 D. R. 643.

an accumulation prohibited by section 9 of the act of April 18, 1853, P. L. 503. It has been held that a provision that deficiencies should be made up from the rents and income does not offend that law, because there can be no invalid accumulation to further a just purpose, such as payment of debts, etc.¹⁴ The wife being given certain real estate for life and the executors power to sell the remainder and distribute the same to collateral relatives, giving his wife the residue, she was, as general residuary legatee, held entitled to the rents for the first year after her husband's death.¹⁵ The real estate is an asset for the payment of debts, but the rents are not.¹⁶ The legal representative who collects rents accruing after the death of the testator holds them in trust for the heir.¹⁷ They are not applicable to the payment of debts or legacies.¹⁸ Conversion is not wrought where a sale is not directed nor necessary to carry out the intentions expressed in the will.¹⁹ Although the personalty be insufficient to pay legacies, conversion is not necessarily wrought.²⁰ But the blending of realty with personalty necessarily converts all into personalty.²¹

18. Contract for sale of land by co-trustee as individual.

Whilst it is true that the Orphans' Court has jurisdiction over executors and testamentary trustees when acting in their fiduciary capacity and may review, set aside a sale and order real estate to be resold, which is under their control,²² it does not have jurisdiction of the sale made by a co-trustee under claim of individual right as by a written agreement.²³

19. Purchase by executor for his own use.

The purchase of land by an executor at his sale, for his own use, has already been considered under sales of real estate, *supra*, together with the forms of procedure, and leave to bid under the act of 1878. The old authorities applicable may be found in P. L. Dig., Vol. VII, col. 11720 *et seq.* No presumption arises that an executor was himself the purchaser, from the fact that many years after a legatee had sold her interest, the executor settles for such interest with the vendee of it.¹ If the executors, under advice of counsel, bought the land at sheriff's sale, in order to discharge a trust, they get the legal title, but still hold it on a trust and cannot convey free from it, without the beneficial owners' joining in the

¹⁴ Wade's Est., 19 D. R. 197, citing with approval, Wahl's Est., 20 Phila. 32.

¹⁵ Dallett, J., in Sax's Est., 19 D. R. 118, on authority of Ackroyd v. Smithson, 1 Brown's C. C. R. 503.

¹⁶ Watts' Est., 168 Pa. 431.

¹⁷ Walker's Est., 116 Pa. 419.

¹⁸ Stoop's Est., 31 Pitts. L. J. 34; Fross' Ap., 105 Pa. 258.

¹⁹ Herron's Est., 57 Pitts. L. J. 257.

²⁰ Neumann's Est., 18 D. R. 181.

²¹ Lamberton's Est., 40 Supr. C. 548. (See Keech v. Keech, 25 Montg. 75.)

²² Armstrong's Ap., 68 Pa. 409; Dundas' Ap., 64 Pa. 325.

²³ Spencer's Est., 227 Pa. 469.

¹ Cunningham's Est., 212 Pa. 441.

deed.² A sale made by an executor in which he is the real purchaser may be set aside by the court, for inadequacy of price.³ But where the price was fair and all the parties satisfied, save the petitioner, the court will not set it aside.⁴ Such sale is not void, but only voidable on the petition and showing a good cause by parties interested.⁵ If the auditor finds that the legal representative was guilty of gross fraud and surcharges him, the finding will not be reversed.⁶ The Court of Common Pleas has jurisdiction to declare a trust, where the executor took title in his own name and removed from the state.⁷ An executor who purchases an outstanding title to the land of his testator, does so on a trust.⁸ In order to protect a judgment which the testator held against another an executor may bid at the sale and acquire title as trustee for the estate he represents.⁹ He does so for the protection of his estate and is not to be surcharged, if he acts prudently and in good faith.¹⁰ Land so bought is treated as personalty and may be sold by the executor without an order of court.¹¹ If the purchaser is not satisfied the Orphans' Court may ratify the sale.¹²

20. Sales of life estates with limited remainder.

Section 1 of the act of June 15, 1897, P. L. 159, provides:

"That the several Orphans' Courts of this commonwealth shall have jurisdiction to decree the public or private sale, mortgaging, leasing or conveyance upon ground rent, of lands within their respective counties which have been or shall be devised or granted for life, or for the life of another, and with remainder limited to a class of persons, some or all of whom may not be in being at the time of the decree for such public or private sale, mortgaging, leasing or conveyance upon ground rent: *Provided*, That the court to which such application may be made shall be of the opinion that it is for the interest and advantage of those interested, or who may become interested therein, that such lands should be sold, mortgaged, leased or conveyed upon ground rent, and that the same may be done without injury or prejudice to any trust, charity or purpose for which such lands may be held, and that the same may be done without violating any law which may confer an immunity or exemption from sale or alienation."

21. Manner of proceedings.

Section 2 of the act, *supra*, provides:

"That the proceedings for such public or private sale, mortgaging,

² Finley's Est., 10 D. R. 272; Freas' Est., 19 D. R. 735.

³ Brittain's Est., 28 Supr. C. 144.

⁴ Price's Est., 13 D. R. 50.

⁵ Shellhamer v. Wade, 25 C. C. 252; Myers' Est., 19 York, 164.

⁶ Regan's Est., 219 Pa. 176.

⁷ Goodwin v. Colwell, 213 Pa. 614.

⁸ Keller v. Auble, 58 Pa. 410; Wood v. Jones, 7 Pa. 478.

⁹ Chase v. Irvine, 87 Pa. 286; Bean v. Mercer, 1 Chester County, 335. (See Fleming's Est., No. 3, 15 D. R. 25; Beck v. Ulrich, 13 Pa. 636.)

¹⁰ Billington's Ap., 3 Rawle, 48.

¹¹ Oeslager v. Fisher, 2 Pa. 467; Fell's Est., 9 W. N. C. 382; Johnson v. Bliss, 11 W. N. C. 293; Hillard's Est., 8 Luz. L. R. 237.

¹² Fell's Est., *supra*.

leasing or conveyance upon ground rent shall be in all respects the same as are now provided by existing laws in cases where contingent remainders or executory devises are limited, and a decree of the court is sought for the sale, mortgaging, leasing or conveyance upon ground rent of the land. And the decree of court made under this act shall have the same effect as to title, discharge of liens, and in all other respects as in the instances last above enumerated. And the purchase money, mortgage money, ground or other rent reserve, shall in all respects be substituted for the land sold, mortgaged or let, as regards the enjoyment and ownership thereof after payment of liens, and shall be held for or applied to the use and benefit of the same persons and for the same estates and interests, present or future vested, contingent or executory as the lands so sold, mortgaged or let had been held. And the court shall make such order or orders as to the distribution or investment of such funds as may be requisite to protect the interests of all persons who are or may become entitled thereto, or to any part thereof, whether such persons, or any of them, are in being at the time of such order and have vested interests therein, or may come into being."

22. Executors or trustees may make conveyance by attorney.

Section 1 of the act of March 14, 1850, P. L. 195, provides:

"Any trustee, executor or other person acting in a fiduciary character, with power to convey lands or tenements in Pennsylvania, may make conveyance under such power, by and through an attorney or attorneys duly constituted, and such conveyance shall be of the same validity as if executed personally by the constituent; * * * *Provided*, That nothing herein contained shall authorize any person so acting in fiduciary character to delegate to others the discretion vested in himself for the general management of his trust."

If the attorney acting under the power conveys the land in his own name, without mentioning his power, it will be considered as an exercise of the power, nevertheless.¹³

23. Executors, etc., may join in incorporation.

Section 1 of the act of April 22, 1889, P. L. 42, provides:

"Corporations for profit may be organized by executors or trustees acting under a will authorizing or directing them to carry on or continue a business of the testator with any other purpose than that of winding up the same, in the usual manner, whenever the business is such that a charter could have been obtained by the testator, to conduct the same, under the then existing laws of this commonwealth. And the executors or trustees may unite with others in the organization of such corporations, and contribute the property, the legal title to which is vested in them, as capital to the corporations on terms to be agreed upon by the associates, and accept stock in the corporations in lieu thereof."

24. How proceeds are to be held.

"*First*. The whole of the proceeds of the trust estate, whether

¹³ *Henby v. Warner*, 51 Pa. 276.

contributed or sold, and whether paid for by shares or money, shall be held on the same uses and for the same trusts and persons, and subject to the same powers, as the estate and property was held for or under before the organization."

25. Consent in writing by adult cestuis que trustent.

"*Second.* All persons having a beneficial interest, vested or contingent, who are in being at the time of such organization and are of full age, shall consent in writing to the organization. All persons who are in being and interested, immediately or contingently, if under age or *non compos mentis*, shall, by a guardian or committee appointed for that purpose, consent. The husbands of all married women interested, if not living separate and apart, shall consent."

26. Orphans' court given jurisdiction.

"*Third.* The Orphans' Court of the county shall, upon petition, inquire into the circumstances and give their sanction to the terms and conditions of the organization. In appointing guardians or committees to inquire and consent under this act, no security shall be demanded, nor shall such guardians or committees be entitled to receive any property of the beneficiary, other than the compensation for his services ordered by the court."

27. Discretionary power of executor as trustee.

Under a will creating an active trust for the benefit of testator's wife and son and giving his trustee a special personal and discretionary power to withhold the conveyance of the son's share until he arrived at the age of twenty-five, if the trustee dies before the time to make conveyance, and he has not exercised his discretion, the estate passes to the son.¹⁴ The power to withhold was incidental and continued until the time fixed for the conveyance. Justice M'Lean said in *Fountain v. Ravenel*:¹⁵ "A power, when coupled with a trust, if it is not executed before the death of the trustee, is extinguished at law, but the trust in Chancery is held to survive." In this case a charity failed because the discretion to give it was not exercised by the trustee.

It was said by Finletter, J.:¹⁶ "The incidental power or special trust with which the trustee was clothed, depending solely upon his own discretion and judgment, ceased of course, with his death."

A successor in the trust, if such were appointed, would have no power left but to give the will effect and make conveyance according to the devise. If the *cestui que trust* took possession of his share on arriving at the age fixed, a Court of Equity would decree him a conveyance, if he deemed it important as an additional muniment of title.

28. Pleas by executors.

Every executor is an administrator of goods and the pleading is *ne unques executor, nec unques administravit come executor* — when

¹⁴ Baeder's Est., 190 Pa. 606, 614.

¹⁵ 17 Howard (U. S.), 386.

¹⁶ Woodward's Est., 8 Phila. 211.

he denies the executorship — i. e. that he never was executor, nor ever administered as executor.¹⁷ If he bring his action as administrator, it is a matter for plea in abatement and not bar.¹⁸ In *assumpsit* against an executor, the plea of *non assumpsit*, shall have relation to the testator and not the executor.¹⁹ An executor or administrator, when the debt is "true and just," as it ought to be averred in the complaint, should confess the same, and if he have no assets or insufficient assets, so plead.²⁰ The plaintiff may take issue thereon as to both or either, by replication. The plea of *plene administravit* is but an echo now. But it may be of interest to know what was its office and effect.

The defendant pleads fully administered; the plaintiff replies assets in his hands and joins issue. If he recovers, it is of the whole debt with costs and damages. But upon plea nothing *per discent* by the heir, the plaintiff may have judgment presently, and a *scire facias* when assets do descend.²¹ But though the plaintiff have judgment for his whole debt, he cannot have execution against the executor for more than the assets found in his hands, or that may come into them, notwithstanding his false plea. He shall not be therefore amerced of that which he hath not, as executor.²² If judgment be against the plaintiff it is *quod nihil capiat per breve*; — that he take nothing by his writ.

29. Judgment against the executor's own goods.

De bonis propriis — the judgment is called. Prior to the statute that an administrator shall not be answerable out of his own goods for a promise to pay the decedent's debt, it was held that such a promise was *nudum pactum*, unless he had assets of the decedent wherewith to answer.²³

30. Judgment at the common law.

A judgment at the common law embraces only the sentence upon that which was considered in the cause. The form was: "*Ideo consideratum est per curiam*" not "*adjudicatum est*." It must be confined, *ad materiam subjectam*, the very point which was considered.²⁴

31. Process against executors for waste.

At the common law, "when judgment is given against executors and the sheriff returneth *nulla bona*, etc., upon the *scire facias*, the plaintiff may have a special writ of *feri facias*, *scilicet*: That the sheriff levy the debt of the goods of the dead, *et sibi constare poterit*,

¹⁷ Snelling's Case, 5 Coke's Rep. 83. (Rep. means Coke.)

¹⁸ Robinson's Case, 5 Coke's Rep. 33; Granwel v. Sibley, 2 Lev. P. 190; *similibus casus* — Howley v. Sibley.

¹⁹ Baker's Case, Latch, 125; Browning v. Litton, 1 Levinz, 184.

²⁰ Merial Tresham's Case, 9 Coke, 109.

²¹ Mary Shipley's Case, 3 Coke, 131-4.

²² Wentworth on Ex., p. 352-3, quoting Sir Edward Coke, Tr. 16th, Eliz., 8 Coke, 134.

²³ William Banes' Case, 9 Coke, 94, Stat. 29 Chas. 2d, 4; Rann v. Hughes, 7 T. R. 350 n.

²⁴ Wentworth on Ex., 372, citing Ognell v. Underhill, 4 Coke, 51 b, in illustration.

that the executors have wasted the goods, then *de bonis propriis*.²⁵ In case of waste it was early held that executors shall find bail, because the act is tortious.²⁶

The special execution above does not presume either that the executor hath goods of the testator, or so having hath wasted them, but it commands that if he have assets, then to be levied in one way; if he has wasted them, then in another way; and if neither, then *nil fieri*.²⁷

32. Dismissal of executor, etc., for disability.

Section 2 of the act of 1861, *supra*, provides:

"Whenever any sole executor, administrator, guardian, committee or trustee shall become incompetent to discharge the duties of these respective trusts, by reason of sickness or other visitation, and it shall appear to the satisfaction of the court having jurisdiction of these accounts, that such incompetency is likely to continue, to the injury of the estates under their control, it shall be lawful for such court to make a decree vacating the letters testamentary or of administration granted to such executor or administrator, or revoking the appointment of such guardian, committee or trustee; after which, new letters shall be granted and appointments made, in the same manner as in other cases of vacancy in such trusts."

The discretion of the court under this act will not be reviewed.²⁸

33. Removal when executor, etc., is a lunatic or habitual drunkard.

Section 26 of the act of 1832, *supra*, provides:

"When any executor, administrator, or guardian shall have been duly declared a lunatic, or an habitual drunkard, it shall be lawful for the Orphans' Court having jurisdiction over the accounts of such executor, administrator or guardian, to vacate the letters testamentary or of administration granted to such executor or administrator, and to remove such guardian, and to award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper; and in the case of a guardian, the court shall proceed to the admission or appointment of a new guardian accordingly; and the court shall also make such order for the security of the trust property, and for its delivery to the successor of such executor, administrator or guardian, as the circumstances of the case may require."

The fact that one is a habitual drunkard does not in itself disqualify him from acting as executor.

34. Proceedings when executor, etc., has removed from the state.

Section 27 of the act of 1832, *supra*, provides:

"When any executor, administrator, or guardian shall have re-

²⁵ Pettifer's Case, 5 Rep. 32.

²⁶ Hartness v. Hartness, 1 Wendell, 303; Penrose v. Penrose, 2 Binney, 440.

²⁷ Wentworth on Ex., p. 319.

²⁸ Bell's Est. (No. 2), 44 Supr. C. 62.

moved from this state, or shall have ceased to have any known place of residence therein, during the period of one year or more, the Orphans' Court having jurisdiction of the account of such executor, administrator, or guardian, may, on the application of any person interested, and after a citation shall have been returned, served, or published, as is hereinafter provided, make a decree vacating such letters testamentary or of administration, and remove such guardian, and award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper; and in the case of a guardian, the court shall proceed to the admission or appointment of another guardian accordingly: *Provided*, That no decree, as aforesaid, shall suspend the power or prejudice the acts of any person who may be joined with such executor, administrator or guardian in the trust."

[For forms, see *supra*.]

35. Surety of executor, etc., protection of.

Section 28 of the act of 1832, *supra*, provides:

"Application may be made to the Orphans' Court or any judge thereof, in the cases mentioned in the twenty-third section of this act, by any surety in the bond of such executor, administrator or guardian, and upon such surety making oath or affirmation as required in that section, the like proceedings may be had for the purpose of compelling such executor, administrator or guardian to give security, and thereupon the court may order such executor, administrator or guardian to give such counter securities as they shall judge necessary to indemnify him against loss by reason of his suretyship; and if such executor, administrator, or guardian shall refuse or fail to give such security, within such reasonable time as the court shall order, it shall be lawful for the court to direct such executor, administrator or guardian to pay or deliver over forthwith to such surety, or to some other person for him, all goods, chattels, effects and securities whatsoever, for which such surety may be accountable: *Provided*, That such surety shall first give, to the satisfaction of the court, sufficient security, faithfully to preserve and account therefor, and deliver and dispose of the same according to the order of the said court."

36. Security where executrix marries without securing minors' interests.

Section 25 of the act of March 29, 1832, P. L. 190, provides:

"Whenever it shall be made to appear to the satisfaction of the Orphans' Court having jurisdiction as aforesaid, or of any judge thereof, when such court shall not be in session, that an executrix, having minors of her own, or being concerned for others, is married, or like to be espoused to another husband, without securing 'the minors' portions, or real estates, it shall be lawful for such court, or for such judge thereof, to issue a citation to such executrix, or if she shall have been married to another husband, then to her and such husband, requiring her or them, as the case may be, to appear on a day certain before an Orphans' Court to be convened for such purpose, if the said court shall not then be in session, as is hereinbefore provided for in the case of delinquent executors, administrators

or guardians, and on the return of such citation the said court may require such security to be given by such executrix, or by her husband, if she shall have been married again, as the circumstances of the case may require; and if such executrix, or her husband, as aforesaid, shall fail or refuse to give such security, it shall be lawful for the said court to vacate the letters testamentary, and to award new letters, to be granted by the register having jurisdiction, on such security as they may think proper."

The act of April 25, 1850, P. L. 569, extended the above act to all executrices whether minors are concerned in the estate or not, or whether she is a sole executrix or otherwise. Since a married woman's emancipation her husband is not concerned with her acting as executor.

37. Decree of real estate at a valuation, under a will.

Section 1 of the act of March 5, 1903, P. L. 10, provides:

"That in all cases of wills heretofore made and duly proved and recorded, and in all cases of wills hereafter duly proved and recorded, wherein the testator has given or shall give the right to one or more persons to take any or all of his real estate at a certain valuation therein named, and of the said will appoints such person or persons executor, to whom letters testamentary shall afterwards be issued, in all such cases it shall be lawful for the person or persons to whom the said right is given, to present his or their petition to the Orphans' Court of the county in which such real estate is situate, setting forth the terms and character of such devise or direction, that he or they may have been appointed executor or executors of the said will, that letters testamentary have been issued to him or them and formally accepting such real estate at such valuation. Upon the presentation of such petition, the court shall have power to adjudge the said real estate to such person or persons, and shall have power to decree that he or they shall account for the valuation thereof, in the settlement of his or their accounts with the register of wills having jurisdiction of such accounts."

38. Effect of decree.

"Section 2. Whenever any Orphans' Court shall have heretofore made a decree adjudging real estate to certain persons, in any case mentioned and provided for in the first section of this act, such decree shall be valid and available to vest in the person or persons to whom such real estate was adjudged, all the right, title and interest of the testator who had died, leaving a will wherein the right to accept such real estate was given."

39. Form of petition to ratify sale, etc.

To the Honorable, etc.

The petition of John Mussleman, executor, etc., of Samuel Mussleman, late of said county, deceased, respectfully represents:

1st. That the said decedent died about the — of —, 19—, leaving to survive him a widow, Elizabeth, four children, and two minor grandchildren, children of a deceased daughter, seized of a tract of land containing 138 acres, and described in the will as the

"Homestead," and more fully described, as follows: [Here follows description].

2d. That by his will the decedent ordered his land to be sold, naming no one to execute the power of sale.

3d. That the petitioner, as executor, exposed the land to sale, on the — of —, 19—, without a previous order from the Orphans' Court.

4th. That the conditions of sale stipulated that the purchaser should pay ten per cent. of the purchase-money immediately, one-third to remain in the land for the widow during her life, half of the remainder to be paid — —, when a deed was to be made; the other half to be paid — —, with interest, and to be secured by a judgment; for the widow's share a mortgage was to be given to secure her the interest during life, and the principal to the legatees at her death; the land was sold subject to the lease of John Jones, the present tenant, for the term of one year, from the — day of —, and that the purchaser should sign an agreement to comply with the conditions of sale.

5th. That James D. Bell became the purchaser of the aforesaid land, and acknowledged in writing the purchase at \$209.50 per acre, and bound himself under seal "to comply with the conditions of the sale," and paying the sum of \$2,859.57 as down payment.

6th. That in the latter part of —, the said James D. Bell, with the assent of the parties in interest, took possession of the farm, changed the terms of the lease, cleared off an acre or more of timber land, cut valuable walnut trees, and exercised acts of complete ownership over said farm.

7th. That the widow and heirs of the decedent ratify the sale, and are ready and willing to execute any assurances necessary to vest the title in the said Bell; but that he refuses to complete the purchase, alleging that the deed tendered him was not sufficient to convey the title, and that the contract was rescinded.

Your petitioner therefore prays the court to approve and ratify the said sale of the said tract of land so made to the said James D. Bell, and that a citation may be issued to him, to show cause why the said sale should not be approved and ratified, and why your petitioner should not have specific performance thereof on a tender to him of a deed duly executed by said executor and approved by the court.

(Affidavit of truth.)

John Mussleman, Executor.

NOTE.—A citation follows with answer, etc., and reference to an auditor, and on confirmation of his report the decree follows.

40. Form of release by widow and heirs appended to the petition.

To the Honorable, etc.

The undersigned, being the widow and all the heirs of Samuel Mussleman, deceased, respectfully represent:

That the facts set forth in the foregoing petition are true, to the best of their information and belief, and that they join in the prayer of the petitioner.

They further set forth, that if the sale be approved and ratified

as set forth, they are ready and willing to execute and deliver to the said James D. Bell, a release and quit claim of all their right, title, and interest in the premises described.

Elizabeth Mussleman, Widow.

William Mussleman, Etc.

41. Form of decree on the above.

And now, —, —, the sale of the real estate of Samuel Mussleman, made by John Mussleman, his executor, to James D. Bell, as stated in the petition of the said executor, is approved and ratified. And upon the aforesaid executor executing a bond with security agreeably to law, to be approved by the court, in the penalty of \$58,000; it is ordered that said executor execute and tender to the said James D. Bell, a deed in fee simple for the aforesaid real estate, so as aforesaid sold by the said John Mussleman, executor as aforesaid, to the said James D. Bell. And upon the execution and tender of said deed, it is ordered and decreed that the said James D. Bell shall pay the said John Mussleman, executor as aforesaid, the balance of the purchase-money due and payable by the said James D. Bell, under the contract of sale, with interest from the time it became due and payable.

And shall further execute a mortgage to said executor, on said real estate, conditioned to pay to the widow of Samuel Mussleman, deceased, annually, during her life, the interest on the one-third of the purchase-money from the — of —, 19—, and to pay to her the accrued interest from the — of —, 19—, to the — of —, 19—, and the principal in full at the death of the widow.

By the Court.

42. Form of petition by executors for authority to sell land which the testator directed should be sold, but did not give any one power to make the sale.

To the Honorable, etc.

The petition of P. Catlin, executor of the estate of A. Hewit, late of said county, deceased, respectfully represents:

1st. That said A. Hewit died on the — day of —, 19—, leaving a will which has been duly proved, wherein he directed that "his real estate should be sold after one year from the date of his death, and the proceeds thereof be divided among his children" (or copy the will so far as it relates to this subject), but gave no one authority to make the sale, as will appear by a copy of the will hereto attached.

2d. That all the debts of the decedent have been paid (or that the personal assets, amounting to — dollars, is surely more than sufficient to pay the debts of the decedent).

3d. That the only real estate owned by the decedent at the time of his death was a certain lot of land, situate in the city of —, this State, bounded and described as follows: [Here follows description].

4th. That the widow, Mary Hewit, has filed with the clerk of this court, her election to take under the will.

5th. That your petitioner is of the opinion that, owing to the present activity in the real estate market, now would be a favorable time to make the sale which the testator directed should be made, and

that he has consulted with the children who are entitled to the proceeds, and they approve a sale at the present time.

Your petitioner therefore prays the court to authorize him to offer the said real estate to public sale, on such terms as the court may think proper, agreeably to the act of 24th February, 1834. And he will ever pray, etc.

P. Catlin, Executor.

(Affidavit of truth.)

Consent of Legatees.

The undersigned, being all the children of A. Hewit, deceased, say that we have been made acquainted with the contents of the foregoing petition and believe them to be true, and we do join in the prayer of the petitioner.

Samuel Hewit, Etc.

43. Form of condition in bond by nonresident executor.

After the obligatory part which is the same as in an administrator's bond, follows:

The condition of this obligation is that if the said Willis Grant, executor of the last will and testament of Anna Shoelock, deceased, shall make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, being within this commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands and possession of any other person for him and the same so made do exhibit in the office of the register of the county of Northumberland within thirty days from the date hereof; and the same goods do well and truly administer, according to law; and make a just and true account of all his actions and doings therein, in one year from the date hereof, or when thereunto lawfully required; and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances; and in all other respects with the laws of this commonwealth relating to his duty as executor, then this obligation to be void, otherwise of force and effect.

Willis Grant,	[Seal.]
Toby Hanna,	[Seal.]
Ira Deppan.	[Seal.]

Signed and sealed in the presence of:

John Welch,
Isaac Wetzel.

Affidavit of Sureties.

Toby Hanna and Ira Deppan, the sureties in the foregoing bond, being duly sworn, say, each for himself, that he is seized and possessed of real estate in his own name and right, situate in the county of Northumberland, which he verily believes is worth the amount of above bond, over and above all incumbrances and the amount exempt by law from levy and sale on execution.

Toby Hanna.
Ira Deppan.

Sworn to, etc.

CHAPTER LI.

DISINCUMBERING ESTATES OF LEGACIES AND CHARGES UNDER WILLS.

1. Act of February 20, 1853 — petition.
2. Annual report.
3. Discharge of estate.
4. Rights to remain.
5. Purpose of the act.
6. Legatee's right to take corpus on giving security.
7. Security under the act of 1871.
8. Security where the corpus is converted.
9. Form and discharge.
10. Curtilage of reservation, how determined.
11. Appointment of commissioners.
12. Duty of commissioners.
13. Discharge from charges by will or otherwise.
14. Owners may pay into court.
15. When money may be paid into court.
16. Discharge of dower, etc., when presumption of payment has arisen.
17. Form of release of legacy charged on land.

1. Act to disincumber estate charged with legacies.

Section 1 of the act of February 23, 1853, P. L. 98, provides:

"Whereas, it sometimes happens that testators bequeath annuities or legacies of principal sums payable at distant periods, or upon contingencies, or under other circumstances which prevent the payment and discharge of such legacies in the usual course of administration, and charge their residuary real estate with the payment of the same, whereby all the said residuary estate is in fact incumbered with the lien thereof, and is rendered in some measure inalienable, although such annuities and legacies might be amply secured by setting apart a portion of the estate, and it is proper to provide a remedy for this inconvenience.

Therefore, whenever any testator shall have heretofore, by his last will and testament duly proven, given or bequeathed any annuity or annuities to any person or persons, or directed the payment of an annuity or annuities by his executors or by trustees, or bequeathed legacies of principal sums payable at a future period, or upon contingencies or under other circumstances by which the payment or discharge and satisfaction of such legacies may be postponed, or may not take place until a distant period after the death of such testator, and either by the express words of the will or by the rules of the law in the construction thereof, such annuities or legacies are made or become a charge upon all the residuary estate of the testator; and whenever any testator shall hereafter make any such bequests and provisions, in any such case it shall be lawful for the executors of any such will, or for any such annuitant or legatee, or for any person interested in such residuary estate, at any time after the expiration of one year from the granting of letters testamentary, to

apply by petition to the Orphans' Court having jurisdiction of the accounts of such executors, setting forth the facts and praying relief.

Whereupon the court may order a citation to be issued to the parties interested to appear at a day certain, to show cause why the relief prayed for should not be granted; and upon the return of such citation, if all the annuities, legatees, and other persons interested shall have had due notice of the application, the court may refer the case to an auditor, with directions to inquire into the circumstances and to report upon the amount and condition of the estate, and upon the expediency and propriety of exempting any part or portion of the residuary real estate from the lien and charge of such annuities and legacies, or of either of them, having due regard to the absolute and ultimate security of such annuities and legacies. And upon such report being made, and due notice thereof having been given to all persons interested, it shall be lawful for the court to make a decree in the premises; and if it shall appear that all the debts of the testator have been paid or sufficiently secured, the court may order and decree that such part or parts of the residuary real estate, or such real securities or investments in public stocks, shall be set apart or appropriated as, in the judgment of the court, shall appear to be, and with reasonable probability to continue to be, adequate and sufficient beyond all charges, expenses, and deductions for the payment of such annuities and legacies, providing always a sufficient surplus to meet any contingent diminution or depreciation in the value or income of the estate and securities so set apart. And when such decree shall have been made, it shall be further lawful for the court to order and decree that all the remaining residuary real estate of the testator, not so specifically set apart, shall be and remain discharged and exonerated from the lien and charge of any and every such annuity and legacy in the hands of any *bona fide* purchaser of such real estate for a valuable consideration, and such decree shall have the force and effect of discharging and exonerating all such real estate accordingly, unless an appeal be taken from such decree to the Supreme Court within one year after entering of the same: *Provided*, That nothing herein contained shall be deemed or held to authorize the exoneration of any real estate which may have been or may be specifically charged by a testator with the payment of any annuity or legacy.

2. Annual report.

Section 2. The real estate, securities and stocks set apart and appropriated by order of the court aforesaid, shall be and continue in the possession, charge and management of the executors, trustees or other persons to whom the same may have been devised by the testator as aforesaid, under and subject to the charge of such annuities and legacies. And it shall be the duty of every such executor, trustee and other person, at the expiration of one year after such decree shall have been made, and at the expiration of every year thereafter, until the termination of such trust, to make report to the court setting forth the situation and circumstances of such estate, securities and stocks, and the annual income therefrom, and the payment thereof; and if, upon such report, it shall appear to the court that the said income exceeds, in any con-

siderable degree, the amount of the existing annuities and other charges and expenses payable thereout, it shall be lawful for the court to order and decree that such surplus income may be paid over to such persons as may be entitled to the residuary estate under the provisions of the will, or the court may, in their discretion, order and decree that the same be invested in real securities or public stocks, for the further or additional security of such annuitants or legatees.

3. Discharge of estate.

Section 3. Upon the application of any person interested in any residuary estate, set apart as aforesaid, setting forth that by reason of the decease of any such annuitant, or by the happening of any other event, the charge of any annuity or legacy as aforesaid has become extinguished, in fact or law, it shall be lawful for the said court, from time to time, after due notice and inquiry into the facts, to make an order and decree for the exoneration and discharge of such part or portion or so much of the real estate, securities and stocks so set apart and appropriated, as may appear to such court to be beyond the amount requisite or proper, for the purpose of providing a sufficient continuing security for the payment of the remaining annuities and legacies; and every such order or decree, unappealed from as aforesaid, shall have the same force and effect in respect to the real estate, securities and stocks therein and thereby exonerated and discharged, as is declared in the first section of this act, in respect to the residuary real estate not specifically set apart and appropriated.

4. Rights to remain.

Section 4. Nothing in this act contained, or in any decree or order that may be made by any Orphans' Court, by the authority of this act, shall be deemed or held to affect in any way the legal or equitable rights of any person or persons interested in the residuary estate set apart and appropriated as aforesaid, but all such rights to the ultimate enjoyment of such estate shall remain and continue as before the passage of this act.

5. Purpose of the act.

Under the act of February 23, 1853, P. L. 98, providing for the disincumbering of a testator's residuary estate from the charge of legacies or annuities, the Orphans' Court may release the land from an annuity and set apart a portion of the personalty as security.¹ Said Penrose, J.,² the object of the act is to provide a remedy where there is a general testamentary charge rendering the testator's residuary real estate in some measure inalienable, although the charge could be amply secured by setting aside a portion of the residuary estate; and where the will contains a power of sale and the charges do not interfere with the alienability of the land under the power, no case is presented for a decree under the act. The property so

¹ McCredy's Est., 1 W. N. C. 578.

² Haldorn's Est., 3 C. C. 367.

set apart must belong to the testator's estate alone;³ and it must be sufficient to meet all the exigencies of the charge; but the principal annuitant may release so as to clear the estate from the incumbrance.⁴ A refusal to make a decree in favor of the petitioner divests no right and therefore is not appealable.⁵ But an appeal will lie if the court refuses to consider the petition.⁶

In this proceeding all persons interested must have notice and an opportunity to be heard.⁷ The residuary legatee may also rid his estate of the incumbrance by paying the interest due and the legacy into court, under the act of May 1, 1861, P. L. 420.⁸ Having been restricted to a certain portion of the estate by the court, the remainder being released, the court will not go back and undo its work and recharge the property released.⁹

6. Legatee's right to take the corpus on giving security.

At the common law an executor might hand over to a legatee personal property bequeathed for life without taking security, as now required by section 49 of the act of February 24, 1834, P. L. 70.¹⁰ But in the case of gift of money with a limitation over he might require security.¹¹ The statute says "The executor shall not be compelled to pay or deliver, etc." But if the intent of the testator is that the legatee shall have it, limited by a contingency only, security need not be given;¹² otherwise if the will be silent.¹³ Where the bequest is absolute during the existence of a corporation, security need not be given.¹⁴ The words "in trust" in the bequest do not relieve donee from the requirement of the statute.¹⁵ Where the sum is to be paid to the donee he can have it on giving security;¹⁶ but not where it is to be invested for his use for life.¹⁷ Where a bequest is to several, with a clause of survivorship, security is necessary.¹⁸ But where, after the life estate has terminated, the estate was to be converted and distributed to his children and their heirs, an absolute estate was given to the son who survived the life tenant.¹⁹ Where a gift to the widow was absolute, but followed with precatory words as to her will, she having made one, no security is

³ McCredy's Est., 7 Phila. 478.

⁴ Hanbest's Est., 5 D. R. 691.

⁵ McCredy's Appeal, 64 Pa. 428.

⁶ Davis' Ap., 83 Pa. 348.

⁷ McCoy's Est., 23 Supr. C. 282.

⁸ Robinson's Est., 15 D. R. 453.

⁹ Miller's Est., 49 Pitts. L. J. 359.

¹⁰ Brinton's Est., 7 Watts, 203.

¹¹ Eichelberger v. Barnetz, 17 S. & R. 293; Kinnard v. Kinnard, 5 Watts, 108. (See P. & L. Dig., vol. 14, col. 24426.)

¹² Fisher v. Redsecker, 19 Pa. 113; Gormley's Est., 154 Pa. 378; Sherer's Ap., 3 Walker, 284.

¹³ Feiser's Est., 1 Walker, 256.

¹⁴ Haley's Est., 5 D. R. 533.

¹⁵ Clevestine's Ap., 15 Pa. 495; Reiff's Ap., 60 Pa. 361. (See act of 1871, *infra*, as to trusts.)

¹⁶ Parker's Ap., 61 Pa. 478.

¹⁷ Alsop's Ap., 9 Pa. 374.

¹⁸ Bedford's Ap., 40 Pa. 18.

¹⁹ Umstead's Ap., 60 Pa. 365; P. & L. Dig., vol. 14, col. 24430.

required.²⁰ A remainderman may waive the right to security by acquiescence.²¹ Where the life-tenant is given power to consume, no security as to the personalty is required, but as to the real estate it is.²²

7. Security under the act of 1871.

The act of May 17, 1871, P. L. 269, was passed to further secure the remainderman, as to personal property, when left to one for life, a term of years or a limited period, whether in trust or otherwise, by requiring security from the holder. This act was held not to apply to active trusts.²³ The first taker is entitled to possession, by giving security, even though a passive trust is created by the will.²⁴ The widow is entitled to the possession by giving security, whether given to her for life or during widowhood.²⁵ Where a legacy is given with a limitation over, if the legatee dies without issue, security is required.²⁶ The acts of 1834 and 1871, *supra*, are *in pari materia*. The former was for the protection of the executor and the latter enables the life-tenant or tenant for a limited term to enforce delivery to him, which the former did not. A decree awarding to an executrix the balance in her hands as executrix, as life-tenant, is not self-executing, and unless she gives security as life-tenant and does not take actual custody as life-tenant, she is solely responsible as executrix. The remainderman has power to compel security for his interest under the act of 1871.²⁷ Where personal property is bequeathed to a lunatic, his committee may enter the required security.²⁸ An order to pay over the interest and income of the fund will be refused, if the bond is not sufficient.²⁹ Although an auditor has found that a legacy is due a person, it will not be delivered without security.³⁰ The auditor should not omit to require it,³¹ although the executor may protect himself, where it is money, by paying it into court.³² Without security, the widow will not be allowed to collect her share by *fi. fa.*; ³³ unless the will intends that no security shall be required.³⁴ Where the executrix is also trustee with active duties to perform and is also life-tenant

²⁰ Teller's Est., 215 Pa. 263.

²¹ Justice's Est., No. 2, 15 D. R. 343.

²² Dewey's Est., 33 C. C. 307.

²³ Watson's Ap., 125 Pa. 340, approved in Mooney's Est., 205 Pa. 418; Sim's Est., 130 Pa. 451; McCann's Est., 16 Phila. 270; Haly's Est., 5 D. R. 533; Oliver's Est., 4 C. C. 209; Mason's Est., 12 D. R. 717.

²⁴ Penrose, J., in McCoy's Est., 17 Phila. 482. (See, also, his dissentient in McCann's Est., *supra*.)

²⁵ Carnell's Est., 9 Phila. 322.

²⁶ Scull's Est., 9 C. C. 347.

²⁷ Scott, J., in Swift's Est., 6 Northam. 105, commenting on Van Dusen's Ap., 102 Pa. 224, and Duval's Ap., 38 Pa. 112; Buist's Est., 8 Phila. 190.

²⁸ Wagner's Est., 18 Phila. 101.

²⁹ Harshberger's Est., 4 Lanc. Bar, No. 35.

³⁰ Whitehill's Est., 3 Lanc. L. R. 275.

³¹ Allen's Est., 16 Phila. 269.

³² Gormley's Est., 154 Pa. 378.

³³ Peckham's Est., 1 Kulp, 353.

³⁴ Feiser's Est., 1 Walker, 256.

no security is necessary, it seems.³⁵ An anomalous case is presented where the life-tenant was a daughter, aged 56, without issue, and the remaindermen asked the court to make equitable distribution on security to the trustee or his successor in case a child should be born to her and survive her.³⁶ At the common law the possibility of issue is never extinct.

Under the act of 1871, the widow may have the personal property willed her for life, by giving her personal bond as security,¹ and where it was willed to her "in trust" no security at all was required.² But an administratrix must give security, or the fund will be awarded to a trustee.³ An executor who holds the property is still liable as executor and cannot be compelled to give security, so long as he neither wastes nor mismanages the estate in his hands.⁴ Where security is given the cost of it must be paid by the life-tenant and not the remainderman, the act of June 24, 1895, P. L. 248, as to costs of suretyship having no application here.⁵

8. Security where the corpus is converted.

The acts of 1834 and 1871, *supra*, have been held to apply not only where personalty is bequeathed, but also where money is substituted for land devised;⁶ and where the land is converted by a sale under a mortgage by life-tenant and remainderman.⁷

9. The security, form, discharge, etc.

Where the *cestui que trust* for life and the remainderman are both *sui juris*, they may agree to a distribution without security,⁸ but not where their interests are doubtful.⁹ So the right to security may be lost by laches.¹⁰ The bond must be in the form and condition provided by law,¹¹ and no qualifications as to liability of the sureties will do. It should be in double the value of the *corpus* of the estate, to the commonwealth, and the condition should conform to the provisions of the will.¹² The court may so mold the bond as to protect the remainderman fully.¹³ It was suggested, *obiter*, that in case of a life estate, a first mortgage upon the property is necessary to give ample security.¹⁴ Upon a petition show-

³⁵ Keene's Est., 81 Pa. 133; Lindsay's Est., 14 Phila. 269; Bourguignon's Est., 20 Phila. 143.

³⁶ Gowen's Ap., 106 Pa. 288.

¹ Zehender's Est., 8 D. R. 439.

² Grabill's Est., No. 2, 19 Lanc. L. R. 189.

³ Steward's Est., 5 York, 9.

⁴ Miller's Est., 11 D. R. 714.

⁵ Mutchmore's Est., 14 D. R. 251.

⁶ Shearer's Est., 5 York, 119; Peckham's Est., 1 Kulp, 353; Duval's Ap., 38 Pa. 112.

⁷ Bloomfield v. Budden, 2 Dallas, 183.

⁸ Hubb's Est., 16 Phila. 211.

⁹ Bannar's Est., 12 Phila. 129.

¹⁰ Bourguignon's Est., 20 Phila. 143.

¹¹ Singerly's Est., 14 Phila. 313.

¹² Hershberger's Est., 4 Lanc. Bar, No. 35.

¹³ McCann's Est., 16 Phila. 270.

¹⁴ Watson's Ap., 125 Pa. 340.

ing the death of the life tenant or "termor" and satisfaction by payment to the remainderman, the court will order the bond cancelled and the sureties discharged.¹⁵

10. Curtilage of reservation, how determined.

Section 1 of the act of April 14, 1868, P. L. 97, provides:

"Whenever, under and by the provisions of any last will and testament, or by reservation or limitation in any deed or deeds of conveyance, or by reservation in any deed of partition between tenants in common or coparceners any dwelling house or other building is devised, bequeathed, reserved or limited to any person or persons, for life or other period of time, without defining the boundaries of the curtilage or lot appurtenant to such dwelling house or other buildings, and necessary for the use and enjoyment of the same, it shall be lawful for any of the parties interested to apply, by petition in writing, to the Orphans' Court of the county in which said lands or buildings are situate, for the appointment of commissioners to designate the boundaries of the curtilage or lot appurtenant to such dwelling house or other building and necessary for the convenient use of the same for the purposes for which it was intended."

11. Appointment of commissioners.

Section 2 of the act of 1868, *supra*, provides:

"It shall be the duty of the said court, on presentation of said petition, to appoint three competent and skillful persons, as they shall think proper, for the purposes aforesaid, who shall receive the sum of one dollar per day for the time spent in the performance of their duties as said commissioners."

12. Duty of commissioners on curtilage.

Section 3 of the act, *supra*, provides:

"It shall be the duty of the commissioners so appointed to give reasonable notice to all parties interested, of the time at which they will examine said dwelling house or other buildings for the purposes aforesaid, and to make report to the court in pursuance of the order to them directed, and in such report they shall sufficiently designate and describe, by metes and bounds, with their courses and distances, and by a draft, if necessary, the limits and extent of ground necessary for the convenient use of such dwelling house or other building for the purpose for which it is designed; and such report shall, if approved by the court, be entered of record, and be conclusive on all persons concerned; and the ground thus set apart shall be the exclusive property of the occupant of such dwelling house or other building during the full term for which it was devised, reserved or limited."

Section 4 provides that the costs of these proceedings shall be equally divided between all parties interested."

13. Discharge of land from charges by will or otherwise.

The act of March 22, 1907, P. L. 30, provides:

"In all cases in which, by proceedings in the Orphans' Court of

¹⁵ Clarke's Est., 2 W. N. C. 51.

- any county, or by the provisions of a last will and testament, or otherwise, any money has been charged upon real estate, payable at a future period, it shall be lawful for any person claiming an interest therein, when the same shall have become payable, to apply by bill or petition to the said Orphans' Court for the payment of the same; whereupon such court, having caused due notice to be given to the owner of such real estate, and to such other persons as may be interested, either by service or publication, shall proceed according to equity to make such decree or order for the payment of said charge, out of such real estate, as shall be just and proper."

This act only applies to a charge by proceedings in the Orphans' Court and not by deed.¹ Owelty in partition is such a charge,² but notice must be given as required by the act³ to all parties interested. It applies where a dower is charged on the land in the Orphans' Court, but it is error to bring in the executor of the deceased purchaser, with a view to make a personal charge against his estate.⁴

14. Owners may pay into court.

Section 2 of the act, *supra*, provides:

"It shall be lawful for the owner of such real estate, so charged, when the same shall become payable, to pay the amount of such charge into the said Orphans' Court, which payment shall operate as a complete discharge thereof; and the said Orphans' Court may, thereupon, appoint a suitable person as auditor, to distribute the same among these legally entitled thereto, and shall make such decree, or order, thereon, as shall be just and proper." This applies to an owner of land charged by recognizance.⁵ The Orphans' Court has large discretion in the control of investments for the protection of annuitants.^{5a}

15. When money may be paid into court.

The late Judge Rhone in *Eroh's Est.*, 1 Kulp, 81, presented the following synopsis of when money might be paid into the Orphans' Court.

1. After sale under proceedings in partition, in the discretion of the court. Act of April 28, 1868.

2. The owner of real estate charged by a proceeding in the Orphans' Court, with money payable at a future period. Act of May 17, 1866.

3. Where a recognizance is given in partition. Act of March 29, 1832, section 49.

4. Where a legacy is charged on land, the devisee or owner thereof may pay the money into court. Act of May 1, 1861.

5. If a sale of real estate be made under a will for the payment of debts, or legacies, for the support of children, or for distribution, or other purpose. Act of February 24, 1834, section 19.

¹ *Farrer v. Denning*, 11 Supr. C. 62; *Brenneman's Est.*, 27 C. C. 478.

² *Neel's Ap.*, 88 Pa. 94; *Deckard's Est.*, 25 C. C. 187.

³ *Oviatt's Est.*, 14 C. C. 611.

⁴ *Woodrow's Est.*, 7 Lanc. L. R. 209; 114 Pa. 198.

⁵ *Mount's Est.*, 7 D. R. 713.

^{5a} *Henderson's Est.*, 228 Pa. 405. (As to an annuity with limitation over, on the death of both or either, see *Ferguson's Est.*, 223 Pa. 530.)

6. The court may direct investment of the fund where a distributee or legatee is unable to give a refunding bond when required. Act of February 24, 1834.

7. Where a fund awaiting distribution is in dispute. Gray's Ap., 57 Pa. 46.

8. Where the names and number of those entitled to a fund are unknown. Gables' Exs. Ap., 40 Pa. 231.

16. Discharge of dower, legacies, etc., when presumption of payment has arisen.

• Section 1 of the act of June 8, 1893, P. L. 356, provides: ⁶

"That in all cases where any dower, legacy or other charge upon land shall have been paid, or wherever the legal presumption of payment shall exist from lapse of time and no satisfaction or release of such dower, legacy or other charge appears of record, it shall be lawful for the owner or owners of the lands bound by the said dower, legacy or other charge to apply by petition to the Orphans' Court of the county where the said lands are situate, setting forth the premises and also the name or names of the holder or holders of such dower, legacy, or other charge, if known, and if not known, then stating that fact, whereupon the said court shall direct the sheriff of the said county to serve a notice, stating the facts set forth in the petition, on the holder or holders of the said dower, legacy or other charge, if to be found in said county, and in case the parties aforesaid cannot be found in said county, then the said sheriff shall give public notice as aforesaid in one or more newspapers published within or nearest to said county once a week for four weeks successively prior to the then next term after the petition as aforesaid shall have been presented, requiring said parties to appear at said term and answer the petition as aforesaid, at which term, should any person or persons appear claiming to be the holder or holders of the said dower, legacy or other charge, the said court shall issue a citation on the person or persons so claiming, to proceed forthwith in the manner provided by the act of February 24, 1834, section 59, P. L. 84, relating to legacies charged upon lands, to which it shall be lawful for any party to appear and defend, and in default of compliance with said citation, and in the event of the non-appearance of any person or persons to answer the petitions as aforesaid, the said court being satisfied of the truth of said petition, are hereby authorized and required to enter a decree that said dower, legacy or other charge be satisfied, extinguished and discharged, and said proceedings and decree, upon payment of the costs, shall be recorded in the office of the recorder of deeds of said county, and thereupon the said dower, legacy or other charge shall be satisfied, extinguished and released, and all actions thereon forever barred."

If the presumption of payment has arisen an heir is barred, but such presumption may be rebutted by competent proofs.⁷ A widow who makes no claim or demand for her income, in lieu of dower, for thirty-one years will be barred.⁸

⁶ Meek's Est., 161 Pa. 360.

⁷ De Haven's Est., 41 Supr. C. 382; S. C., 25 Supr. C. 507; 215 Pa. 549.

⁸ Meek's Est., 161 Pa. 360.

Where the widow received payments under a will as of right, but by the mistake of the executors, the statute of limitations will be held to apply, when the residuary legatees claim to recover from her administrator. She did not receive it as a trust fund.⁹

17. Form of release of legacy charged on land.

Know all men by these presents: That I, James Hewit, of the city of Scranton, County of Lackawanna, State of Pennsylvania, have received of William Hewit, of the same place, the sum of — dollars, in full satisfaction of the legacy bequeathed to me by my father, A. Hewit, deceased, with the interest thereon, and by his last will charged on the land devised by him to said William Hewit. The will of my said father is recorded in the register's office of said county, and the legacy given to me, as well as the land devised to the said William Hewit, is therein set forth and described, as follows:

(Here give extract from will.)

And further, in consideration of the sum paid to me as aforesaid, I do hereby release and forever discharge, the said William Hewit, his heirs and assigns, from any further liability for the payment of said legacy, and I do also release and forever discharge the lands aforesaid from any and every charge or lien on account of the legacy aforesaid.

Witness my hand and seal, this — day of —, 19—.

James Hewit. [Seal.]

In presence of,

— —,
— —.

Acknowledge all releases same as a deed, and record the instrument in the recorder's office.

⁹ Skeel's Est., 228 Pa. 407.

CHAPTER LII.

PROCEEDINGS ON PRESUMPTION OF DEATH — INVESTMENT OF FUNDS.

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| 1. Presumption of death. | 12. Citation and hearing. |
| 2. Proceedings upon estate of one presumed to be dead. | 13. Decision — probate — hearing, etc. |
| 3. Orphans' Court to direct advertisement, before letters. | 14. Investment of trust moneys. |
| 4. Competency of witness, though interested. | 15. Investment in bonds of municipal corporations. |
| 5. Duty of Orphans' Court. | 16. Investment in ground rents, etc. |
| 6. Court to order issuance of letters. | 17. Form of petition to register. |
| 7. Revocation of letters, if person be alive. | 18. Form of certificate of register. |
| 8. Security to refund — investment. | 19. Form of decree directing advertisement. |
| 9. Proceedings after revocation. | 20. Form of advertisement. |
| 10. Costs. | 21. Form of decree upon hearing. |
| 11. Probate of will of one presumed to be dead. | 22. Form of advertisement. |
| | 23. Form of order to issue letters. |
| | 24. Form of refunding bond. |

1. Presumption of death.

When one leaves his usual abode or last known place of residence and remains away so that for seven years he has not been heard from, nor his whereabouts known during that time, there is still a presumption of life which must be overcome by circumstances showing imminent peril when he disappeared, in order to raise the legal presumption of death.¹ If there are no such circumstances shown it requires another period of seven years to overthrow the presumption of life.²

2. Proceedings upon estate of one presumed to be dead.

After seven years have elapsed from the time of disappearance of a person under circumstances as stated, the proceedings are regulated by the act of June 24, 1885, P. L. 155, which has been declared constitutional.³

¹ Ashman, P. J., in *Freeman's Est.*, 18 D. R. 194, citing C. J. Gibson in *Burr v. Sim*, 4 Wharton, 150; *Bradley v. Bradley*, 4 Wharton, 173. (See also Bierly on Presumptions of Law and of Fact, P. & L. Dig., vol. 7, cols. 11346-50.)

² *Freeman's Est.*, *supra*.

³ *Cunnius v. Reading School District*, 206 Pa. 469, affirmed in 198 U. S. 458. (See, also, *Morrison's Est.*, 183 Pa. 155.)

3. Orphans' Court to direct advertisement, before letters are issued.

Section 1 of the act provides:

"Whenever, hereafter, letters of administration, on the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicile within this commonwealth, shall be applied for, it shall be the duty of the register of wills, to whom the application shall be made, to certify the same forthwith to the Orphans' Court of the county; the said court, if satisfied that the applicant would be entitled thereto, were the supposed decedent in fact dead, shall cause to be advertised, in a newspaper published in the county, once a week for four successive weeks, the fact of said application, together with notice that on a day certain, which shall be at least two weeks after the last of said advertisements, the court will hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof.

4. Competency of witness, though interested.

Section 2 of said act provides:

"At the hearing, the Orphans' Court shall take such legal evidence as shall then be offered, for the purpose of ascertaining whether the presumption of death is established, and no person shall be disqualified to testify, by reason of his or her relationship as husband or wife to the supposed decedent, or of his or her interest in the estate of the person supposed to be dead."

5. Duty of Orphans' Court.

"Section 3. If satisfied upon the hearing, that the legal presumption of death is made out, the court shall so decree, and shall forthwith cause notice thereof to be inserted for two successive weeks in a newspaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the commonwealth, where, when last heard from, the supposed decedent had his residence. The said notice shall require the supposed decedent, if alive, or any person for him, to produce to the court within twelve weeks from the date of its last insertion, satisfactory evidence of his continuance in life."

6. Court to order issuance of letters.

"Section 4. If within the said period of twelve weeks evidence satisfactory to the Orphans' Court, of the continuance in life of the said decedent, shall not be forthcoming, it shall be the duty of the court to order the register of wills to issue the letters of administration to the party thereto entitled; and the said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead."

The validity of this act was questioned in *Cunnius v. the School District of Reading* and it was by the Superior Court held to be unconstitutional on the assumption that the case was ruled by *Scott v. McNeal*, 154 U. S. 34, which held that a similar provision in the code of Washington did not apply to a case where the one presumed

to be dead was not actually dead, and came into court, though late in time, and demanded his property rights. The Supreme Court reversed the Superior Court, sustaining the statute as one of repose, and this decision was affirmed by the United States Supreme Court.⁴

7. Revocation of letters, if person be alive.

"Section 5. The Orphans' Court may revoke the said letters at any time, on due and satisfactory proof that the supposed decedent is in fact alive; after which revocation, all the powers of the administrator shall cease, but all receipts or disbursements of assets, and other acts previously done by him, shall remain as valid as if the said letters were unrevoked; and the administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets, remaining in his hands, to the person as whose administrator he had acted, or to his duly authorized agent or attorney: *Provided*, Nothing in this act contained shall validate the title of any person to any money or property received as a widow, next of kin or heir of such supposed decedent, but the same may be recovered from such person, in all cases in which such recovery would be had, if this act had not been passed."

8. Security to refund — Investment.

Section 5, continued. "Before any distribution of the proceeds of the estate of such supposed decedent, the persons entitled to receive the same, shall respectively give sufficient real personal security, to be approved of by the Orphans' Court having jurisdiction, in such sum and form as the court shall direct, with condition, that if the said supposed decedent shall in fact be at the time alive, they will respectively refund the amounts received by each, on demand, with interest thereon; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by said court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the Orphans' Court, on application, shall order it to be paid to the person or persons entitled to it."⁵

9. Proceedings after revocation.

"Section 6. After revocation of the letters, the person erroneously supposed to be dead, may, on suggestion filed of record of the proper fact, be substituted as plaintiff in all actions brought by the administrator, whether prosecuted to judgment or otherwise. He may, in all actions previously brought against his administrator, be substituted as defendant, on proper suggestion filed by himself, or by the plaintiff therein, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed. Judgments recovered against the administrator, before revocation as aforesaid, of the letters, may be opened, on application by the supposed decedent, made within three months from the said revocation, and sup-

⁴ *Cunnius v. Reading School Dist.*, 206 Pa. 469; 198 U. S. 458. (See *Devlin v. Comth.*, 101 Pa. 273; *Hummel v. Brown*, 24 Pa. 310.)

⁵ *Meaher's Est.*, 28 W. N. C. 275; *Beck's Est.*, 4 D. R. 222.

ported by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defense; but if, within the said three months, such application shall not be made, or being made, the facts exhibited shall be adjudged an insufficient defense, the judgment shall be conclusive to all intents, saving the defendant's right to have it reviewed, as in other cases by certiorari or writ of error. After the substitution of the supposed decedent as defendant in any judgment, as aforesaid, it shall become a lien upon his real estate in the county, and shall so continue for the period of five years, as other judgments, unless and until it shall be set aside by the court below or reversed in the Supreme Court."

10. Costs.

"Section 7. The costs attending the issue of letters, or their revocation, shall be paid out of the estate of the supposed decedent; and costs arising upon an application for letters which shall not be granted, shall be paid by the applicant.

11. Probate of will of one presumed to be dead.

Section 1 of the act of April 14, 1905, P. L. 153, provides:

"That whenever, hereafter, letters of administration shall be issued upon the estate of any person, supposed to be dead, on account of absence for seven years or more from the place of his last domicile within the commonwealth, in accordance with the provisions of the act of" June 24, 1885, "then, and in that case, the person having custody of any will which may have been left by such person, supposed to be dead, may produce said will in the office of the register of wills of the county in which the proceedings to establish his death by presumption have been held, as aforesaid, together with a petition setting out the names of the wife, children or next of kin, who under the intestate laws, should be entitled to the property of the deceased, and praying for the probate of the said will."

12. Citation and hearing.

"Section 2. Thereupon the register of wills shall issue a citation to the person to whom letters of administration have been issued as aforesaid, and to the person or persons who are the relatives or next of kin of the decedent, entitled under the intestate laws to his estate, to appear upon a day fixed, and to show cause why the said alleged will shall not be admitted to probate."

13. Decision — Probate — Revocation, etc.

"Section 3. Upon the return of the writ of citation, if the register of wills shall be satisfied, from all the evidence that may be adduced, that the proposed will was in fact the last will and testament left by the decedent before his departure or disappearance from his residence, the said will shall be admitted to probate, as if the testator were in fact dead, and a certificate of said will shall be directed to the administrator, and attached to the letters of administration theretofore issued, or to a certified copy of such letters, and thereafter the administrator shall execute the said will according to its terms, and all property of the decedent shall be vested, as provided by said will, in the several legatees and devisees named therein: *Provided,*

That nothing herein shall prevent the Orphans' Court from revoking the said letters, as provided in the act to which this is a supplement, upon satisfactory proof that the supposed decedent is in fact alive; after which revocation the powers of the administrator and the rights of the legatees and devisees, under said will, shall cease; and all receipts and disbursements of assets, and other acts, previously done by them, shall remain as valid as if the said letters were unrevoked; and providing, that legatees and devisees may be called upon, at any time, by the supposed decedent to account for any property which they may have received, remaining in their hands, exactly as, in the act to which this is a supplement, the administrator may be called upon to account for such property or assets: *And provided further*, That if upon probate of the last will and testament of the decedent it appears that an executor is named in the will, the letters of administration granted to such administrator by the register of wills shall be revoked, and letters of administration shall be issued, in due form of law, to the executor named in said last will and testament."

The act of 1885, *supra*, to which this is a supplement, was held constitutional,⁶ and the appointment of an administrator under it cannot be attacked in an action of ejectment against the purchaser. It is held to be a proceeding *in rem* and the statute one of repose. The court distinguished *Scott v. McNeal*, 154 U. S. 34, as having held, not that the statute was unconstitutional, but that there was no authority to appoint an administrator for one who was not actually dead, although the legal presumption had arisen.

14. Investment of trust moneys.

Section 14 of the act of March 29, 1832, P. L. 190, provides:

"When an executor, administrator, guardian or trustee shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession, or under his control, and the interest, profits or income thereof are to be paid away, or to accumulate, or when the income of a real estate shall be more than sufficient for the purposes of the trust, such executor, administrator, guardian or trustee may present a petition to the Orphans' Court of the proper county, stating the circumstances of the case and the amount or sum of money which he is desirous of investing; whereupon, it shall be lawful for the court, upon due proof, to make an order directing the investment of such moneys in the stocks or public debt of the United States, or in the public debt of this commonwealth, or in the public debt of the city of Philadelphia, or on real securities, at such prices or on such rates of interest and terms of payment, respectively, as the court shall think fit; and in case the said moneys shall be invested conformably to such directions, the said executor, administrator, guardian or trustee shall be exempted from all liability for loss on the same, in like manner as if such investments had been made in pursuance of directions in the will or other instrument creating the trust: *Provided*, That nothing herein contained shall authorize the court to make an order contrary to the direction contained in any will or other instrument in regard to the investment of such moneys."

⁶ *Cunnius v. Reading School District*, 206 Pa. 469, affirmed, 193 U. S. 458. (See, also, *Morrison's Est.*, 183 Pa. 155.)

Such investment was authorized to be made in the bonds of the Pennsylvania Railroad Company secured by general mortgage, under the act of April 1, 1870, P. L. 45; and in the bonds of the Philadelphia and Reading Railroad Company by act of March 29, 1872, P. L. 31. By act of June 10, 1871, P. L. 386, the act of 1832 was extended to the bonds of the city of Williamsport.⁷ By act of February 14, 1863, P. L. 45, such investment was authorized in Adams County, on the loan of that county.

This act is not restrictive of the power of the legal representative or fiduciary. It points out and authorizes a safe investment,⁸ where otherwise he might make a risky one, although made in good faith,⁹ and become personally liable, unless his discretionary power in the will is so ample that the majority of the court deem he should be relieved from the loss in a special case.¹⁰ Section 22 of article 3 of the constitution prohibits the investment of trust funds in the stock or bonds of any private corporation.

15. Investment in bonds of municipal corporations.

The act of May 8, 1876, P. L. 133, extends the provisions of section 14, of the act of 1832, *supra*.

"So as to include all bonds or certificates of debt now or hereafter to be created and issued according to law by any of the counties, cities, school districts or municipal corporations of this commonwealth, which said bonds or certificates are hereby declared to be legal investments of moneys by executors, administrators, guardians or trustees."

16. Investments in ground rents, etc., by leave of court.

Section 2 of the act of April 13, 1854, P. L. 368, provides:

"It shall and may be lawful for any trustee, committee, guardian, or other person acting in a fiduciary capacity, to invest trust moneys in ground rents, or other real estate, by leave of the proper court, under proceedings as provided in the act to which this is a supplement: *Provided*, That it shall be the opinion of the court, that such investment will be for the advantage of the estate, and no change be made in the course of succession by such change of investment, as regards the heirs or next of kin of the *cestui que trust*."

This act was held to be merely declaratory of the law and practice as it existed under the act of 1832.¹¹ Having acquired jurisdiction the court has power to permit a sale of the ground rent.¹² The original character of the investment as personal estate is continued.¹³

⁷ City of Williamsport v. Comth., 84 Pa. 487.

⁸ Twaddell's Ap., 5 Pa. 15; Nyce's Est., 5 W. & S. 254; Worrell's Ap., 9 Pa. 508.

⁹ Ihmsen's Ap., 43 Pa. 431.

¹⁰ Barker's Est., 159 Pa. 518. The sounder rule was laid down in the court below, by Penrose, J., although dissentient. It is not always the majority opinion that is sound law, though we must bow thereto and obey it.

¹¹ Bunting's Est., 23 W. N. C. 160.

¹² Fell's Est., 9 W. N. C. 382; Musselman's Ap., 65 Pa. 480.

¹³ Davis' Ap., 60 Pa. 118; Bowker's Est., 12 Phila. 161.

17. Form of petition to register.

To ———, Esq., Register of Wills of ——— County, Pa.:

The petition of ——— of ———, respectfully represents:

That Jacob G. Reed was a resident of ———, in said county of ——— until the ——— day of ———, A. D. 19—, when he undertook a journey to ———, and [here state the circumstances of peril, if any]. That since then he has remained absent from his last known place of residence for the period of ——— years [must be upwards of seven] and has never since been heard from by any one and is believed to have perished [state circumstances, if any].

The said Jacob G. Reed left to survive him as his only heirs at law [Here name them in their order, as entitled to inherit].

The said Jacob G. Reed left moneys and estates in said county of the value of about five thousand dollars, consisting of [mention lands, etc.].

Your petitioner showing that he would be entitled to administer upon the estate of the said Jacob G. Reed were he in fact dead, prays that the register of wills may grant him letters of administration upon said estate according to the acts of assembly in such case made and provided. And he will ever pray, etc.

[Affidavit to the truth.]

In case the absentee left a will the petitioner should be the executor named in it and the petition above adjusted to the facts.

18. Form of certificate of register.

Commonwealth of Pennsylvania, County of ———, ss.

In the matter of application of ——— for letters of administration upon the estate of Jacob G. Reed, late of ———, supposed decedent.

The application of ———, for letters of administration upon the estate of ———, a supposed decedent, a copy of which application is hereto attached, having been presented to me, the register of wills in and for the county of ———, on the ——— day of ———, A. D. 19—, I do hereby certify the same, together with all the matters relating thereto, to the Orphans' Court of the county of ———, in accordance with the acts of assembly in such case made and provided.

Witness my hand and the seal of my office this ——— day of ———, A. D. 19—.

———, Register.

19. Form of decree directing advertisement.

In the matter of the application of ———, for letters of administration upon the estate of Jacob G. Reed, a supposed decedent.

In the Orphans' Court of ——— County, Pa.

And now, to-wit: ——— day of ———, A. D. 19—, the application of ——— to the register of wills of ——— County, for letters of administration upon the estate of Jacob G. Reed, a supposed decedent, together with all matters relating hereto having been certified to this court by said register, and the court being satisfied that said applicant would be entitled to such letters were the said Jacob G. Reed, supposed decedent, in fact dead, it is ordered and decreed

that the clerk of the Orphans' Court shall cause to be advertised once a week for four successive weeks, in the —, a newspaper published in the county of —, the fact of such application, together with notice that on the — day of —, A. D. 19—, at — o'clock — M., the court will hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof, and will make such orders and decrees therein as in the acts of assembly are provided.

By the Court.

20. Form of advertisement.

In the Matter, Etc.

In the Orphans' Court of, Etc.

Whereas an application for letters of administration upon the estate of Jacob G. Reed, whose last known place of residence was at — in the county of — and State of Pennsylvania, and who is alleged to have been absent therefrom and unheard of by anyone, for seven years and upwards last past, and is supposed to be dead, was presented by — —, to — —, Esq., register of wills of said county of —, on the — day of —, A. D. 19—, and by the said register certified, on the — day of —, A. D. 19—, to the Orphans' Court of said county, whereupon a decree was entered in accordance with the acts of assembly, in such case made and provided:

Therefore, now, in pursuance of the decree of said court therein made, all parties interested in the estate of said Jacob G. Reed, the supposed decedent, are hereby notified to be and appear at the courthouse in —, on the — day of —, A. D. 19—, at — o'clock — M., when and where the Orphans' Court of the county of —, will hear evidence concerning the alleged absence of Jacob G. Reed, the supposed decedent, and the circumstances and duration thereof, and will make such orders and decrees therein as in the acts of assembly are made and provided.

_____,
Clerk of the Orphans' Court.

21. Form of decree upon hearing.

In the matter of application, etc.

And now, to-wit: —, A. D. 19—, after publication of notice of the foregoing application and day of hearing, by the clerk of the Orphans' Court, once a week for four successive weeks in the —, a newspaper published in the said county of —, and proof of such publication having been adjudged sufficient, the last of said advertisements having been made at least two weeks prior hereto, and said application having come on to be heard this day, and legal evidence having been offered concerning the alleged absence of said Jacob G. Reed, and the circumstances and duration thereof, it is hereby decreed by the court that the legal presumption of the death of said Jacob G. Reed is made out and established; and it is further ordered and decreed, that notice of this decree shall be inserted, by the clerk of the Orphans' Court, for two successive weeks, in the —, a newspaper published in the county of —, and said notice shall further require the said Jacob G. Reed, if alive, or any other person for him, to produce to this court, on or before the — day

of —, A. D. 19—, satisfactory evidence of his continuance in life, and that, upon failure to produce such evidence within the time specified, a decree will be entered directing the register of wills of the county of —, to issue letters of administration to the party entitled thereto.

By the Court.

22. Form of advertisement.

In the matter of, etc.

Evidence concerning the alleged absence of Jacob G. Reed, lately a resident of — in the county of —, and State of Pennsylvania, a supposed decedent, and the circumstances and duration thereof, having been heard by the Orphans' Court of — county, on the — day of —, A. D. 19—, it was then ordered and decreed by the said court that the legal presumption of the death of the said Jacob G. Reed was made out and established, and in pursuance of the said order and decree, you the said Jacob G. Reed, if alive, or any person for you, are hereby required, on or before the — day of —, A. D. 19—, to produce to the Orphans' Court of — county, satisfactory evidence of the continuance in life of the said Jacob G. Reed. If, at the said date satisfactory evidence of the continuance in life of the said Jacob G. Reed shall not be forthcoming, a decree will be entered by said court directing the register of wills of the county of — to issue letters of administration upon the estate of said Jacob G. Reed to the party thereto entitled.

_____,
Clerk of the Orphans' Court.

23. Form of decree directing letters to be issued.

In the matter, etc.

And now, to-wit: —, A. D. 19—, notice as decreed by the court in the above matter, on the — day of —, A. D. 19—, having been duly advertised, and proof of the publication of said notice having been adjudged sufficient, and twelve weeks since the date of the last insertion of said notice having elapsed, and no evidence of the continuance in life of the said Jacob G. Reed being forthcoming, it is ordered and decreed that the register of wills of the county of —, issue letters of administration upon the estate of the said Jacob G. Reed to the party entitled thereto, upon compliance with the requirements of the acts of assembly regulating the grant of letters upon the estates of decedents within the commonwealth.

By the Court.

24. Form of refunding bond.

Know all men by these presents, that we [name of distributee] of — of the county of —, and State of Pennsylvania, one of the heirs at law [or distributees] of Jacob G. Reed, late of —, in the county and state aforesaid, a presumed decedent, and — — and — — [names of sureties, when required] all of said county and state, are held and firmly bound unto — —, administrator, etc., of said presumed decedent, in the sum of, etc. [same as in any other bond].

Whereas, the said — —, has this day received from — —,

administrator as aforesaid, the sum of — dollars, being his share of the estate of said presumed decedent, as appears by the account of the said — —, administrator, filed in the register's office of the said county of —, on the — day of —, A. D. 19—;

Now, the condition of this obligation is such, that if the said Jacob G. Reed, presumed decedent, shall in fact be alive at this time, and the said — — shall refund the amount as aforesaid received, on demand, by said administrator or his successor in the trust, with interest thereon, then this obligation shall be void; otherwise, to remain in full force and effect.

[The above forms, substantially, were prepared by Monaghan & Hause, West Chester, Pa., in Ebner's Case. See 3 C. C. 5.]

CHAPTER LIII.

TESTAMENTARY GUARDIANS.

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| 1. Common law ages of man. | 7. Mother's right to appoint. |
| 2. The common law as to ages of woman. | 8. Guardian of devised estate. |
| 3. Guardian by nature. | 9. Manner of appointment. |
| 4. Testamentary guardian. | 10. Duties of guardian. |
| 5. Drunken husband loses his right. | 11. Power to mortgage or sell lands divided by county lines. |
| 6. Appointment of testamentary guardian. | 12. Private sale authorized. |

1. Common law as to ages of man.

At the common law a male at twelve is "at the leet to swear fidelity to the king." At fourteen is the age of discretion, at which he may commit a felony; and also he may then be free from guardianship in socage, by the next of kin, and choose his own guardian. At fifteen was the age of knighting and knight socage. Full age is twenty-one; and seventy is the ultimate of jury duty, called "dotage," from *pro dote ætatis*, gift or privilege from being summoned as a juror.

2. The common law as to ages of women.

At the common law, a female at seven was old enough for her father to have aid of his tenants to marry her, but she could not assent to marriage or dissent from, until the age of twelve; nor could she consent to coition before ten, so it was a felony to force her. At nine she was capable of being a widow, had she married before. At fourteen she could choose to be and remain in wardship or not. Being once in wardship, at sixteen she came out, except the Lord sooner marry her to some one willing to take her subject to the custom of chivalry, or otherwise. She could not make grants or conveyances in her own right until she became twenty-one.

Now, by statute the age of consent is sixteen; the age of full freedom twenty-one, and partial emancipation eighteen. Her age of marriage is twenty-one, unless her parents or guardians consent sooner thereto.

3. Guardian by nature.

At the common law the guardian by nature was only of the heir apparent, and guardianship for nurture commits the custody of the infant to the parents until the age of fourteen.¹ Where the inheritance comes *ex parte materna*, the father, although guardian by nurture, is excluded from being guardian *in lege*.

Whatever age the minor is, he or she shall present in his or her

¹ Note 66, section 123, Lib. 2, Coke on Litt.

own name, thus: Miranda Mowry by her next friend Henry Royer, or John Reed by his guardian Bernard Hoopes. An infant may by his next friend complain against his guardian and require him to account in equity.² Marriage does not determine the guardianship of a male minor.³

4. Testamentary guardian.

Section 6 of the act of 1855, P. L. 430, provides:

"No father who shall have, as aforesaid, for one year or upwards, previous to his death, willfully neglected or refused to provide for his child or children, shall have the right to appoint any testamentary guardian of him, her or them during minority."

5. Drunken husband loses his right.

The act of May 25, 1887, P. L. 264, provides:

"Whenever any husband from drunkenness, profligacy or other cause has neglected or refused to provide for his wife and children or has deserted them, such wife may, if she leave to her children an estate, either in lands or chattels, appoint a testamentary guardian for her minor child or children."

6. Testamentary guardian — Appointment.

The appointment of a guardian in a will is sufficient authority for the appointee to act, without anything further, and he becomes immediately amenable to the laws of this state and liable to account.^{3a} Without such an appointment, no one can intermeddle with a minor's estate, unless he be appointed guardian by the Orphans' Court.^{3b} If he does he is a guardian *quasi de son tort*.^{3c} No form of words is necessary to appoint a testamentary guardian. If the duties placed upon the executor or trustee are such as to require the care and custody of the person or estate, or both, of the minor, it is an appointment as guardian.⁴ One may not in his will appoint a guardian for his grandchildren, but he may appoint a trustee with powers over the fund which the legal guardian of the minor cannot overthrow.⁵ A father's appointment of his wife as guardian "of our children," extends to a child *in ventre sa mere*.⁶ A testamentary guardian has control of the estate of the ward devised or bequeathed, the eighth and ninth sections of the act of 12th Charles II, C. 24, being in force in Pennsylvania.⁷

² Cary v. Bertie, 2 Vernon, 342; Eyre v. Countess of Shaftesbury, 2 Peere Williams, 119; Mendes v. Mendes, 1 Vesey Sr. 91.

³ Mendes v. Mendes, 3 Atkyns, 625. The guardianship of the person of a female is determined by marriage under age. (Same case.)

^{3a} Penrose, J., in Mayer's Est., 10 W. N. C. 261.

^{3b} McGrew's Ap., 14 S. & R. 396; Rost's Est., 14 Lanc. L. R. 78; Magee's Est., 5 C. C. 58.

^{3c} Munn's Est., 49 Pitts. L. J. 234.

⁴ Palumbo's Est., 15 D. R. 188; Scully's Est., 10 D. R. 731.

⁵ Peale's Est., 17 D. R. 339; Filer's Est., 7 Lack. L. N. 318.

⁶ Trimble's Est., 10 Del. Co. 89; Hollingsworth's Ap., 51 Pa. 518.

⁷ Mellor v. Reed, 5 C. C. 372; 122 Pa. 635.

7. Mother's right to appoint.

The mother having the right to appoint a guardian, if she does so, it is binding.⁸ The acts of June 10, 1881, P. L. 96, and May 25, 1887, P. L. 264, conferred upon a mother the right to appoint a testamentary guardian,⁹ which was prior limited to the father,¹⁰ except where "for one year or upwards previous to his death, he willfully neglected or refused to provide for his child or children."¹¹

The act of 1881 is as follows:

"Every mother of an unmarried minor child, who shall leave to such child an estate, either in lands or chattels, may appoint a testamentary guardian for such child: *Provided*, That the father be not living, or being deceased, he has not appointed such guardian.

"Section 2. Every mother, who by her deceased husband's will has been appointed testamentary guardian of her children, may by her last will appoint a successor in such guardianship."

The act of 1887 is as follows:

"Whensoever any husband, from drunkenness, profligacy or other cause, has neglected or refused to provide for his wife and children, or has deserted them, such wife may, if she leave to her children an estate, either in lands or chattels, appoint a testamentary guardian for her minor child or children."

These acts confer authority over the mother's estate whether it passes by the will or otherwise.¹² But if the father has already appointed a guardian the mother cannot supplant him.¹³ No one but the mother can appoint a testamentary guardian for an illegitimate child,¹⁴ which excludes the putative father¹⁵ and other relatives.¹⁶

8. Guardian of devised estate.

Where there is a particular estate devised the deviser may commit it to a particular guardian or trustee for the minor, independently of any relation whatsoever.¹⁷ In such case the care and management of the estate must be expressly conferred by the will.¹⁸

9. Manner of appointment.

As already said, no particular form of appointment is necessary,¹⁹ the law regarding substance rather than name.²⁰ So if the intention be to appoint a trustee and the will names him guardian, the intent

⁸ Luccareni's Est., 14 D. R. 296.

⁹ Pratt's Case, 1 Lanc. Bar, No. 46; Quinn's Est., 15 Phila. 594.

¹⁰ Comth. v. Hearne, 1 L. T. (O. S.) 113; Kuhn v. Newman, 26 Pa. 227.

¹¹ Section 6, act of May 4, 1855, P. L. 430.

¹² Sheetz's Est., 6 D. R. 367.

¹³ Treen's Est., 4 C. C. 330.

¹⁴ Baldwin's Est., 2 Del. Co. 504.

¹⁵ Holbrook's Est., 3 C. C. 265; Vanartsdalen v. Vanartsdalen, 14 Pa. 384.

¹⁶ Melcher's Est., 3 Phila. 26.

¹⁷ Vanartsdalen v. Vanartsdalen, 14 Pa. 384; Beilstein's Est., 147 Pa. 85; Reed v. Mellor, 122 Pa. 635.

¹⁸ Melcher's Est., 3 Phila. 26; Darmody's Est., 6 W. N. C. 487.

¹⁹ Young's Est., 17 Phila. 511.

²⁰ Beilstein's Est., 147 Pa. 85; Hewson's Ap., 102 Pa. 55; Schmidt's Est., 30 Pitts. L. J. 126.

and not the term will govern.²¹ A father's appointment will not be set aside for sentimental reasons or *ab* convenience.²³ But if the appointment is defective and does not confer the power of managing the estate the court may appoint another if to the advantage of the minor;²⁴ and on a question of religious difference the Orphans' Court may award the custody to the one in religious accord with the parents.²⁵

10. Duties of guardian.

The duties of a guardian whether appointed by a will or the court are so fully detailed in the chapter on Guardian and Ward, *supra*, that reference is made thereto.

11. Power to mortgage or sell ward's land divided by county lines.

Section 1 of the act of May 21, 1901, P. L. 272, provides:

"That when application shall hereafter be made to the proper Orphans' Court, having jurisdiction of the accounts of any guardian, for leave to sell or mortgage the real estate of a ward, or any part of the same, for the payment of debts or for other purposes, and any part of said real estate is situated partly in each of two or more counties, by reason of a county line running through the same, the court shall have power to order and direct the sale or mortgage of the interest of the ward in the whole or any part of said tract of land, irrespective of the county boundary lines, and such sale when confirmed by the said court shall be as effectual to pass the title of such real estate to the purchaser as if the whole of said tract of land had been within the boundaries of the county having jurisdiction of the accounts of the guardian: *Provided*, That notices of said sale, as now required by law, be given in all the counties in which the land is situated, and that a certified copy of all proceedings in connection with said sale or mortgage, including the return of sale, be recorded in the Orphans' Court of each county in which said land is situated: *And provided further*, That any mortgage, judgment, bond or other obligation taken by such guardian to secure the purchase money, or any part thereof, by lien on such lands, shall be duly recorded or entered in each of the counties in which said lands lie, as now required by law."

12. Private sale authorized.

Section 2 of the act of 1901, *supra*, provides:

"The Orphans' Court of the several counties of this commonwealth, in all cases where under existing laws the court has power to order the sale of real estate for the payment of debts of a ward and for other purposes, may decree and approve a private sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at private than public sale, as where the interest shall be undivided, or for any other sufficient cause."

²¹ Colehower's Est., 5 W. N. C. 343; Potts' Pet., 1 Ashmead, 340.

²³ Comth. v. Keisel, 13 Montg. 172.

²⁴ Darmody's Est., 6 W. N. C. 487.

²⁵ Brown's Est., 166 Pa. 249.

CHAPTER LIV.

EXECUTORS' ACCOUNTS, AUDITS, DISTRIBUTION AND DISCHARGE.

1. Filing of accounts.
2. When executor will be cited.
3. When executor will not be cited.
4. Petition for citation.
5. The citation.
6. Statement of account by an auditor.
7. Form of appointment of auditor.
8. Notice of filing account.
9. Manner of account.
10. Blending of accounts.
11. Accounts of deceased executors.
12. Supplemental accounts.
13. Form of account of proceeds of realty.
14. Form of account of personalty.
15. Form of account after partition.
16. Form of account for deceased executor.
17. Exceptions to account.
18. Appointment of auditor in Philadelphia.
19. Notice of appointment, Philadelphia.
20. Time of report, Philadelphia.
21. Form of appointment on exceptions.
22. Distribution.
23. Distribution of death benefits.
24. Advancements.
25. Surcharge of executor, etc.
26. Party barred from distribution.
27. When the Orphans' Court has no jurisdiction.
28. Liquor license.
29. Co-executors.
30. Liability of co-executors.
31. Decree of distribution.
32. Transmission of funds to domicile.
33. Questions for argument.
34. Argument list, Allegheny.
35. Notice and time of hearing, Allegheny.
36. Attorney's briefs of the argument, Allegheny.
37. Form of rule to take depositions.
38. Form of notice of rule.
39. Form of protocol to letters rogatory.
40. Discharge of executor or administrator.
41. Discharge on his own application.
42. Dismissal or release.
43. Discharge of sureties.

I. Filing of accounts.

In a preceding chapter, covering accounts of fiduciaries, will be found the practice and forms. All that is necessary to add, here, are some features of the practice particularly appropriate to executors, and some later authorities. Where a will has been probated, but later the probate revoked, the executor is entitled to file an account of his acts while executor, and have a decree thereon, after his authority has ceased;¹ but not to charge the estate with a debt due himself;² or the expenses preliminary to administration.³ Even after his discharge, he may file an account, with leave of court.⁴ But after five

¹ Peebles' Ap., 15 S. & R. 39.

² Shenk's Ac., 5 Watts, 84.

³ Royer's Ap., 13 Pa. 569.

⁴ Redcay's Est., 6 Lanc. Bar, 57.

years from filing his account, an executor will not be given leave to open his account and file one claiming additional credits.⁵ If an executor files more accounts than are necessary, the court may impose upon him the charges.⁶ In order to compel an executor to file an account the petitioner for a citation must show his interest in the estate.⁷ A creditor is a person interested who may apply to court for a citation.⁸ So is the owner of a contingent interest, under the act of April 17, 1869, P. L. 70;⁹ also the legatees, heirs and distributees;¹⁰ also attaching creditors.¹¹ If twenty years or more have elapsed since an executor might have been called upon to account, the presumption is that he has settled and made distribution.¹² This applies as well to a co-executor who settles an account and pays over to his co-executor, especially after both have died.¹³ The long lapse of time raises presumption of acquiescence and settlement without filing an account.¹⁴

2. When executor will be cited.

An executor may be cited to file an account when an annuitant petitions showing that he has failed to pay the annuity and applied the income to taxes and repairs;¹⁵ or where a principal has been left in their hands and not paid over to a child which has died;¹⁶ or where a mortgage has been satisfied by one of several trustees, on petition of his co-trustees.¹⁷ A supplementary account may be required as to additional funds which come into his hands.¹⁸ An executrix may be cited to account for receipts of interest of testatrix in real estate.¹⁹ An account will be required from a legatee in remainder after the

⁵ Billheimer's Est., 3 Kulp, 278.

⁶ Spangler's Est., 21 Pa. 335.

⁷ Koerner's Est., 45 Leg. Int. 5; Mercur's Est., 151 Pa. 49; Fryer's Est., 12 W. N. C. 408; Cromwell's Est., 15 D. R. 326; Flaherty's Est., 4 Lack. Jur. 354; Price's Est., 9 D. R. 511; Emig's Est., 17 York, 99; Parker's Est., 6 Phila. 369; Melizet's Ap., 17 Pa. 449; Halsey v. Tate, 52 Pa. 311.

⁸ Rizer's Est., 11 W. N. C. 563; Wilson's Ap., 3 Walker, 216; Wistar's Est., 5 W. N. C. 128; P. & L. Dig., vol. 7, col. 11838, *et seq.*

⁹ Keene's Ap., 64 Pa. 268; Hartman's Est., 90 Pa. 203; Dugan's Est., 15 W. N. C. 550; Stewart's Est., 7 C. C. 603; 2 C. R. A., col. 2386.

¹⁰ Hart's Est., 9 D. R. 274; Heath's Est., 10 D. R. 281; Smith's Est., 7 D. R. 754; Meyer's Est., 13 D. R. 191; Palethorp's Est., 3 D. R. 144; O'Neil's Est., 15 Phila. 593; P. & L. Dig., vol. 7, col. 11842.

¹¹ Gallagher's Est., 8 D. R. 699; Agnew's Est., 8 D. R. 699; Mahon's Est., 8 Lack. L. N. 258; Canam's Est., 6 Northam. 242; Helbling's Est., 49 Pitts. L. J. 378; Raeder's Est., 10 D. R. 282.

¹² Hubley's Ap., 19 Pa. 138; Okeson's Ap., 2 Grant, 303; Bentley's Est., 9 Phila. 344; Seibert's Ap., 2 W. N. C. 53.

¹³ Anderson's Ap., 102 Pa. 258; Phillips' Ap., 13 Atl. 906; Henry's Est., 8 D. R. 649; 198 Pa. 382.

¹⁴ McCluen's Est., 52 Pitts. L. J. 297; Wilt's Est., 13 D. R. 483; Hedderly's Est., 12 D. R. 72; Graham's Est., 14 D. R. 5; Boyd's Est., 12 D. R. 280; Wright v. Taylor, 26 C. C. 369; Justice's Est., 15 D. R. 343.

¹⁵ Blackburn's Est., 20 Phila. 160.

¹⁶ Palethorp's Est., 3 D. R. 144.

¹⁷ Biss' Est., 4 D. R. 251.

¹⁸ Witman's Ap., 28 Pa. 376.

¹⁹ Yerkes' Est., 10 D. R. 204.

death of the life tenant.²⁰ To entitle petitioner to a citation, a *prima facie* case is sufficient.²¹ But one year must have elapsed after the death of decedent and issuing of letters.²² The petitioner will be given the benefit of the doubt on his right to a standing in court.²³ A widow claimant need not establish the validity of her marriage as a preliminary to requiring an account.²⁴ If petitioner fails to make out a *prima facie* case, he must resort to his action at law.²⁵ The right must be established by competent evidence and not by indirection.²⁶ Executors may be required to account after one year, notwithstanding the will says they shall have five years;²⁷ or gives them an absolute discretion.²⁸ An accounting will not be ordered within a year from issuance of letters, even on petition of the widow, in order to enable her to make her election.²⁹ The law gives an executor one year from the issuing of letters to settle up the estate and until the end of the year he need not file an account. Indeed, if he does so, he takes the risks.³⁰

3. When executor will not be cited.

After long acquiescence, a legatee may have lost his right to a citation.¹ The court will exercise a reasonable discretion in each case whether it is best to grant or refuse a citation.² If there be no funds to account for an account would entail useless expense.³ Where the petitioner interferes with and prevents the settlement, a citation will be refused.⁴ He should, in every case satisfy himself of the necessity, before moving.⁵

If the executor shows reasons why he cannot or ought not account, at the time, the court will suspend proceedings.⁶ After a family settlement has been made and acquiesced in, an account will not be required.⁷ If no assets have come into the hands of the executor, an answer to that effect is sufficient.⁸

²⁰ Cromwell's Est., 15 D. R. 326.

²¹ Schlemmer's Est., 12 D. R. 137; McNeal's Est., 6 Kulp, 271.

²² Wistar's Est., 5 W. N. C. 128; McKeown's Est., 3 W. N. C. 343; Clinton's Est., 8 D. R. 661.

²³ Kern's Est., 4 Northam. 71.

²⁴ Dickson's Est., 11 Phila. 86.

²⁵ Bortin's Est., 12 D. R. 265.

²⁶ Emig's Est., 17 York, 99.

²⁷ Young's Est., 18 Phila. 43; Disston's Est., 14 Phila. 310.

²⁸ Harrison's Est., 12 C. C. 388. (But see Brown's Est., 6 D. R. 163, as to personal representatives of an executor.)

²⁹ Farrell's Est., 3 W. N. C. 243; Gallen's Est., 6 Kulp, 25.

³⁰ Brown's Est., 8 Phila. 197; Bentley's Est., 2 Foster, 5.

¹ Harlan's Est., 16 C. C. 51.

² Singerly's Est., 9 D. R. 261.

³ Flaherty's Est., 4 Lack. Jur. 354; Scanlan's Est., 24 Montg. 38; Maule's Est., 13 D. R. 142.

⁴ McArdle's Est., 12 D. R. 256; Ashoff's Est., 14 D. R. 333.

⁵ Frey's Est., 23 Lanc. L. R. 42; Powers' Est., 10 D. R. 165; 2 C. R. A., col. 2391.

⁶ Marvill's Est., 15 D. R. 874.

⁷ Justice's Est., 15 D. R. 343; Graham's Est., 27 Lanc. L. R. 230; Shellenberger's Est., 17 York, 130; Hoff's Est., 7 D. R. 93.

⁸ Bestford's Est., 10 Kulp, 223; Smythe's Est., 11 D. R. 441; Hart's Est., 9 D. R. 347; P. & L. Dig., vol. 7, col. 11857, *et seq.*

4. Petition for citation.

The practice upon petition and citation with the forms is given in a preceding chapter and need not be given here. What is applicable to an administrator in this practice also applies to an executor or trustee. It has been held that a petition for a citation which does not aver that personal property has come into the hands of the executor is defective.⁹ The petition need not set forth the facts upon which the executor is to be questioned before the auditor.¹⁰ It must, however, be accompanied with an affidavit to its truth.¹¹ It should not contain a prayer for a distribution.¹² A demurrer to a petition will be sustained, after a lapse of more than twenty years from the filing of one account.¹³

5. The citation.

Having been cited to appear and file his account, if he makes no answer, an order will be entered requiring the executor to file it;¹⁴ and if he then fails to obey the order, an attachment may issue, as for contempt of court.¹⁵ If the citation is returned not served because he has removed from the county, an alias will be awarded.¹⁶ An appeal does not lie from an order awarding a citation.¹⁷ An executor who is in default may be required to pay the costs of the citation.¹⁸

6. Statement of account by an auditor.

The executor having been cited to file an account, should do so promptly; if he does not, the court may appoint an auditor to state one for him.¹⁹

7. Form of appointment of auditor.

Estate of ———, Deceased.

Now, to-wit, ——— day of ———, A. D. 19—, it appearing to the court from petition filed by ———, a legatee [or heir, creditor, etc.] that ———, the executor of the estate of ———, deceased, has heretofore been duly cited to state an account according to law, as such executor, and that he has failed to comply with the order of court directing him to do so, on motion of ———, Esq., the court appoints ———, Esq., auditor to take testimony and state an account between the said ———, executor, and the estate of ———, deceased, and to make report thereof.

By the Court.

⁹ Price's Est., 9 D. R. 511. (See Tasker's Est., 13 D. R. 402.)

¹⁰ Bowen's Ac., 2 Clark, 147.

¹¹ Darrach's Est., 2 Clark, 454.

¹² Mazurie's Est., 11 Phila. 143.

¹³ Davis' Est., 12 Phila. 82.

¹⁴ McGittigan's Est., 1 W. N. C. 21.

¹⁵ Brader's Est., 6 Luz. L. R. 243.

¹⁶ Case's Est., 10 Luz. L. R. 45.

¹⁷ Starr's Est., 3 Supr. C. 212; Palethorp's Est., 160 Pa. 316.

¹⁸ Blackman's Est., 2 Kulp, 162; Fox's Est., 5 Kulp, 218; Luckenbach's Est., 1 Northam. 162.

¹⁹ Witman's Ap., 28 Pa. 376; Bitler's Est., 1 Leg. Rec. 210; Montgomery's Est., 3 Brewster, 306.

8. Notice of filing account.

An executor's account as well as an administrator's should be filed with the register,²⁰ who gives the notice provided by law, which is binding upon all persons.²¹

9. Manner of account.

The manner and form of an administration account, given *supra*, also apply to an executor's account. Where it is regulated by rule of court, as in Luzerne County, the rule must be observed.²² If the account be partial only, things omitted from it, cannot be brought up by exceptions.²³ If the assets have not been turned into cash by them they should not account as cash.²⁴ His charging himself with the inventory and appraisement does not necessarily mean cash;²⁵ for the distributees may take their shares in kind.²⁶ An account, if a final one, should include the whole of the decedent's estate, and leave it to the court to make distribution, where there are conflicting interests.²⁷ A trust fund, improvidently stated as of the testator's estate, may be withdrawn by leave of court.²⁸ And where he charges himself with a debt that is worthless it is not conclusive.²⁹ Where there are two or more executors, if they file a joint account, they will be jointly liable. If one seeks to escape a joint liability, he should file a separate account.³⁰ The Orphans' Court has no jurisdiction to settle the account of coal royalties which belong to the widow and were wrongfully collected by the executor.³¹ An accountant should only charge himself with assets actually in his hands.³² His account should be complete in itself showing debits and credits in dollars and cents with a balance struck;³³ showing what is left for distribution without any further calculation.³⁴ If not properly stated, exceptions to it will be sustained at the costs of the accountant.³⁵ An executor who borrows money from the widow and uses it in the estate claiming credit for it, is surchargeable.³⁶

10. Blending of accounts.

The law does not favor mixing fiduciary accounts of different

²⁰ Witman's Ap., 28 Pa. 376; Leslie's Ap., 63 Pa. 355.

²¹ Priestley's Ap., 127 Pa. 420; Miller's Est., 7 D. R. 762; Ferguson v. Yard, 164 Pa. 536.

²² Fettig's Est., 5 Kulp, 152.

²³ Jamison's Est., 1 Kulp, 146, Rhone, P. J. Galloway's Est., 5 Supr. C. 272; Pelham's Est., 9 Kulp, 347; Reese's Est., 10 Kulp, 524.

²⁴ McMahon's Est., 18 Phila. 188.

²⁵ Page's Est., 3 D. R. 212.

²⁶ Miller's Est., 58 Pitts. L. J. 169; Page's Est., *supra*.

²⁷ Ake's Ap., 21 Pa. 320.

²⁸ Osmond's Est., 161 Pa. 543.

²⁹ James' Est., 3 D. R. 373; Glesenkamp's Est., 51 Pitts. L. J. 155.

³⁰ Bierly's Est., 81 * Pa. 419.

³¹ Duffy's Est., 209 Pa. 390.

³² Eisenmann's Est., 12 D. R. 322; Grover's Est., 12 Luz. L. R. 224.

³³ Cumming's Est., 2 Kulp, 64.

³⁴ McCullough's Est., 14 D. R. 7; Wise's Est., 22 Lanc. L. R. 382.

³⁵ Reeve's Est., 12 Luz. L. R. 137; Breiter's Est., 21 Lanc. L. R. 101; Hurst's Est., 21 Lanc. L. R. 334.

³⁶ Fitzpatrick's Est., 12 D. R. 730.

kinds in one. An executor who is also trustee or guardian under the will should keep and file each account separately.¹ Unless it be necessary to sell the land for the payment of debts the personal representative is not concerned with rents, repairs, taxes, etc.² Administration should in no case be blended with distribution.³ In stating an account the income should be kept separate from the principal;⁴ and personal estate from the proceeds of realty.⁵ The administrator *d. b. n. c. t. a.* should not mix his account with that of the original executor.⁶ If a blended account, however, is not excepted to, and the parties interested are satisfied with it, the court will not tear it to pieces for them.⁷ An executor may not charge in his account commissions for collecting rents for lands not devised.⁸ When an executor, in good faith, defends against an attachment, he will be allowed his counsel fees and charges.⁹ He may use a reasonable discretion in paying for repairs of real estate out of the corpus.¹⁰ An executor is entitled to his commissions the same as an administrator. His duties in the payment of preferred claims are also the same.¹¹

Where personal property goes to one for life, at life tenant's death, there being no debts of the testator, the remainderman is entitled to receive it from the legal representative of the life tenant undiminished and the administrator *d. b. n.* has no claim for it or upon it for commissions or otherwise.¹² An executor is not liable for the loss of money by the failure of a bank of which he is a director.¹³ After the executors have filed an account and they are awarded as trustees corporate stock of another state, the levy of an assessment against the executors on account of said stock, is not ground for entering judgment here against the trustees. It matters not that the same persons are trustees as executors.¹⁴ Trust funds may be followed even if mingled with the trustee's own money.¹⁵ A legal representative who delivers money of his estate to a Philadelphia attorney to pay over to those entitled but who fails so to do, will be surcharged with it and the Orphans' Court of another county will not order

¹ Anck's Est., 2 W. N. C. 306; Morris' Est., 16 Phila. 343; Simon's Est., 9 D. R. 59.

² O'Donnell's Est., 9 Kulp, 123; Reeve's Est., 12 Luz. L. R. 137; Sheaffer's Est., 22 Lanc. L. R. 39.

³ Grover's Est., 12 Luz. L. R. 224; Hamilton's Est., 21 Lanc. L. R. 213; Brinton's Est., 29 C. C. 107; Speise's Est., 21 Lanc. L. R. 185, P. & L. Dig., vol. 2, C. R. A., col. 2396; Lefever's Est., 24 Lanc. L. R. 189; Moran's Est., 24 Lanc. L. R. 70.

⁴ Rankin's Est., 9 W. N. C. 407; Parker's Est., 12 C. C. 436; Fell's Est., 13 Phila. 289.

⁵ Watson's Est., 6 Luz. L. R. 13.

⁶ Hamaker's Est., 5 Watts, 204.

⁷ Barker's Est., 159 Pa. 518; Gross' Est., 36 Supr. C. 54. (See vol. 3, C. R. A., col. 985, for various accounts.)

⁸ Nax's Est., 18 D. R. 423.

⁹ Price's Est., 18 D. R. 442.

¹⁰ McEwen's Est., 18 D. R. 534.

¹¹ As to claims for services, nursing, etc., see Miller's Est., 222 Pa. 334; Bittenbinder's Est., 1 Berks, 349; Boyer's Est., 23 York, 103.

¹² Grim's Est., 12 Northam. 61.

¹³ Clark's Est., 39 Supr. C. 445.

¹⁴ Saml. Hano Co. v. Hano, 224 Pa. 212.

¹⁵ Kleinhaus' Est., 19 D. R. 278.

such attorney to the bar and compel him to pay it over since he is not an officer of that court.¹⁶ If he were, he would probably be disciplined, as is explained in volume 1, Johnson's Practice, title "Attorneys at law."

11. Accounts of deceased executors.

If an executor dies without having accounted, his executor or administrator should be cited to file an account, and not the administrator *d. b. n.*¹⁷ and this account can include only such matters as were transacted by the deceased executor.¹⁸ An order to file an account by the executor of an executrix cannot be made in a proceeding to amend the schedule of distribution.¹⁹ An order may be made to file an account, although forty years have elapsed since the executor filed an account showing a balance in his hands.²⁰ The legal representative will be charged only so much as came into the hands of the one he represents.²¹ The account must be filed in the county of original administration.²² In response to a citation to file an account, it is not sufficient to say that the funds were rents collected or that they vested in the deceased executor as devisee.²³ Such account is required for the information of the administrator *d. b. n.*, who does not, however, assume any of the risks of his predecessor.²⁴ The sole inquiry is to learn what amount was due at the death of the executor.²⁵ In order to file this account the legal representative is entitled to free access to all the books and papers relating to the estate, that may have come into the hands of the successor in the trust.²⁶ A petition for an account will be dismissed where the fund was trivial.²⁷ A question of surcharge can be considered only upon the account stated by the executor of the decedent.²⁸ An account filed by an executor cannot be attacked when he is dead and his representative files an account.²⁹ If an estate is held up and no one moves, if the court's attention is called to it, it will upon its own motion proceed to an adjudication of the matter.³⁰

12. Supplemental accounts.

Having filed an account, supplemental accounts will be ordered only when necessary and required.³¹

¹⁶ Locher's Est., 19 D. R. 666.

¹⁷ Montgomery's Est., 3 Brewster, 306; Rickey's Est., 16 Phila. 244; Whitehead's Est., 3 W. N. C. 475.

¹⁸ Stephen's Ap., 56 Pa. 409; Pugh's Est., 17 W. N. C. 170; Bowman's Ap., 62 Pa. 166.

¹⁹ Sower's Est., 16 D. R. 224.

²⁰ Stewart's Est., 212 Pa. 327.

²¹ Nolde's Est., 27 Supr. 413.

²² Bickley's Est., 13 D. R. 461; Graham's Est., 14 D. R. 5.

²³ Hanbest's Est., 4 W. N. C. 402.

²⁴ Gressle's Est., 29 C. C. 97.

²⁵ Tasker's Est., 14 D. R. 435.

²⁶ Eckart's Est., 14 D. R. 423.

²⁷ Stoker's Est., 10 D. R. 375.

²⁸ Gillespie's Est. (No. 3), 14 D. R. 870.

²⁹ Houseman's Est., 11 D. R. 87.

³⁰ Hill's Ests. (No. 4), 23 Lanc. L. R. 30.

³¹ Seeger's Est., 6 W. N. C. 369; Caldwell's Est., 6 W. N. C. 370; Neill's Est., 16 Phila. 378.

It is not demandable of right,¹ and should contain only what occurred since filing a final account.² If there have been errors or omissions in an account the executor may file a supplemental account to correct them.³ An account can only be settled in the county where letters issued.⁴

13. Form of account of the proceeds of real estate sold by an executor, etc., under an order of court to pay debts.

To the Honorable the Judges of the Orphans' Court of — County:

The undersigned, appointed by order of the said court, dated the — day of —, 19—, to make sale of the real estate of A. Hewit, deceased, for the payment of his debts, doth make account and report of the proceeds thereof as follows:

Lot, No. 1 in the order of sale (situate, etc.), was
sold to R. James for \$— —
Amount received on same, on day of sale, . . \$— —
Amount received on confirmation of sale, . . — —
Balance, secured on bond and mortgage on the
premises, payable as follows:
Due 1st January, 19—, — —
Interest on same, from 1st July, 19—, . . — —
Due 1st July, 19—, — —
Interest on same, from 1st July, 19—, . . — —

Total amount of proceeds to date, . . . \$
(Same for lot No. 2.)

The entire expenses of such sales were as follows:

John Croll, Clerk O. C., on order, return, and
confirmation, \$— —
J. K. Bogert, advertising in *Union Leader*, . — —
A. R. Page, counsel, preparing papers for sale,
making returns and deeds, — —
Compensation to administrator, — —
John Croll, clerk O. C., on this account, . . — —
Total expenses, \$
Balance due the estate, \$— —

P. Cline,

Administrator (or executor, or trustee, as the case may be.)
(Affidavit of the truth.)

NOTE.—In some counties the proceeds of a sale of real estate to pay debts is accounted for on the same sheet with the personal estate, and thus runs through the register's office. When the proceeds and the expenses of making the sale, with all other disbursements from such fund, are distinctly and separately stated, this course is found not objectionable, especially where there are no special liens against the land.

¹ Price's Est., 9 D. R. 511.
² Irvine's Est. (No. 2), 209 Pa. 325; Jennings's Est., 10 D. R. 90; Mutchmore's Est., 9 D. R. 293.
³ Stouffer's Est., 14 D. R. 108; Beyerbach's Est., 18 Lanc. L. R. 381; P. & L. Dig., vol. 7, cols. 11883-4.
⁴ Musselman's Ap., 101 Pa. 165; Van Dyke's Ap., 4 W. N. C. 283.

It is safe, in most cases, to account for the entire fund at once, and the court will so distribute it as to protect the accountant in that which is not due.

This form will be found to be applicable to the account of the proceeds of any sale of real estate made by virtue of an order of the court to any executor, administrator, guardian, or trustee, except in proceedings in partition.

Rhone's O. C., Vol. II, p. 28.

14. Form of account of personal estate by two or more executors where they desire to account separately.

First and final account of John Smith and James Rex, executors of the last will and testament of C. Long, late of — County, deceased. The inventory filed in the register's office, amounts to . \$—— —

The said John Smith took charge of and accounts for the following items set forth in the said inventory, to-wit (here state the items on inventory):

Total, — —
The said Smith further charges himself with (here state the items): — —

Total charges to Smith, \$—— —

The said James Rex took charge of and accounts for the whole of said inventory, except what stands charged as above to the said John Smith, his co-executor, amounting to — —

The said Rex further charges himself with (here state the items): — —

Total charges to Rex, \$—— —

The said John Smith claims credit for the following disbursements to creditors and his share of the expenses of administration, etc., as follows (here give names, etc., as in No. 4):

Total credits to Smith, \$—— —

The said James Rex claims credit for the following disbursements to creditors and his share of the expenses of administration, etc., as follows (here state the same as above):

Total credits to Rex, \$—— —

Recapitulation.

Smith, Dr., \$—— —
" Cr., — —

Balance due to (or from) Smith, \$—— —
Rex, Dr., \$—— —
" Cr., — —

Balance due to (or from) Rex, \$—— —
Total balance due the estate (or the accountants), . \$—— —

John Smith,
James Rex,
Executors.

(Affidavit as to truth.)

15. Form of account of executor, administrator, or trustee after sale in partition.

To the Honorable the Judges, etc.

The undersigned, appointed by an order of the said court, dated the — day of —, 19—, to make sale of the real estate, late of A. Hewit, deceased, under proceedings in partition, doth make account and report of the proceeds as follows: [Itemize charges.]

Total charges, \$— —

Said accountant claims credit and allowance for expenses which he considers reasonable in conducting the proceedings in partition, and in making the sale as follows:

L. Roth, clerk Orphans' Court, on order and return, etc.,	\$— —
C. King, editor <i>Luzerne Union</i> , for advertising sale,	— —
S. McNeal, sheriff, on inquisition,	— —
S. McNeal, sheriff, serving rules and notices,	— —
S. McNeal, sheriff, jurors' fees paid,	— —
R. P. Anson, Esq., attorney for the estate in conducting the proceedings to sale and making return thereof,	— —
Accountant's compensation,	— —

Payment of the above bill awaits the approval of the court on this account.

Total allowance claimed, \$— —

Balance due the estate, — —

(Affidavit as to truth.)

P. Catlin,
Administrator.

NOTE.—If more than one lot has been sold, and any unusual expense has been incurred in making sale of either, the fact should be stated, otherwise the costs will be apportioned to each lot according to its value.

This form is found a convenient way of taxing the costs and expenses of partition.

This account is filed in the Register's office.

16. Form of first and final account of the executor or administrator of a deceased executor, administrator, guardian, or trustee.

First and final account of Robert Reed, who is the executor (or administrator) of P. Catlin, now deceased, who was the executor (administrator, guardian or trustee) of A. Hewit, late of the county of —, deceased.

The said P. Catlin, late executor, as aforesaid, died on the — day of —, 19—, never having stated any account as executor aforesaid.

Your accountant charges the estate of said deceased executor with the inventory as filed in the register's office of — county, amounting to \$— —

(Here also add any other items not inventoried.)

Total charges, \$— —

The said accountant claims credit for the following disbursements made by the said deceased executor to creditors, and for fees earned and expenses incurred by him, as follows:

[Itemize same.] \$— —

The said accountant also claims credit for goods and chattels unsold, and for evidences of debt uncollected, by the said deceased executor, which have been by your accountant turned over to Roscoe Huff, the present administrator of the estate of the said A. Hewit, deceased, and by him accepted, and receipted for, as follows:

(Here state each item.) \$— —

The said accountant also claims further credit for the following items, which the said Roscoe Huff, the present administrator of the estate aforesaid, refuses to accept, but which are unsalable (or uncollectible), and have been from the first worthless, as follows:

(Here state each item.) \$— —

Recapitulation.

Estate of P. Catlin credit, for disbursements, etc., . . \$— —

Estate of P. Catlin credit, for estate turned over, . . — —

Estate of P. Catlin credit, for worthless debts, — —

Total credits, \$— —

Balance due the estate (of the late executor), — —

Robert Reed,
Executor of the estate of P. Catlin, who was the
executor of A. Hewit, deceased.

— County, ss.

Robert Reed, the above-named accountant, being duly sworn, says the foregoing is as just, full, and true an account of the administration of said estate by P. Catlin, executor, etc., now deceased, as he is able to make from the vouchers and memoranda which have come into his hands.

Robert Reed.

Sworn and subscribed before me, this — day of —, A. D. 19—.
—, J. P.

This form is also applicable to the account of any deceased personal representative, making the necessary verbal changes.

17. Exceptions to account.

The practice upon exceptions to an account has already been treated of in a preceding chapter. In separate Orphans' Courts the judge who is sitting hears exceptions, in the first instance, or if the parties all agree an auditor may be appointed. Exceptions must be filed to the findings of an auditing judge when the case is before him and not *in banc*.

18. Appointment of auditor in Philadelphia.

Section 1 of rule 5, Philadelphia, provides:

"Parties in interest desiring the appointment of an auditor must

all unite in a written request to the court, signed by themselves or their attorneys. The application must be accompanied by sufficient affidavits that the applicants are all the parties in interest and that the signatures appended are genuine.

"Section 2. Auditors shall be members of the bar, who have been admitted to practice in this court at least two years."

19. Notice of appointment.

Section 3, rule 5, Philadelphia, provides:

"Public notice shall be given by auditors of their appointment by advertisement, made twice successively in the *Legal Intelligencer*, and also every other day five times in one daily paper in this city. They shall state in such notice that their appointment was made by the court at the request of all parties interested in the estate."

20. Time of report.

Section 4 of rule 5, Philadelphia, provides:

"Every auditor shall make his report within sixty days after his appointment, unless, upon application made, the court has enlarged the time; and in default thereof, his appointment may be vacated, and nothing allowed him for expense or trouble in relation to the same."

21. Form of appointment on exceptions.

Estate of Wynne Williams, deceased.

Now, to-wit, April 1, 1911, on motion of ———, Esq., attorney for exceptants and by agreement of all the parties interested, the court appoints ———, Esq., auditor to take testimony and make report on the exceptions filed to the account of Oscar Hanson, executor of the estate of Wynne Williams, deceased, to restate the account if necessary, and also to report distribution of the fund in the hands of the said accountant to and among the parties entitled thereto.

By the Court. \

Under the act of April 1, 1909, P. L. 95, which was passed to correct abuses and favoritism in the appointment of auditors, to reward political or personal workers, the parties may agree upon the person whom they wish to have appointed auditor. At least one judge has taken umbrage at this wholesome law and declared it unconstitutional as impinging the judicial power.⁵ If the balance of an account has been distributed, an auditor will not be appointed.⁶ Under the act of 1909, *supra*, the husband of decedent is a party interested, whose consent to the appointment of an auditor has been held to be necessary.⁷

22. Distribution.

The duties of and practice before auditors have been fully considered in a preceding chapter. All that it is necessary to add here, are a few remarks and suggestions with reference to the latest cases.

⁵ Hick's Est., 19 D. R. 410. (See vol. 1, Johnson's Practice and see rule of court in Phila., *supra*.)

⁶ Peters' Est., 12 Dauphin Co. 222.

⁷ Best's Est., 19 D. R. 337.

Where, upon distribution, there is a demand for an issue the auditor should report it to the court forthwith and give his opinion whether or not it should be awarded.⁸ If the auditor's findings are based upon incompetent and irrelevant testimony he will be reversed, and a trial by jury ordered.⁹ The court's deductions from the evidence before the auditor, as to matters of fact, will not be reversed.¹⁰ If the auditor cannot decide, his report will be referred back to him.¹¹ His findings of fact will not be reversed, except for manifest error. In case of mutual accounts between parties interest may not be charged.¹²

23. Distribution of death benefits.

Where conflicting claims to death benefits are made by one called a wife and the father and heirs the case will be considered in the light of the state of the corporation.¹³ Benefits payable to the pseudo-wife were awarded to the real wife.¹⁴ The beneficial member may change his beneficiary without the latter's consent, at any time.¹⁵ Benefits payable to the widow or dependents are not payable to the legal representative.¹⁶ The rules of the beneficial society must be complied with in making the claim.¹⁷ If the widow has recovered damages in a suit for the death of her husband, against a railroad company, which also has a beneficial fund, she is barred from the benefits, under the terms of the contract.¹⁸

24. Advancements.

The doctrine of advancements, which is treated of in chapter 22, *supra*, does not apply to a will, but the testator may provide for its equivalent, where he has advanced to his children.¹⁹ He may treat advancements as assets of his estate and direct them to be deducted from their shares.²⁰ Advancements are to be deducted from the whole share,²¹ on distribution. If the heir advanced is barred from the first distribution, unless he has been advanced more than his share, he may come in on a subsequent distribution.²²

25. Surcharging executor — Finality of decree — Equity.

Where the Orphans' Court, having jurisdiction, whether exclusive or not, made distribution of an estate and surcharged the executor,

⁸ Shuman's Est., 12 Northam. 198.

⁹ Schwann v. Brann, 57 Pitts. L. J. 156.

¹⁰ Dingee v. Wood, 228 Pa. 250.

¹¹ Miller's Est., 23 York, 136.

¹² Gibson's Est., 228 Pa. 409; Goodwill v. Heim, 212 Pa. 595; Gyger's Ap., 62 Pa. 73. (See Hoover's Est., 12 Dauphin Co. 302, for auditor as witness before himself.)

¹³ Mikesell v. Mikesell, 40 Supr. C. 392.

¹⁴ B. & O. R. Co. v. Veltri, 37 Supr. C. 399.

¹⁵ Noble v. Assn., 224 Pa. 298.

¹⁶ Hartman v. Hartman, 25 Montg. 58.

¹⁷ Geddes v. C. & N. Co., 39 Supr. C. 417.

¹⁸ Jack v. R. Co., 43 Supr. C. 337; Remmert v. R. Co., 2 Berks Co. 226.

¹⁹ Lefevre's Est., 39 Supr. C. 189.

²⁰ Bowers v. Bowers, 227 Pa. 395.

²¹ Vilsack's Est., 56 Pitts. L. J. 404; 226 Pa. 379.

²² Stahl's Est., 26 L. R. 61. (When distribution of balance may be made, see Michener's Est., 227 Pa. 284.)

who bought at the sale, as he had a right to do, but failed properly to protect his estate, and a final decree of distribution was entered unappealed from, it is a final adjudication and a bill in equity will not lie to review it.²³

26. Party barred from distribution.

One *sui juris*, who without fraud or covin, and against the advice of the parties who buy from him, sells them his property, cannot afterwards come in on distribution and ask to be reimbursed for his willful folly.²⁴

27. When the Orphans' Court has no jurisdiction.

The Orphans' Court, on distribution, or exceptions to an account, has no jurisdiction to charge a personal representative with rents which he, as son, collected for decedent, in his lifetime.²⁵ Neither has it anything to do with gifts *inter vivos*.²⁶ When, however, it has jurisdiction, it will not be ousted by a dubious agreement between attorneys.²⁷

28. Liquor license.

A liquor license in Pennsylvania is not an asset in the strict sense of the word. It is a personal privilege to the grantee and when he dies and the business is continued by the personal representative in decedent's name no attachment will lie, for the individual debt of said representative, although the license be in his name.²⁸

29. Co-executors.

Co-executors have been treated in law as one person, exercising the like powers jointly and equally charged with the duties of the office and jointly accountable.^{28a} But where one executor does not act and becomes insolvent he cannot then intermeddle but will be perpetually enjoined.²⁹ Less than the whole number of executors may release a mortgage.³⁰ But one executor cannot without the knowledge and assent of his colleague release a demand arising from a deposit made in a bank to the joint credit of both and agree to look solely to a fund in the hands of the bank's assignee for creditors.³¹ One executor cannot confess a judgment without the knowledge or consent of his colleague.³² Executors may make a sale of real estate,

²³ Connor v. Gibbons, 228 Pa. 617.

²⁴ Frey's Est., 223 Pa. 61.

²⁵ Greenawalt's Est., 57 Lanc. L. R. 433.

²⁶ Hutchin's Est., 19 D. R. 76. (As to gifts *inter vivos*, see Ashman's Est., 223 Pa. 543.)

²⁷ Spencer's Est., 227 Pa. 469.

²⁸ Ashenbach v. Carey, 224 Pa. 303.

^{28a} D' Invilliers v. Abbott, 12 Phila. 462; Fesmire v. Shannon, 143 Pa. 201.

²⁹ Borhek's Est., 5 D. R. 297.

³⁰ Devling v. Little, 26 Pa. 502.

³¹ DeHaven v. Williams, 80 Pa. 480. (But see Fesmire v. Shannon, 143 Pa. 201, on different facts, and in a different relation.)

³² Hall v. Boyd, 6 Pa. 267; Karl v. Block, 2 Pitts. 19.

it seems, without all joining, if the one acquiesces who does not join.³³ One of several executors may transfer personal property of the decedent for value by way of pledge.³⁴ If the acting executor takes out ancillary letters in another state his co-executors are not liable for his *devastavit* there.³⁵

30. Liability of co-executors.

Generally co-executors are not individually liable further than for assets that come into their hands,³⁶ unless negligent³⁷ or equally culpable or admitted.³⁸ When they settle a joint account, they thereby admit a joint liability,³⁹ though this is only *prima facie* so.⁴⁰ Executors who settle a joint account will be surcharged with a debt which one of them owes to the estate.⁴¹ If they embrace an item which never reached their hands, the account will be corrected.⁴² Death of one executor terminates his office and his estate will not be charged with assets he never received.⁴³ Where one executor has taken in his hands the entire management his co-executor may compel him to file an account.⁴⁴

After forty years from taking a release from a legatee, which was fraudulent, it appears, the executor may not be subrogated, because of laches, etc.⁴⁵ If executors file separate accounts there must be a separate distribution.⁴⁶ If executors have acted separately and one of them dies, his legal representative may account for him.⁴⁷ If a joint duty is imposed concerning a fund and one neglects to perform it, he will be liable to the legatees for its loss.⁴⁸ Where there are separate accounts filed and one is adjudicated and the other not, on appeal from one, the appellate court will not presume to adjudicate both.⁴⁹ The surviving executor is by law invested with all the authority and powers which all had.⁵⁰ On the death of both

³³ Silverthorn v. McKinster, 12 Pa. 67; Taylor v. Adams, 2 S. & R. 534; P. & L. Dig., vol. 7, cols. 12178-9.

³⁴ Schell v. Deperven, 198 Pa. 600.

³⁵ Fleming's Est., 54 Pitts. L. J. 277.

³⁶ Irwin's Ap., 35 Pa. 294; Ripple's Est., 9 Kulp, 66; Myer v. Myer, 187 Pa. 247; Mueller's Ap., 190 Pa. 601; Crissman's Est., 2 Phila. 76.

³⁷ Wilson's Ap., 115 Pa. 95.

³⁸ Fesmire's Est., 134 Pa. 67. (For various cases applying the principles, see vol. 7, P. & L. Dig., cols. 12184-5-6.)

³⁹ Bierly's Ap., 3 W. N. C. 210; Bitler's Est., 1 Leg. Rec. 221.

⁴⁰ Doeblor v. Snavely, 5 Watts, 225; Lightcap's Ap., 95 Pa. 455; P. & L. Dig., vol. 7, col. 12194.

⁴¹ Souder's Ap., 169 Pa. 239.

⁴² Cassel's Ap., 180 Pa. 252.

⁴³ Young's Ap., 99 Pa. 74; Washburn's Est., 187 Pa. 162; P. & L. Dig., vol. 7, cols. 12196-7.

⁴⁴ McMann's Est., 212 Pa. 267.

⁴⁵ Wehrle's Est., 205 Pa. 62. (As to estoppel, see Armstrong's Est., 16 Montg. 9. See also Bickley's Est., 13 D. R. 323.)

⁴⁶ Heyer's Ap., 34 Pa. 183; Ev. Assn.'s Ap., 35 Pa. 316.

⁴⁷ Barclay v. Morrison, 16 S. & R. 129; Richardson v. Richardson, 9 Pa. 428.

⁴⁸ Stong's Est., 160 Pa. 13; Weigand's Ap., 28 Pa. 471; Weldy's Ap., 102 Pa. 454.

⁴⁹ Cowan's Est., 184 Pa. 339.

⁵⁰ Murphy's Est., 184 Pa. 310.

executors and the appointment of an auditor to state their accounts, the joint account should cover every transaction down to the date when the first one died. Then the balance, if any, should be charged to the survivor and the account completed with him.⁵¹

31. Decree of distribution.

When distribution has been decreed, it will not be suspended to entertain visionary and speculative claims.¹ Where one has been absent and unheard from for eighteen years, a distributive share will be ordered paid to one without a refunding bond, who is unable to give it.²

32. Transmission of fund to domicil.

After paying the expenses of ancillary administration, if there are creditors in the domicil of decedent, the balance of the fund will be transmitted to that jurisdiction although there are next of kin in this jurisdiction.³

33. Questions for argument.

Whenever exceptions, rules or motions raise questions for argument before the court the clerk will place them upon the argument list to be heard at argument court. This matter is regulated by rules of court, some of which have been given. Each jurisdiction has its own rules on this subject. Below are the rules in Allegheny County.

34. Argument list.

Section 1, rule 12, Allegheny County, provides:

"Motions and rules requiring argument shall be immediately placed on the argument list by the clerk, without further order."

35. Notice and time of hearing.

Section 2 of rule 12, Allegheny County, provides:

"The regular argument list will be taken up on the first Monday of the months of March, April, May, June, July, September, October, November, December, January and February, and continue so long as may be necessary, and entry on such list (except in cases otherwise provided for) shall be sufficient notice to all parties for whom appearance has been entered; to all other parties five days' notice before argument shall be given."

36. Attorneys' briefs of argument.

Section 3, rule 12, Allegheny County, provides:

"In cases set down for argument, the attorneys of the respective parties shall each deliver to the court a brief in writing, setting forth the points in controversy, and a reference to such principles and authorities as may be deemed pertinent."

⁵¹ Graham's Est., 15 D. R. 258; Tasker's Est., 15 D. R. 166, 174.

¹ Umbstetter's Est., 57 Pitts. L. J. 604.

² Ziegler's Est., 6 Schuylkill Co. 239.

³ Walters' Est., 19 D. R. 293.

37. Form of rule to take depositions.

When depositions are required, to be read on the argument, they are taken under the rules of court, as fully explained in Vol. I, Johnson. Following is a form of the rule:

— County, ss.

In the Orphans' Court of — County.

Estate of —, —, } In Matter of — —,
Deceased. } in Said Estate.

And now, to-wit, —, 19—, rule is entered on the part of — —, to take the depositions of witnesses before any officer duly qualified and authorized to take depositions in the county of — —, in the State of Pennsylvania, ex parte, on — days' notice to — —, agent or attorney, to be read in evidence on — of above stated —.

Certified from the records.

— —, C.
Clerk O. C.

38. Form of notice of rule.

—, Pa., —, 19—.

To — —:

You will take notice that in pursuance of above rule, the deposition of witnesses will be taken at the — of — — by and before the said — —, or by and before some other person competent to administer an oath in Pennsylvania, on the — day of —, A. D. 19—, between the hours of — o'clock, — M., and — o'clock, — M., of said day, at which time and place you can attend and cross-examine the witnesses if you think proper.

Rush Trescott,
Attorney for Rule.

39. Form of protocol to letters rogatory.

In Vol. I, Johnson's Practice, the form of letters rogatory and the practice thereon are given. The response or "protocol" to letters rogatory from a foreign jurisdiction to this may interest lawyers. The following form, drawn by Wm. B. Cuthbertson, Esq., of New Brighton, Pa., in the Common Pleas, may be adapted to the Orphans' Court:

In re Letters Rogatory.

In the Court of Common Pleas of Beaver
County.

No. 289.

September Term, 1906.

And now, to-wit: August 20, 1906, the Court of Common Pleas of Beaver County, in the State of Pennsylvania, United States of America, send greetings to the Royal Hungarian Court of Justice at Elizabethstadt.

The Royal Hungarian Court of Justice at Elizabethstadt having, by letters rogatory, the original whereof, together with a translation thereof into English certified to be correct by the acting Imperial and Royal Austro-Hungarian consul at Pittsburgh, Pennsylvania, is annexed hereto, requested this court to summon before us one — —, at present residing at Monaca, in the county of Beaver, Pennsylvania, box 526, or before a person to be appointed for this

purpose, to have the said ——— take the adjudicated oath fully set forth in said letters rogatory, if he is willing to do it, and to sign the protocol to be drawn up about it; but, if the plaintiff, ———, refuses to take the oath, this fact to be stated in a protocol; and we, being willing, have directed the following protocol to be drawn up.

Protocol.

The said ———, being duly summoned, appears in court this twentieth day of August, 1906, and being first duly sworn according to law, deposes and says:

I am ———, the plaintiff in the suit against the minor ——— and my wife, ———, as defendant, contesting the legitimate birth of said minor, pending in the Royal Hungarian Court at Elizabethstadt.

[Here follows the deposition.]

[Signed.] ———

And the said ———, having taken the adjudicated oath, and having, in the presence of our court, signed the foregoing protocol, we send the said protocol to the Royal Hungarian Court of Justice at Elizabethstadt, together with our greetings.

[Seal of Court.]

By the Court,
Richard S. Holt,
President Judge.

40. Discharge of executor or administrator.

Section 21 of the act of March 29, 1832, P. L. 190, provides:

"An executor or administrator may, with the leave of the Orphans' Court having jurisdiction, make a settlement of his accounts, so far as he shall have administered the estate committed to him, and the same being confirmed by the court, he may be discharged from the duties of his appointment, and surrender the remainder of the property in his hands, to such person as the court may direct."

Until formally discharged an administrator is still an active legal representative and may sue for a debt of his decedent, although his account was filed, passed and confirmed.⁴ Where there are two administrators, and one of them is discharged after inventory filed, he is not liable on the bond for a *devastavit* of his co-administrator.⁵ The section above quoted has reference to a discharge of a partly executed trust. An administrator may pay the balance into court, when the distributees refuse to receive their shares, and ask for his discharge and the release of his sureties.⁶ The practice in some jurisdictions is not to enter a formal discharge. In others it is done on petition showing a full settlement, confirmation and distribution, exhibiting receipts and releases.⁷

41. Discharge on his own application.

An executor (or administrator) having accounted finally, the ac-

⁴ Williams v. Short, 155 Pa. 480.

⁵ Comth. v. Smith, 4 Phila. 270.

⁶ Gready's Est., 14 Phila. 259.

⁷ Wiseman's Est., 12 Phila. 11; Buzby's Est., 2 W. N. C. 31. (See *supra*, Administrators. See vol. 7, P. & L., col. 12158.)

count being audited, money distributed, and paid out on refunding bonds or receipts, may apply to court for his discharge which will be granted, there being no objections.⁸ An order of court is requisite.⁹ If an administrator *c. t. a.* is appointed, the executor is entitled to a discharge.¹⁰ One who is executor, trustee and guardian, must file a petition for discharge in each capacity, if he wishes a discharge from all.¹¹ But the duties must be shown to be fully completed.¹² An executor who has accounted for all the moneys of the estate and removed from the jurisdiction will be discharged on his application, although the life tenant objects.¹³ The office is not vacant, however, until the court acts upon the application.¹⁴

42. Dismissal or release.

The Orphans' Court may enforce its decree of dismissal of an executor by attachment.¹⁵ But an administrator *d. b. n.* cannot compel delivery before his predecessor has filed his account.¹⁶ A decree of removal or discharge can only be challenged by the executor. It is conclusive as to others and not subject to collateral attack.¹⁷ An executor cannot be removed unless it clearly appears that the good of the estate requires it.¹⁸ He will not be removed for slight delinquencies,¹⁹ nor in default of answer to the rule, without depositions.²⁰ The proper course is to serve a citation first.²¹ If the executor files an answer it must be taken as true, unless overcome with proofs.²² Removal from the state is not, in itself, sufficient ground for removal.²³ It has been held that if there is dissension between executors or between an executor and the heirs, it may be ground for removal.²⁴ If the executor is insolvent or likely to be so, it is not cause for instant removal, but on the petition of the heir, creditor or other party interested, he may be required to give security or be dismissed.²⁵

Releases fairly and honestly executed by heirs and distributees

⁸ Widdis' Est., 1 W. N. C. 270; Buzby's Est., 2 W. N. C. 31; Wiseman's Est., 4 W. N. C. 59.

⁹ Hermes' Est., 32 Pitts. L. J. 474; Todd's Est., 1 Chester Co. 446.

¹⁰ Morrow's Est., 15 W. N. C. 240. Penrose, J.

¹¹ Morrow's Est., *supra*.

¹² Motts' Est., 4 Kulp, 43.

¹³ Marley's Est., 18 Supr. C. 303.

¹⁴ Silkman's Est., 12 Luz. L. R. 349; Wise's Est., 22 Lanc. L. R. 382.

¹⁵ Tome's Ap., 50 Pa. 285.

¹⁶ Bradley's Est., 9 Phila. 327.

¹⁷ McNeal v. Holbrook, 25 Pa. 189; Buehler v. Buffington, 43 Pa. 278.

¹⁸ Bucher's Est., 18 York, 31; Mulley's Est., 17 York, 102.

¹⁹ Lancaster's Est., 7 Del. Co. 584.

²⁰ Moore's Est., 3 W. N. C. 80; 19 C. C. 208.

²¹ Van Dusen's Ap., 102 Pa. 224.

²² Souder's Est., 169 Pa. 249; Cremer's Est., 7 W. N. C. 544; Mercur's Est., 31 W. N. C. 73; P. & L. Dig., vol. 7, col. 12155.

²³ Grotz's Est., 1 Northam. 96; James' Est., 20 Phila. 137.

²⁴ Dayton's Est., 1 Kulp, 118; Kellberg's Ap., 86 Pa. 129; Bicking's Est., 15 C. C. 284; Sharpless' Est., 209 Pa. 69.

²⁵ Cohen's Est., 9 Kulp, 116; Grissinger's Ap., 4 Walker, 374; Beshore's Est., 22 York, 107.

will operate as a discharge as far as they go.²⁶ They will not be set aside unless the evidence of fraud or over-reaching is clear, precise and indubitable.²⁷

43. Discharge of sureties, etc.

Section 1 of the act of February 2, 1853, P. L. 31, provides:

"Whenever one or more of several joint administrators shall die or be discharged by the proper Orphans' Court, under existing laws, the said court, upon the application of any party interested, shall have power to discharge from further liabilities said discharged or deceased administrator, his, her or their surety or sureties, as the case may be, and require new or additional sureties of the remaining administrator or administrators, with a like result in case of failure to comply as now provided by law when new or additional surety is for any cause required by such court: *Provided*, That such discharge shall not affect liabilities existing at the time of the discharge of such party or parties."

²⁶ Bierer's Ap., 92 Pa. 265; Shartel's Ap., 64 Pa. 25.

²⁷ Hertzler's Est., 192 Pa. 531; Bierer's Ap., *supra*.

CHAPTER LV.

COLLECTION OF INHERITANCE OR LEGACIES IN EUROPEAN COUNTRIES.

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| 1. Classes of estates. | 9. Treaty with Great Britain. |
| 2. Treaties and conventions. | 10. Treaty with Greece. |
| 3. Treaty with Austria-Hungary. | 11. Treaty with The Netherlands. |
| 4. Transfer of fund from domestic to foreign guardian. | 12. Treaty with Prussia. |
| 5. Treaty with Bavaria. | 13. Treaty with Italy. |
| 6. Treaty with Belgium. | 14. Treaty with Russia. |
| 7. Treaty with France. | 15. Treaty with Spain. |
| 8. Treaty with Germany. | 16. Treaties with Scandinavia. |

I. Classes of "estates."

There are two classes of "estates" in foreign countries which interest the citizens or alien residents of Pennsylvania: First, those which are established in the local tribunals of the country where the inheritance or legacy falls due, and being there duly ascertained, all that is required, generally, is to establish the identity of the heir or legatee and to give a power of attorney to receive and release. Second, those mythical millions of trust estates for a period, under a will, or an unclaimed dividend or an inheritance in which the heirs are said to have become extinct in "the old country," and the millions are now awaiting proof of heirship by American branches of the old family tree.

The mode of collection of the first class is very simple where there is no contest. The local tribunal having ascertained who the heirs or legatees are and determined the amounts, notice is usually given by letter or otherwise. Thereupon, the person entitled should employ an attorney to prepare the proofs of his identity and execute a power of attorney to some relative in the old land or to the nearest resident consul or vice-consul of our own government to collect the same. These papers must be sworn to and attested by a court of similar jurisdiction, in Pennsylvania, the Orphans' Court, under the seal of the court and the certificate of the judge, or before a notary public, and in turn be attested also by the consul of the foreign government, according to the regulations and requirements of that sovereignty.

In case, however, there be a contest about the right or the sum, the rules of practice in the jurisdiction where "the estate" is, must be followed. In some countries letters rogatory may issue from the court or tribunal to a similar court or tribunal¹ in Pennsylvania, to take testimony by deposition, and thus avoid the necessity of the party's returning to the old land to fight it out there. The second class of "estates" (mythical) is by far the most interesting though

¹ Vol. 1, Johnson, p. 645, par. 29-30.

the least profitable to the "heirs." With a recurrent periodicity, some fabulous millions are declared due to "the heirs of Aneke Johns," "the Moser heirs," "the Biehrle heirs," "the McGhee heirs" or some other heirs, and advertisements are inserted in the papers that they shall now come forth and prove themselves or forever after hold their peace! It is not so difficult to gather in all the prospective recipients and prove their descent from and relationship to the stem, but the difficulty is to find the stem and to dig the golden nuggets up from the roots. Most of these "estates" are located in the British Empire, Germany or France, somewhere. We will illustrate the fatuity of securing them by taking the case of a sixty-million-dollar fortune due an American family left by an uncle of the ancestor who made it in India, say in trust for one hundred years and then to be distributed to the descendants of his brother or sister. The improbability of there being such an estate does not occur to the anxious expectants who have had a family tradition handed down through three or four generations, that "some day" a fortune was coming to them from "the Old Country." Of course they raise the funds to employ an attorney or agent to go to London and get it—as London is the centre of the British world, and Somerset House on the Strand the receptacle of all the wills of Great Britain proper—England, Scotland, Wales, Ireland and India. He goes. At Somerset House he calls to see the will which left this vast fortune. He presents the name to the clerk who gives him an index and on examining it he finds a hundred of that name. Which is the one? He can only tell by examining the will itself and for that the charge is a shilling per name. But he pays the shilling every time with his slip until he has exhausted the list only to find no such fortune by will. Then it occurs to him that this queer old bachelor millionaire might have been a Quaker, opposed to law and have left "the estate" in some other form. Now he goes to Chancery—which at the time referred to, was still in Chancery Lane. He searches the Chancery records to see whether it found its way there as an unclaimed dividend, or an estate awaiting "heirs." There is a record of all this and it is free to him who would search through the blue books. After the time has gone by for claimants to appear in Chancery, "the estate" goes to "the Dead Office" near Guild Hall, where it becomes an asset of the Crown. Having landed there once, it requires an order of the King's Privy Council to open it, and, according to the eminent Judah P. Benjamin it is well nigh a hopeless task. It is perhaps proper to remark that all of the so-called million-dollar estates are locked up in a "Dead Office," whether in London, Paris or Berlin, and the chances are that they are escheated to the Crown under the laws of the respective sovereignty.

2. Treaties and conventions.

The matter of collection of inheritances and the rights of aliens and citizens as between the civilized nations are regulated by various treaties and conventions which it is important to know and since these are not generally accessible, they are here briefly stated as to those articles which concern inheritance.

3. Austria-Hungary.

The consular convention of July 11, 1870, proclaimed June 29, 1871,¹ provides, *inter alia*:

"Art. XVI. In case of the death of a citizen of the United States in the Austrian Hungarian Monarchy, or of a citizen of the Austrian Hungarian Monarchy in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall inform the consuls or consular agents of the state to which the deceased belonged, of the circumstance, in order that the necessary information may be immediately forwarded to the parties interested."

The consuls give all the information possible. They are not collection agents, but agents of their respective governments to aid those of their nationality, in procuring what is due them. This applies to all those who have treaties. They certify to the powers of attorney and proofs, under their consular seal, when executed before clerks of the court or notaries public, who should attach certificates of the proper officers showing that they are lawfully in commission, or exhibit their commission to the nearest consul and then a record will be made of the fact. Otherwise the authentication of the commission must accompany every document.

4. Transfer of fund from domestic guardian to foreign guardian.

One of the troublesome things, in practice, arises where, after guardians have been appointed for minor children, here, the surviving parent takes them back to Austria-Hungary. In such case, the Austrian Empire being the guardian for all minor children, the act of May 25, 1871, P. L. 279 (Vol. III, Pennsylvania Practice, p. 225), falls short of meeting the case, unless the court appointing the Pennsylvania guardian, construes it liberally, and authorizes the payment of the balance due to that government, upon petition of the nearest consul or the wards themselves. The act provides for payment of the fund, on petition of the guardian duly appointed in the foreign state; but in this case, the state itself is the guardian.

5. Bavaria.

A. Real estate.

By convention of January 21, 1845, it is provided:

"Art. II. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction."

B. Personal property.

"Art. III. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property, within

¹ Federal Statutes Annotated, vol. 7, p. 419.

the states of the other, by testament, donation or otherwise, and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

C. Absence of heirs.

"Art. IV. In case of the absence of the heirs, the same care shall be taken provisionally, of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same according to Article II, may take measures to receive or dispose of the inheritance."

D. Lex loci.

"Art. V. If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort according to the laws and by the judges of the country where the property is situated."

6. Belgium.

By consular convention of March 9, 1880,² the same provision is adopted as with Austria-Hungary, *supra*.

7. France.

By consular convention proclaimed August 12, 1853, it is provided:³

"Art. VII. In all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves, and in no sense shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed. * * * In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to citizens of the United States, the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens."⁴

8. Germany.

By consular convention, proclaimed June 1, 1872, it is provided:
A.

"Art. X. In case of the death of any citizen of Germany in the

² Treaties and Conventions, 1880, p. 80; Fed. Stat. Annotated, vol. 7, p. 436.

³ Federal Statutes Annotated, vol. 7, p. 551.

⁴ Expounded in *Geofroy v. Riggs*, 133 U. S. 258; *Prevost v. Greneaux*, 19 Howard, 1.

United States or of any citizen of the United States in the German Empire without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs of the circumstances in order that the necessary information may be immediately forwarded to parties interested. The said consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors until they are duly represented.

In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised.”⁵ By protocol of December 11, 1871, “property” was declared to mean “real estate,” and the article was declared to apply to persons of either sex.

B. Goods of sailors and passengers.

“Art. XI. Consuls general, consuls, vice-consuls and consular agents of the two countries are exclusively charged with the inventoring and the safe keeping of goods and effects of every kind left by sailors or passengers on ships of their nation who die either on board ship or on land, during the voyage or in the port of destination.”

The practice is similar to that of Austria-Hungary. The German consul at Philadelphia requires notaries public to exhibit their commissions when a record of the same is made in a book for that purpose. If they do not, all documents attested by a notary must also have a certificate of the recorder of deeds and the clerk or judge of the Orphans’ Court. The consul merely authenticates the documents so that they will be given credit in the German court. All powers of attorney and proofs of identity should be made in the foreign language in the first instance, so as to avoid the expense of translation, which is sometimes heavy. The power of attorney (*Vollmacht*) is usually given to some relative in the district where the inheritance arose.

9. Great Britain.

By convention, proclaimed August 6, 1900, it is provided:

A. Real property.

“Art. I. Where, on the death of any person holding real property (or property not personal) within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years, in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed

⁵ Federal Statutes Annotated, vol. 7, p. 559.

in like cases upon the citizens or subjects of the country from which such proceeds may be drawn."

B. Personal property.

"Art. II. The citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, whether resident or nonresident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same, at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies, shall be liable to pay in like cases."

C. Notice of death to the consul.

"Art. III. In case of the death of any citizen of the United States of America in the United Kingdom of Great Britain and Ireland, or of any subject of her Britannic Majesty in the United States, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the Nation to which the deceased person belonged, of the circumstance, in order that the necessary information may be immediately forwarded to the persons interested. The said consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented." ⁶

These provisions do not apply to the colonies of Great Britain except those which have accepted them.

D. Disposition of property.

"Art. V. In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other, enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation."

In faith whereof, etc.

The laws of Great Britain are in many respects similar to our own, we having in many things copied and transplanted them, as is shown throughout this volume.

10. Greece.

By consular convention, proclaimed July 11, 1903,⁷ a similar provision is adopted in Art. XI as that in Austria-Hungary, *supra*.

11. The Netherlands.

By convention of May 23, 1878,⁸ a similar provision is embodied as to death of parties abroad as in case of Austria, *supra*.

⁶ Fed. Stat. Annotated, vol. 7, p. 615.

⁷ Fed. Stat. An., vol. 7, p. 629.

⁸ Fed. Stat. An., vol. 7, p. 731.

12. Prussia.

By convention of May 1, 1828,⁹ similar provisions as those now with Great Britain, *supra*.

13. Italy.

By consular convention of May 8, 1878,¹⁰ it is provided:

"Art. XVI. In case of the death of a citizen of the United States in Italy or of an Italian citizen in the United States, who has no known heir or testamentary executor, etc. (same as Austria-Hungary, *supra*.)

It required a decision of the U. S. Court to determine that under the treaty of February 26, 1871,¹¹ an Italian citizen has no greater rights in the United States than citizens of the United States.¹² But the Italian consul under the various treaties has the exclusive right to administer the estate of a subject of Italy who died intestate in New York, leaving property there, but no next of kin in the United States, the same being all in Italy.¹³

Art. IV of the convention of 1878 regulates the manner of taking depositions of consular officers.

Where an Italian alien dies here, leaving personalty, and there are no heirs here, the surplus will be transmitted on order of the Italian consul to his Italian domicil for distribution to the heirs who are entitled under the laws, by preference.¹⁴

14. Russia.

By treaty of December 18, 1832,¹⁵ it is provided:

"Art. X. The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves, or by others acting for them, and to dispose of the same, at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the said goods, as would be taken of the goods of a native of the same country, in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants, as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate, within the territories

⁹ Fed. Stat. An., vol. 7, p. 768.

¹⁰ Fed. Stat. An., vol. 7, p. 660.

¹¹ Fed. Stat. An., vol. 7, p. 656.

¹² *Cantini v. Tillman*, 54 Fed. R. 969.

¹³ *Fattosine, in re*, 33 Misc. (N. Y. Surrogate Court), 18.

¹⁴ *Caputa's Est.*, 57 Pitts. L. J. 584. For the standing of aliens (or, rather, want of standing) in negligence cases, see vol. 2, Johnson, "Trespass for Negligence."

¹⁵ Fed. Stat. An., vol. 7, p. 777.

of one of the high contracting parties, such real estate would by the laws of the land descend on a citizen or subject of the other party, who by reason of alienage may be incapable of holding it, he shall be allowed the time fixed by the laws of the country, actually in force, may not have fixed any such time, he shall then be allowed a reasonable time to sell such real estate and to withdraw and export the proceeds without molestation, and without paying to the profit of the respective governments, any other dues than those to which the inhabitants of the country wherein said real estate is situated, shall be subject to pay, in like cases. But this article shall not derogate, in any manner, from the force of the laws already published, or which may hereafter be published by his Majesty the Emperor of all the Russias, to prevent the emigration of his subjects."

15. Spain.

By treaty of July 3, 1902,¹⁶ in articles 26 and 27, similar provisions to those of Italy are made as to notice of death and representation of minor heirs by consuls and consular agents.

16. Scandinavia.

The treaties with Sweden, Norway and Denmark are in many respects like those with Great Britain.

¹⁶ Fed. Stat. An., vol. 7, p. 821.

CHAPTER LVI.

ISSUES AND INVESTMENTS, ETC.

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| <ol style="list-style-type: none"> 1. Demand for issue before an auditor. 2. Awarding the issue. 3. Form of issue. 4. Verdict and decree. 5. Costs. 6. Appeals. 7. Form of petition for an issue. 8. Form of precept for an issue. 9. Form of pleadings in the Common Pleas. 10. Form of verdict. 11. Form of decree authorizing investment. | <ol style="list-style-type: none"> 12. Form of petition to invest. 13. Form of decree. 14. Form of petition to invest in improvements. 15. Form of petition of guardian. 16. Form of petition for leave to pay into court. 17. Form of order of court. 18. Form of petition for leave to draw out. 19. Subjects treated of in volume 2. |
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i. Demand for issue before an auditor.

Under section 55 of the act of March 29, 1832, P. L. 190, a demand for an issue to be tried in the Common Pleas, upon a fact or facts in dispute before an auditor, should be definitely set out and the issue so framed that it may clearly appear what is affirmed on one hand and denied on the other;¹ however, where there is no rule of court regulating this, a strict requirement will not be made.² Upon this demand the auditor must pass in the first instance.³ It must be made before him in proper time so that he may decide from the evidence whether the alleged fact in dispute is material and whether it is his duty to report.⁴ But it has also been held that the Orphans' Court has power to direct an issue even after the report of the auditor.⁵ It is the duty of the auditor, upon demand for an issue, to take the testimony upon the point and report it with his opinion as to whether or not an issue should be awarded.⁶ He has no power to certify an issue; he can only report his opinion. It is the duty of the court to do so.⁷ In a number of jurisdictions it has been ruled that a party cannot take his chances of a favorable report from the auditor, on the facts, and after his report filed, ask the court for an issue.⁸ It has been held, too, that the request comes too late after

¹ Curren's Est., 11 Phila. 59.

² Daddow's Apln., 1 Leg. Rec. 90 (Schuylkill Co.).

³ Hansell's Est., 11 Phila. 47.

⁴ Beehler's Est., 3 Phila. 254.

⁵ Daddow's Apln., 1 Leg. Rec. R. 90.

⁶ Clendaniel's Est., 13 Phila. 248; Fabel's Est., 12 D. R. 329. (See Yohn's Pet., 17 Lanc. L. R. 52.)

⁷ Sheetz's Est., 2 Woodward, 407.

⁸ Bradford's Ap., 29 Pa. 513; Moyer's Est., 1 Pearson, 407; Sharp's

the hearing is closed;⁹ nathless it has been allowed after the evidence was all taken;¹⁰ a court doing equity being unwilling to do inequity to save a rule from being inflexible. The force of this is apparent in a late decision of the Supreme Court, opinion by Dean,¹¹ that there is nothing to prevent the Orphans' Court from sending a disputed question of fact to a jury, on its own motion, if it is not satisfied with the findings of an auditor. It is bound neither by the auditor nor the jury; and, it may direct an issue, though not requested by any one.¹²

2. Awarding the issue.

The awarding of an issue is in the discretion of the court;¹³ and it will be moved to do so only when a material fact is in dispute in regard to which it desires the aid of a verdict of a jury, in case of its conscience.¹⁴ It will not send a hypothetical question to a jury.¹⁵ A question of interpretation of an instrument will not be submitted to a jury, that being for the court as a matter of law;¹⁶ nor will the court award an issue when it has no doubt as to the facts;¹⁷ or where it would seem idle to submit the question.¹⁸ Under section 2 of the act of April 20, 1846, P. L. 411, an issue is a matter of right when the applicant files a proper affidavit and brings himself within its terms.¹⁹

3. Form of issue.

Said Chief Justice Black:²⁰ "When a judge of the Orphans' Court desires to have his conscience informed by a jury, it is necessary that he should state and file the proposition which he considers doubtful at the time he orders the issue. But this is not the issue itself. That is to be made up like other issues, by the pleadings of the parties. It is the duty of the judge to direct the form of the issue. Generally it takes the form of a wager on the truth of the disputed facts. But it need not have that shape if the nature of the subject make another more convenient. Whatever be the form of it, the proceedings shall be such that the jury can find for the plaintiff

Ap., 3 Grant, 260; Vandermark's Est., 2 Luz. L. R. 83; Ralston's Est., 14 Lanc. Bar, 146.

⁹ Young's Est., 148 Pa. 572; Barnes' Ap., 3 Grant, 315; Tassey's Ap., 3 Atl. 101.

¹⁰ Krug's Est., 13 York, 163.

¹¹ Dutton's Est., 205 Pa. 244.

¹² Draper's Est., 10 C. C. 231.

¹³ Baker's Ap., 59 Pa. 313; Thompson's Ap., 103 Pa. 603; Kates' Est., 148 Pa. 471; Ikes' Est., 8 D. R. 501; 200 Pa. 202; P. & L. Dig., vol. 14, col. 24537.

¹⁴ Gray's Est., 13 Phila. 246; Ikes' Est., 200 Pa. 202; P. & L. Dig., vol. 14, col. 24539.

¹⁵ Cobb v. Burns, 61 Pa. 278; Evans' Est., 11 Phila. 113; Yeich's Ap., 1 Mona. 296; Thompson's Ap., 36 Pa. 418.

¹⁶ Curren's Est., 11 Phila. 59.

¹⁷ Krug's Est., 13 York, 163.

¹⁸ For cases where an issue was refused, see P. & L. Dig., vol. 14, col. 24541.

¹⁹ Gordon's Est., 9 Phila. 350; Brinton v. Perry, 1 Phila. 436.

²⁰ Coleman v. Rowland, 1 Pitts. 122.

or for the defendant. That cannot be an issue to which the jury is compelled to respond by a special verdict."

The contesting parties may agree upon the form of the feigned issue and present it to the judge for his direction. The party affirming a fact or facts will be plaintiff and the one denying will be defendant. Then, the question for the jury will be put so that if they find the fact to be as alleged by the plaintiff their verdict shall be for the plaintiff, otherwise for the defendant.

Each fact, it has been said, forms a separate issue, and if several are tried together the jury must make a separate finding upon each.²¹ An issue upon the application of money arising from an Orphans' Court sale can only be tried in the county where the sale was had.²² An issue being awarded, the plaintiff should press it to trial and if he does not, may be nonsuited.²³

[For form of a feigned issue, see Vol. II, Johnson's Practice, "Judgments." See also, *infra*, this chapter.]

4. Verdict and decree.

It has been stated that the judge of the Orphans' Court is not bound by the verdict.²⁴ It is merely advisory, and no decree will be entered upon it if it is against conscience.²⁵ The court may order a new trial and have another jury pass upon it, and so on, until its conscience is satisfied. No judgment is entered upon such verdict,²⁶ but a certificate of it is sent to the Orphans' Court which may enter a decree accordingly or reject it.²⁷ An issue in the Common Pleas, upon distribution of proceeds of a sheriff's sale, may not be binding upon the Orphans' Court, in its outcome, but it may have persuasive force.²⁸

5. Costs.

The unsuccessful party, in such case, is held for the costs. They cannot be paid out of the estate.²⁹ The costs may be taxed after verdict, although the court has made no order directing the costs to be paid or by whom.³⁰

6. Appeals.

It was formerly held that the defeated party had an appeal from the decree of the Orphans' Court, or a writ of error to the Common Pleas under section 8 of the act of April 10, 1848, P. L. 448,³¹ which did not lie until after final decree in the Orphans' Court,³² and on

²¹ Cobb v. Burns, 61 Pa. 278.

²² Gordon's Ap., 93 Pa. 361.

²³ Minium v. Hoig, 34 Pa. 396.

²⁴ Wible v. Wible, 1 Grant, 406; Green v. Mills, 103 Pa. 22.

²⁵ Morton's Est., 7 Phila. 484.

²⁶ Wible v. Wible, *supra*.

²⁷ Finney v. Moore, 8 S. & R. 345.

²⁸ Weimar v. Karch, 153 Pa. 385.

²⁹ York, Etc., Co. v. Kindig, 10 York, 91.

³⁰ Shortlidge v. Walker, 10 Delaware Co. 244.

³¹ Hallowell's Ap., 20 Pa. 215.

³² Green v. Mills, 103 Pa. 22; Shipper's Ap., 4 Penny. 512.

this all errors were overlooked, save such as might influence the decree in the Orphans' Court.³³ The appellate court will not review the discretion of the Orphans' Court in awarding an issue.³⁴ Upon appeal from the decree of the Orphans' Court the whole proceeding, including the trial in the Common Pleas, may be reviewed.³⁵ Upon reversal of the verdict in the Common Pleas, all proceedings in the Orphans' Court subsequent thereto will be set aside.³⁶

7. Form of petition for an issue.

County of —, ss.

Estate of Strawbridge Bannon, deceased.

To — —, Esq., auditor, appointed to distribute the fund in the hands of Frank Lloyd, executor of said estate:

The petition of Sue Bannon respectfully represents:

1. That she is daughter and heir at law of said Strawbridge Bannon, deceased, and has presented her claim and demand before you as such auditor.

2. That here now, before you have closed the case and made your report, your petitioner respectfully requests and demands that you report to the said court, that your petitioner has requested and demanded that a precept be sent to the Court of Common Pleas of our said county, to try before a jury the following question of fact here and now being disputed, to-wit: (here state the fact, and if more than one distinct question arose state each separately and number them), the truth of which your petitioner avers is with her and on the affirmative side of said questions.

(Affidavit of truth.)

Sue Bannon.

8. Form of precept for an issue.

Commonwealth of Pennsylvania,

Luzerne County, ss.

To the Judges of the Court of Common Pleas of the said county, greeting:

Whereas, On the audit and settlement of the account of Nelson Callender, administrator of the estate of S. H. Callender, late of our said county, deceased, there arose, under the evidence then submitted to the judges of the Orphans' Court of said county, a dispute and controversy about material facts in the said case, to-wit:

(1.) Whether there was any hay on the premises of Silas H. Callender, deceased, on the day of his death, to-wit, on the 23d day of October, 1866, or at any time afterwards, and before the 1st day of December, 1866, which belonged to the estate of said decedent, and which was not inventoried or sold at public sale by Nelson Callender, administrator of his estate; if there was any such hay, what was its market value at that time on the premises in Scott Township, this county.

(2.) Whether there were any cows on the premises of Silas H.

³³ Coleman v. Rowland, 1 Pitts. 122.

³⁴ Thomas' Ap., 124 Pa. 640; Thompson's Ap., 103 Pa. 603; Ike's Est., 200 Pa. 202.

³⁵ Hallowell's Ap., 20 Pa. 215; Finney's Ap., 37 Pa. 323.

³⁶ Thomas' Ap., 124 Pa. 640.

Callender, deceased, on the day of his death, to-wit, on the 23d day of October, 1866, or at any time afterwards, and before the 1st day of December, 1866, which belonged to the estate of the said decedent, and which were not inventoried or sold at public sale by Nelson Callender, administrator of his estate; if there were any such cows, what was their market value at that time on the premises in Scott Township in this county.

In the dispute aforesaid, Monroe Callender alleged and stood by the affirmative of the questions aforesaid, and Nelson Callender, the administrator of said estate, denied the allegations, and stood by the negative of the said questions. And the judges of the said Orphans' Court, on due consideration, have deemed it expedient to send the said issues of fact into your said court for a trial by jury.

Now, therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this, our precept, into the office of the prothonotary of our said court, between the said Monroe Callender as plaintiff and the said Nelson Callender, administrator as aforesaid as defendant, so that an issue therein may be formed upon the merits of the controversy between the said parties, and tried in due course, according to the practice of our said courts in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said Silas H. Callender, as heirs, to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into the office of our said court.

Attest:

J. K. Bogert,
Clerk Orphans' Court.

9. Form of pleadings in the Common Pleas.

Luzerne County, ss.

Monroe Callender

v.

Nelson Callender,
Administrator, Etc.

} Issue from Orphans' Court.
No. 84, May Term, 1876.

The plaintiff avers that there was hay on the premises of the decedent, from October 23, 1866, to December 1, 1866, belonging to his estate, worth fifty dollars, which was not inventoried or sold by the defendant as was alleged by said plaintiff, in the Orphans' Court of said county, and certified by the said court into this court as issue of fact No. 1.

The plaintiff further avers that there were cows to the number of two, on the premises of the decedent, from October 23, 1866, to December 1, 1866, belonging to his estate, worth one hundred dollars, which were not inventoried or sold by the defendant, as was alleged by said plaintiff in the Orphans' Court of said county, and certified by the said court into this court as issue of fact No. 2.

All of which the said defendant denies, and thereupon issue is joined, which it is agreed may be tried by the jury without more formal pleadings.

C. E. Lathrop,
Attorney for Plaintiff.
H. W. Palmer,
Attorney for Defendant.

10. Form of verdict.

On the first question of fact No. 1 the jury find in favor of the defendant, and that there was no hay on the premises of S. H. Callender, deceased, at the time alleged by the plaintiff, which belonged to the estate of the said decedent, and which was not inventoried or sold at public sale by the administrator.

And on the second question of fact they find in favor of the plaintiff, and that there were two cows on the premises of S. H. Callender, deceased, at the time alleged by the plaintiff, which belonged to the estate of the said decedent, and which were not inventoried or sold at public sale by the administrator, and that the value of the cows, on the 23d day of October, 1866, was seventy-five dollars.

A. B—, Foreman.

[The above forms are taken from Vol. II, Rhone's Orphans' Court.]

11. Form of decree authorizing investment.

The various acts of assembly and the conditions under which investments by order of the Orphans' Court may be made *pendente lite* have already been given in their proper places. A number of forms are here given.

Estate of ———,
Deceased.

In Orphans' Court of ——— County.

In re petition of Mae Wilson, guardian of ——— and ———, minor children of said decedent, to loan money on bond and mortgage.

Now, ——— day of ———, A. D. 19—, the report of the auditor in the above case having been filed and confirmed absolutely, and the court being of opinion that such investment will be for the advantage of the estate and will not change the course of descent of the fund, it is hereby ordered and decreed that the said guardian do make said investment of said sum of three thousand dollars in manner as follows, viz.: That the said loan be made to ———, of ——— County, Pennsylvania, upon his executing as security therefor a personal bond in double the amount of said sum, and a mortgage on fifty acres of land in said county, as set forth in the petition in this case. The said mortgage to be the first lien against said land. The terms of said bond and mortgage to be as follows: The interest at six per cent. to be made payable semi-annually; the principal to be paid \$—— yearly for ——— years, and the balance in ——— years from the date of the mortgage. The expenses of these proceedings to be paid by the said guardian out of the estate of his ward (or by the borrower).

By the Court.

12. Form of petition of trustee to invest funds in his hands on mortgage.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne:

The petition of David Smith, trustee of Emma Jones, under the will of John Jones, deceased, respectfully represents:

I. That the said John Jones died on the ——— day of ———, A. D. 19—, leaving a will, under the codicil to which William Smith and

Edward Jones, or the survivor of them, were appointed trustees of the said Emma Jones, child of the decedent, with full power and authority to invest whatever they should receive under the said will, in bond and mortgage, on sufficient unincumbered real estate, as by reference to the said will, recorded in Will Book "B," page 99, will more fully and at large appear.

II. That the said William Smith having died and the said Edward Jones having been discharged from his trust by your honorable court, your petitioner was duly appointed trustee of the said Emma Jones in their stead on the — day of —, A. D. 19—.

III. That your petitioner, trustee as aforesaid, now has in his hands a large sum of money, to-wit: the sum of ten thousand dollars (\$10,000), the principal or capital whereof is to remain in his possession, under his control, and the interest, profits, or income thereof are to be paid to the said Emma Jones.

IV. That your petitioner desires to invest the said sum of money in bond and mortgage on certain real estate belonging to John Roe, situate in Wilkesbarre Township, in said county, he being the sole owner of fifty acres of land, with coal underlying, bounded and described as follows, to-wit: (here give a description of the real estate), and he being desirous of borrowing said sum at six per cent. per annum on the security aforesaid, the principal to be paid at the end of five years. That your petitioner considers the proposed investment a good, safe, and desirable one.

Your petitioner therefore prays your honorable court to make an order directing the investment of the said sum of ten thousand dollars on the securities aforesaid on such rates of interest and terms of payment as the court shall think fit, agreeably to the fourteenth section of the act of 29th March, 1832. And he will ever pray, etc.

(Affidavit of truth.)

David Smith.

13. Form of decree.

Estate of John Jones, }
Deceased. } In the Orphans' Court of — County.

In re petition of trustee for investment of funds in his hands.

Now, — day of —, A. D. 19—, it appearing to the court from the report of the auditor appointed to take testimony, etc., in the matter, that due proof has been made of the facts set forth in the petition, notice having been first given to Charles Law, Esq., as next friend of Emma Jones, agreeably to the direction of the court. Now, therefore, after due consideration, the court being of the opinion that the investment prayed for is safe and desirable and not contrary to the direction contained in the said will in regard to the investment of such moneys, it is ordered, adjudged, and decreed, that the said sum of ten thousand dollars (\$10,000) be invested by the said David Smith, trustee, on the securities offered by John Roe at the rate of interest and terms of payment following, viz.: — dollars, to be paid on the — day of —, A. D. 19—, and — dollars on the — day of — each and every succeeding year until the whole be paid, with interest upon the whole principal sum unpaid, payable semi-annually on the first days of — and — at the rate of six per cent. per annum, provided, however, that the

said mortgage shall be a first lien upon the real estate described in the petition.

By the Court.

14. Form of petition by a trustee for leave to invest the money of a cestui que trust for the improvement of his real estate.

To the Honorable, etc.

The petition of John Jay respectfully represents:

1st. That Isaac Wood, late of said county, died on — day of —, 19—, testate, and by his will devised to your petitioner a lot of land in the city of Wilkesbarre, which he denominated his "homestead," in trust as follows:

(A) To collect and receive the annual income, rents, and profits arising therefrom, and to apply the same to the use of my granddaughter, Ruth W. Mills, for and during her natural life, and at her death to convey the same to the child or children of the said Ruth W. who shall be living at the time of her death, and their heirs in equal parts, the issue of any deceased child or children to take as the representatives of their parent.

(B) In trust after the death of the said Ruth W. in the event of her not leaving any child or children, or the issue of any deceased child or children living at the time of her death, then to convey the same to my son John and my daughter Elizabeth, or their heirs.

2d. That said lot of land is more particularly described as follows: (here follows description).

3d. That the said Ruth W. is now a minor, and has B. M. Esty, Esq., as her guardian, and that said John Wood and Elizabeth Wood are still living.

4th. That the buildings on said lot consist of a frame dwelling-house and small out-buildings, all of which are in a dilapidated condition, unfit to occupy, and unproductive, the entire rent from the buildings not exceeding \$500, while the land alone is worth at least \$20,000, and the annual taxes and other charges on the same amount to about \$200.

5th. That under the will of the said Isaac Wood there was placed in the hands of your petitioner the sum of \$10,000 in cash in trust, for the same uses and purposes and to the same persons hereinbefore set forth concerning the real estate.

6th. That your petitioner believes and knows, that if the said property could be improved, by the erection thereon of two brick buildings, to be used as stores and dwellings, it would be of great benefit, not only to the life tenant, but to those who are to take the estate at her death.

7th. That such suitable buildings could be erected on said lot of land at a cost not exceeding \$8,000, which would rent in ordinary times for at least \$1,000, while it is difficult to find investments for the money belonging to the said *cestui que trust* at six per cent.

8th. That a plan and specification of the proposed buildings, with the estimate of M. B. Haupt, a competent builder, are hereto attached.

Your petitioner therefore prays that he may be permitted to invest the said \$8,000 in the erection of such buildings on the lots afore-

said, or so much thereof as may be necessary to erect and complete such buildings, agreeably to the act of assembly of 13th April, 1854. And he will ever pray, etc.

(Affidavit of truth.)

John Jay.

15. Form of petition of guardian for the court to approve an investment made by a former guardian without leave of court.

To the Honorable, etc.

The petition of James Wood, guardian of William Roe, a minor child of Richard Roe, late of said county, deceased, respectfully represents:

1st. That R. Stone was formerly the guardian of said minor, and that as such guardian he did, without authority of the court, invest the money of his said ward, to-wit, the sum of \$1,000, in a bond issued by the city of Wilkesbarre, of the par value of \$1,000, bearing interest at the rate of five per cent. per annum, dated the — day of —, A. D. 19—, and payable ten years from date, which bond the said guardian still holds, less the accrued interest to date, but is desirous of handing it over to your petitioner as cash.

2d. That your petitioner, believing the said bond to be a safe investment, is desirous of taking said bond and holding it as an investment for his said ward.

He therefore prays the court to authorize him to take the said bond at par and to receipt for the same to said R. Stone as cash, and to hold the same as an investment for his said ward. And he will ever pray, etc.

(Affidavit of truth.)

James Wood, Guardian.

Same day appears R. Stone, the guardian named in the foregoing petition, and says the facts stated in the petition are true, and that he joins in the prayer of the petitioner so far as the same relates to the turning over the said bond and taking a receipt therefor as cash.

(Affidavit of truth.)

R. Stone.

(Affidavit of a responsible person, setting forth that the investment is desirable, and giving reasons why.)

16. Form of petition for leave to pay money into court.

To the Honorable the President Judge of the Orphans' Court of the County of Luzerne:

The petition of John Dean, administrator of the estate of Henry Weeks, deceased, respectfully represents:

1st. That your petitioner, administrator of said decedent, filed an account of his doings as administrator, which account has been confirmed absolutely by the said court, and the balance in his hands has been distributed by this court to the parties entitled thereto, confirmed absolutely the — day of —, 19—. (See Distribution as per Audit Docket, No. 2, p. 225.

That by such distribution there was awarded to

James Weeks, a son, \$100 00

Lucy Weeks, a daughter, 50 00

2d. That petitioner has the money on hand to pay these parties, but they have long since been lost track of by your petitioner, and

do not come to get their money, and petitioner knows of no way to compel them. The residence of these parties is to your petitioner unknown.

3d. That your petitioner wants to formally close the estate and be discharged. He therefore prays the court to permit him to make a deposit of it in some proper depository, to be designated by the court. And he will ever pray, etc.

(Affidavit of truth.)

John Dean.

17. Form of order of court.

Order of Court.

Now, — day of —, A. D. 19—, the prayer of the petitioner is granted, the deposit to be made in the Miners' Savings Bank as directed by general rule of court.

By the Court.

18. Form of petition for authority to draw money out of court.

To the Honorable, etc.

The petition of Conrad Weeks respectfully represents that he is the administrator of Lucy Weeks, deceased, duly appointed by the register of wills, etc., of — County, State of Pennsylvania, as appears by a certificate hereto attached.

That the Orphans' Court of this county, upon the audit of the estate of Henry Weeks, deceased, awarded to Lucy Weeks, who is now dead, the sum of fifty dollars, which was on the — day of —, 19—, by order of this court deposited in the Miners' Savings Bank, and has been drawing interest at three per cent.

Your petitioner prays that the said sum of fifty dollars with the accrued interest may be paid to him. And he will ever pray, etc.

Conrad Weeks,
Admr., etc.

(Affidavit of truth.)

Order of Court.

Now, — day of —, 19—, it is ordered that a check be drawn on the Miners' Savings Bank by the clerk of the Orphans' Court for the amount stated in the petition, with interest.

By the Court.

19. Subjects of Orphans' Court practice treated in Vol. II.

Estrepelement in case of decedents' estates, act of April 22, 1850, P. L. 549, see Vol. II, p. 670, par. 31.

Judgments against decedent, see Vol. II, p. 220. par. 15; p. 226, par. 24.

Sci. fa. sur recognizance in the Orphans' Court, see Vol. II, p. 820, par. 36, *et cet.*, the action being in the Common Pleas.

Sci. fa. on transcripts from the Orphans' Court, see Vol. II, p. 828, par. 9, *et cet.*

CHAPTER LVII.

TESTAMENTARY TRUSTS — ACTIVE AND PASSIVE — SEPARATE USE AND SPENDTHRIFT.

1. Origin of testamentary trusts.
2. Heir and trustee at the civil law.
3. Particular things in trust.
4. Kinds of trusts.
5. How a trust may be created.
6. Testamentary trust, how created.
7. How an active trust is created.
8. Active and continuing trust.
9. Executory trust defined.
10. Words sufficient to create a trust.
11. Precatory words.
12. Parties requisite to a trust.
13. Trusts not to fail for want of a trustee.
14. Appointment to fill vacancy.
15. Appointment when co-executor is alive.
16. Dismissal of trustee for misbehavior.
17. Vacancy by declination, to be filled.
18. Transfer of estate to foreign trustee.
19. Removal of trustees in Philadelphia.
20. Executors may renounce.
21. Appointment of trustee *durante absentia*.
22. Trustees to give bond.
23. Distribution of such estate.
24. Form of petition to fill vacancy.
25. Trust *ex maleficio* under a will.
26. Limitation on resulting trusts.
27. Time when limitation begins to run.
28. Active and passive trusts.
29. Management of the estate.
30. Trust to protect remainders.
31. Termination of trust by accomplishment.
32. Rights of the *cestui que trust*.
33. Time of vesting, etc.
34. Devolution of the legal title.
35. Surviving trustees may execute trust.
36. Deeds by surviving executor, etc.
37. Right to follow trust funds.
38. Jurisdiction of the Orphans' Court.
39. Termination of trust in various ways.
40. Conveyance at end of trust.
41. Distribution.
42. Creation of separate use trust.
43. No particular words necessary.
44. Necessity for trustee.
45. Power of married woman over the estate.
46. Rights of husband.
47. Rights and powers of trustee.
48. Termination of separate use trust.
49. Spendthrift trusts.
50. Beneficiary of a spendthrift trust.
51. Trust annexed to absolute estate.
52. Necessity for trustee.
53. Protection of trust fund.
54. Trustee of a spendthrift trust.

I. Origin of trusts testamentary.

"It must be observed that anciently all trusts were weak and precarious; for no man could be compelled to perform what he was only requested to perform. But when testators were desirous of an inheritance or legacy to persons to whom they could directly give neither, they then bequeathed in trust to some person capable of

taking; and such bequests were called fiduciary [*fidei commissa*],¹ because the performance could not be enforced by law, but depended wholly upon the honour of the trustee. The Emperor Augustus, having been frequently moved with compassion on account of some persons and detesting the perfidy of others, commanded the consuls to interpose their authority; and this, being a just and popular command, gave them by degrees a continued jurisdiction; and in process of time, trusts became so common, and were so highly favoured, that a *prætor* was purposely appointed to give judgment in these cases and was therefore called the commissary of trusts."²

2. Heir and trustee.

"There must be an heir appointed to every testament; to whom it is entrusted in confidence that he will restore the inheritance to some other person; for without an heir, a testament is ineffectual. * * * But a testator may request his heir [*haeredem*] to restore a part of the inheritance only, and may make him a trustee upon condition, or from a day certain."³

3. Particular things in trust.

"A man may also leave particular things in trust, as a field, silver, clothes or a certain sum of money; and may request either his heir to restore them, or even a legatee; although a legatee cannot be made chargeable with a legacy."⁴

4. Kinds of trust.

It is not the purpose of this treatise to discuss the various kinds of trusts and their nature, which would require volumes. Reference is made to Lewin on Trusts, three volumes, and Lewis on Perpetuities; also to Vol. XXII, Pepper & Lewis' Digest of Decisions, col. 37949, *et seq.*; where all the Pennsylvania cases are analyzed, with keen legal discrimination, as to the diverse facts and the application of principles.⁵ This inquiry will be confined to trusts which come within the jurisdiction of the Orphans' Court.

"The law has distinguished between the various kinds of trusts, according to their nature; hence we have trusts created by deed, by will and by parol; trusts resulting from the acts of the parties and by operation of law; separate use trusts, spendthrift trusts; active trusts and dry trusts; trusts for accumulation; trusts voluntary for the settlor himself or for others; drunkard's trusts and some other forms."⁶

5. How a trust may be created.

In order to create a trust there must be the expression of an intention, not to create a present gift, but to become a trustee.⁷ If

¹ Section 1, Lib. 2, Tit. 21. Justinian.

² Section 1, Lib. 2, Tit. 23. Justinian.

³ Section 2, Lib. 2, Tit. 23. Justinian.

⁴ Lib. 2, Tit. 24, *summa*. Justinian.

⁵ See also Bierly on Executors, Wills and Trustees, p. 127.

⁶ Bierly on Executors, etc., p. 127, par. 2.

⁷ Long's Ap., 86 Pa. 196.

it be intended, it will be equally effective whether the donor transfers the title to the trustee or declares that he himself holds the property for the purposes of the trust.⁸ It need not be irrevocable.⁹ Three things must concur: Sufficient words, a definite subject and a certain or ascertained object; to which may be added that the terms of the trust should be sufficiently declared. One may either settle it upon himself, by such a declaration, or another as trustee; if upon himself, no transfer is necessary. If it be in writing, no particular form is essential, if it be clearly expressed. So when a father makes a writing that he holds a certain sum of money for his daughter, with interest to her during her life and principal to her children at her death, it is a sufficient declaration of a trust and the rule in Shelley's case has no application.¹⁰

6. Testamentary trust, how created.

A trust as to the application of an estate devised may arise from a parol understanding had between the devisor and devisee privately, although the devise be absolute upon its face.^{10a} If in one part of the will a fee is created, but subsequently a less interest is intended the latter will restrict the former, and a trust may thus be created.¹¹ Where a gift of the use of a house in trust for life, contains no devise over, but directs that the trustee should pay certain legacies after the death of the *cestui que trust*, it is valid and there is an estate for life only.¹² If a grantor makes a deed of trust for his own personal convenience and no beneficial interest is vested in anyone until after his death, such disposition is testamentary and revocable. A voluntary deed will be set aside, if it appears that the settlor was not advised of the necessity of a power of revocation in it, to protect a beneficiary interest accruing after death, against the demands of creditors.¹³ Where by codicil a testator created a trust for a niece and a son whom he had excluded by the will, which gave the residue to his children except this son, there was no conversion, except as to the trust, perhaps, and the Orphans' Court might decree partition.¹⁴

7. How an active trust is created.

To establish an active trust in Pennsylvania the duty to be performed by the trustee must not only involve some positive action

⁸ Dickerson's Ap., 115 Pa. 210.

⁹ Lines v. Lines, 142 Pa. 149.

¹⁰ Eshbach's Est., 197 Pa. 153, 162.

^{10a} McAuley's Est., 184 Pa. 124, distinguishing Irwin v. Irwin, 34 Pa. 525.

¹¹ Krebs' Est., 184 Pa. 223, distinguishing Silknitter's Ap., 45 Pa. 365, and Ritter's Est., 148 Pa. 577. (See Dickinson's Est., 20 Montg. 83; 209 Pa. 59.)

¹² Nevin's Est., 192 Pa. 258. No particular form of words is necessary to create a trust. Tilford's Case, 8 Watts, 531; Sheets' Est., 52 Pa. 257; Craige's Est., 12 Phila. 163; Colehower's Est., 12 Phila. 78; Eichelberger's Est., 135 Pa. 160; Cotton's Est., 6 D. R. 44. Its validity depends upon its effect and purpose only. Davis' Est., 6 D. R. 45.

¹³ Bank v. Ins. Co., 186 Pa. 333.

¹⁴ Reid v. Clendenning, 193 Pa. 407.

on his part, but action attended with some discretion, as to pay "net income" to the *cestui que trust*, and, upon petition, in such case, a trustee will be appointed.¹⁵ Where a will directs the trustee to manage and sell when two-thirds of the parties interested agree, and to divide the proceeds is an active trust and not in conflict with the rule against perpetuities.¹⁶ In a case where the testator created a separate use trust for his daughter during her life and at her death gave the same to the issue of her body, but if she should have none, then to revert, with power to extinguish the trust, it was held to be an active trust;¹⁷ and, upon the death or divorce of the husband becomes executed and the legal title vested.¹⁸ The legal estate will remain in the trustee so long as it is necessary to preserve the estate itself, as in a separate use trust for a married woman.¹⁹ The trustee having a power to surrender at any time up to the death of the *cestui que trust*, his trust is active.²⁰

8. Active and continuing trust.

Where a testator created a trust for his children, "making them all equal at twenty-one years of age," but giving his executors and trustees power to give or withhold the proceeds of the estate, "as they regard their best interest," it was valid,²¹ and the continuance thereof not limited to the time when the youngest child came of age, except in the discretion of the trustees, even during the lives of the children, *cestuis que trustent*. Words can only be supplied where it is necessary to give effect to the unquestionable purpose of the testator.²² "Making them all equal," in the will, referred to, had reference to the accumulated income at their majority.²³

9. Executory trust defined.

An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done, in order to complete and perfect the trust and to give it effect. The intention of the testator to create a trust, in such case, will be inferred from his words though meagre.²⁴ Where the limi-

¹⁵ Hemphill's Est., 180 Pa. 95. (See P. & L. Dig., vol. 22, col. 37967.)

¹⁶ Cooper's Est., 150 Pa. 576. (See Moorhead's Est., 180 Pa. 119.)

¹⁷ Barnett's Ap., 46 Pa. 392.

¹⁸ People's Sav. Bank v. Denig, 131 Pa. 241, citing Koenig's Ap., 67 Pa. 352; Bacon's Ap., 67 Pa. 504; Dodson v. Ball, 60 Pa. 492; Ogden's Ap., 70 Pa. 501.

¹⁹ Kay v. Scates, 37 Pa. 31; Rife v. Geyer, 59 Pa. 393; Thompson v. Carmichael, 122 Pa. 478.

²⁰ Wallace v. Denig, 152 Pa. 251; 166 Pa. 29. (See these cases of active trust; Bois' Est., 177 Pa. 190; Fetherman's Est., 181 Pa. 349; McIntosh's Ap., 158 Pa. 528; Potteiger's Ap., 170 Pa. 531; Fisher v. Wister, 154 Pa. 65.)

²¹ Earp's Ap., 75 Pa. 119; Wilkinson v. Buist, 124 Pa. 253.

²² Varner's Ap., 87 Pa. 422.

²³ Marshall's Est., 147 Pa. 77.

²⁴ Smith's Est., 144 Pa. 428, Clark, J. (See also Gaffney's Est., 146 Pa. 49, as to a book account as a declaration of trust.)

tations of a trust are fully and perfectly declared, it is regarded as an executed trust.²⁵

10. Words sufficient to create a trust.

A bequest to one subject to maintenance of another creates a trust;²⁶ and a devise for certain uses and purposes, also.²⁷ A trust will not fail because there is no disposition of the *corpus* in remainder and the beneficiaries for life are the heirs at law.²⁸ Where a will creates a trust, though the executors are not designated as trustees, they will be so considered and the fund awarded to them.²⁹ The words "in trust" may not in themselves import more than confidence;³⁰ so of "to be paid" or "shall be paid," as applied to income.³¹ An invalid will of a married woman cannot be transformed into a declaration of trust.³² Where a will gives a share to a daughter and directs that one-half of it be paid to her husband he takes it absolutely and not upon a trust;³³ and so of a clause which gives an executor absolute power to "appropriate" the residue as he sees fit;³⁴ or where the income is directed to be paid to one for the support of himself and children.³⁵ Having created trusts in his will the testator may revoke them and give the legacies direct without any trust.³⁶ To create a trust in legatees the language must be lucid and without doubt.³⁷ Where a trust is predicated upon an act to be done, but which is not done, no trust has fructified.³⁸

A bequest of the use of a fund to a married woman for life, with a gift over of the fund at her decease, creates a trust in her for the remainder.³⁹ Where a will directs the executors to pay debts but does not authorize the sale of the land, no trust arises to charge such debts upon the land.⁴⁰ A trust in a will to care for graves and tombstones on a burial lot was held void because it did not specify whether the sum should be paid out of the income or principal.⁴¹

²⁵ Cushing v. Blake, 30 N. J. Eq. 689.

²⁶ Pierce v. McKeehan, 3 W. & S. 280; Brownfield's Est., 193 Pa. 163, 165.

²⁷ Eyre's Est., 13 W. N. C. 314.

²⁸ Clarke's Est., 6 Phila. 163.

²⁹ Oliver's Est., 4 C. C. 209; Beilstein's Est., 147 Pa. 85; M'Mullin v. M'Mullin, 8 Watts, 236; Geiger's Est., 9 D. R. 457.

³⁰ Freedley's Ap., 60 Pa. 344.

³¹ Waldron's Est., 11 D. R. 441.

³² Long's Ap., 86 Pa. 196.

³³ Wike v. Aurandt, 48 Pa. 103.

³⁴ Beck's Ap., 116 Pa. 547.

³⁵ Stewart v. Cochran, 49 Pitts. L. J. 437.

³⁶ Lejee's Est., 181 Pa. 416.

³⁷ Carlile's Est., 3 D. R. 153.

³⁸ Miller v. Schneider, 5 Rawle, 140; Buchanan v. Greer, 22 W. N. C. 171; Lippe's Est., 7 D. R. 288.

³⁹ Clevestine's Ap., 15 Pa. 495; Parker's Ap., 61 Pa. 478; Reiff's Ap., 60 Pa. 361. (See Umstead's Ap., 60 Pa. 365; Reiff's Ap., 124 Pa. 145.)

⁴⁰ Mitchell's Est., 182 Pa. 530.

⁴¹ McElwain's Est., 11 Lanc. L. R. 193.

11. Precatory words.

Words in a will which express desire, confidence and recommendation, called "precatory," do not in themselves effectuate a trust in Pennsylvania, as in England, following the Roman rule as laid down at the beginning of this chapter.⁴² Praying words may become mandatory words by force of the context.⁴³ The court can only make out the intention of the testator from his words.⁴⁴ If the words vest an absolute gift there is no room for a trust to abide.⁴⁵

12. Parties requisite to a trust.

The parties necessary to a trust are the settlor, the trustee and the *cestui que trust*, or beneficiary.¹ The settlor and beneficiary may be the same person.² If no trustee is named equity will raise one.³

13. Trusts not to fail for want of trustee, etc.

Section 1 of the act of May 9, 1889, P. L. 173, provides:

"No disposition of property heretofore or hereafter made for any religious or charitable use, shall fail for want of a trustee or by reason of the objects ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity, or in excess of the annual value limited by law; but it shall be the duty of any court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity, subject to an appeal as in other cases, in said courts respectively, and to be reviewed, reversed, affirmed or modified by the Supreme Court of this state."⁴

14. Appointment to fill vacancy.

Section 1 of the act of April 22, 1846, P. L. 483, provides:

"In all cases where any trustee or trustees created or vested with authority by the last will and testament of any deceased person, or any writing testamentary in the nature of a will, shall die, resign or be otherwise removed from the trust, the Orphans' Court of the proper county shall have power and authority to appoint another trustee or trustees, to supply the vacancy occasioned by such death, resignation or removal, and shall require security for the faithful performance of the trust; and the said courts are hereby

⁴² Pennock's Est., 20 Pa. 268, where Lowrie, J., discusses the whole subject; P. & L. Dig., vol. 22, cols. 37997-38002; Craig v. Reilly, 13 Supr. C. 536; Bellas' Est., 176 Pa. 122; Murphy's Est., 184 Pa. 310; Byer's Est., 186 Pa. 404; Smith's Est., 27 Supr. C. 494; Miskey's Est., 209 Pa. 474.

⁴³ Presby., Etc., v. Culp, 151 Pa. 467; Steenson's Est., 5 Lack. L. N. 163; Oyster v. Knull, 137 Pa. 448, 2 C. R. A., col. 4220.

⁴⁴ Thewlis v. Fenton, 224 Pa. 25; Slemmon's Est., 173 Pa. 156.

⁴⁵ Schleicher's Est., 201 Pa. 612.

¹ Smith, J., in Patrick v. Smith, 2 Supr. C. 113; 165 Pa. 526.

² Dickerson's Ap., 115 Pa. 198; Crawford's Ap., 61 Pa. 52; Eshbach's Est., 197 Pa. 153, 162; Smith's Est., 144 Pa. 428; P. & L. Dig., vol. 22, col. 38021.

³ Varner's Ap., 80 Pa. 140; Fitzgerald's Est., 11 D. R. 628.

⁴ Lennig's Est., 154 Pa. 209.

invested with power to dismiss all executors, administrators or guardians of estates held by testamentary trust, in case of waste or mismanagement, coming within the provisions of the 22d section of the act of 29th March, 1832, relative to Orphans' Courts."

The jurisdiction of the Orphans' Courts over testamentary trusts, given *virtute officii*, is exclusive.⁵ Where the trust arises independently of the office of executor, the jurisdiction is concurrent with the Common Pleas.⁶ A trust *virtute officii* is one arising from some power given or act required in the will by the trustee.⁷

15. Appointment when co-executor is alive.

By section 2 of the act of April 10, 1849, P. L. 597, extended to the entire state by act of April 23, 1864, P. L. 550, it is provided that —

"Whenever, by the provisions of any last will and testament admitted to probate in the City and County of Philadelphia, a trust has been or shall be declared of and concerning any real or personal estate, to be executed by the executor or executors of said last will, whether by virtue of their office or otherwise, and any of the said executors shall die, renounce, resign, be dismissed from or refuse to act in the said trust, leaving the other executor or executors continuing therein, it shall be lawful for the Orphans' Court, * * *, on the application of any party in interest, and with the consent of the continuing executor or executors, with notice to such of the other parties in interest as the said court may deem material, to appoint a trustee or trustees in the place of the executors so dying, renouncing, resigning, dismissed or refusing to act; which said trustee or trustees shall have the same power and interest over and in the premises in trust, as the executor or executors in whose stead he or they shall be so appointed as aforesaid; and it shall also be lawful for the said court to appoint a successor or successors to such trustee or trustees, from time to time, whenever from death, resignation or otherwise, the same shall be necessary or expedient."

16. Dismissal of trustee for misbehavior.

Section 1 of the act of April 7, 1859, P. L. 406, provides:

"The Orphans' Courts of the several counties of this commonwealth shall have full power and authority, in all cases of trusts derived under, or created by any last will and testament, whether vested in executors, administrators with the will annexed, or any other trustee or trustees, to dismiss from such office or trust any and all such trustee or trustees as aforesaid, whenever such courts shall be satisfied that there has been waste or mismanagement in the administration of such trust, or whenever the said trustee or trustees shall fail or neglect to pay over the principal or income of the trust funds, according to their duty under their several

⁵ Innes' Est., 4 Wharton, 179; Brown's Ap., 12 Pa. 333; Seibert's Ap., 19 Pa. 49; Wapples' Ap., 74 Pa. 100.

⁶ Kuhler v. Hoover, 4 Pa. 331; Wheatley v. Badger, 7 Pa. 459.

⁷ Comth. v. Barnitz, 9 Watts, 252; Olwine's Ap., 4 W. & S. 492; Anderson v. Henszey, 9 Phila. 14; Nixon's Est., 7 Phila. 505; Eberts' Ap., 9 Watts, 300; Baird, *in re*, 1 W. & S. 288.

trusts, or fail or neglect to comply with any order or direction of the said courts made in relation to said trust; and shall further have power to make all such orders for the surrender and delivery of the funds, securities, moneys, books, accounts and papers belonging or relating to said trusts, to such person or persons as such courts may appoint to receive the same, and to enforce obedience to such orders by attachment, execution or otherwise, as to them shall seem necessary and proper for the due protection of the rights and interests of any and all parties interested in such trusts."

17. Vacancy by declination of trust to be filled.

Section 1 of the act of March 13, 1859, P. L. 611, provides:

"In all cases of trusts created by will, and annexed to the office of executor, he may decline to accept the trust, or be discharged therefrom, without affecting his office of executor, and the Orphans' Court of the proper county shall have power to fill the vacancy by appointment; and if a trust fund or estate is committed to an executor, or other trustee, in which several *cestuis que trust* have or are entitled to enjoy separate interests, and a vacancy should in any manner occur in the office of trustee thereof, the said courts may appoint one or more trustees of such estate or fund, for each of the *cestuis que trust*, on his or her application; and the said trustee shall give security as is provided by existing laws."

18. Transfer of estate to foreign trustees.

Section 1 of the act of May 8, 1889, P. L. 123, provides:

"When all the persons for whose benefit a valid trust shall have been created by deed or will, for a term of years or for life, shall have removed from this state into any other state or territory of the United States to permanently reside therein, the court having cognizance of such trust is hereby authorized and empowered, on application by, or on behalf of all the persons interested in said trust, to direct the trustee or trustees appointed in and by said deed or will, to pay over said trust moneys, or transfer the securities in which they may have been invested, to a trustee or trustees duly appointed by the court of such other state or territory: *Provided, however,* It shall be made to appear to the satisfaction of the court making such order or decree of transfer, that the trustee or trustees so appointed by the court of such other state or territory, have given security in double the amount of the trust funds to be transferred, and that such security has been approved by such court."

19. Removal of trustees of life estate in Philadelphia.

Section 1 of the act of April 9, 1868, P. L. 785, provides:

"Where any trust now exists or is hereafter created, the *cestuis que trust*, or a majority of them, having the life estate, shall have the right to elect or choose trustees to execute said trust; and upon petition of the *cestuis que trust* or parties in interest as aforesaid, having such life estate, the Court of Common Pleas or Orphans' Court in and for the City of Philadelphia, having jurisdiction, shall remove the acting trustee, or trustees, and appoint other or others as chosen or elected by said parties, who shall have all the powers to

execute said trusts, upon security being approved and entered by said appointees as directed by said court appointing them."

If a trustee has been appointed without notice to the life tenants, he will be dismissed on their application.⁸ It is sufficient cause to dismiss, when it is shown that the retention of the trustee would work probable disadvantage and inconvenience to the *cestui que trust*.⁹ The court is the judge of the sufficiency of the cause.¹⁰ It will require a greater cause to be shown for the removal of a testamentary trustee than a statutory one.¹¹ If a majority of those who are interested in the estate are satisfied with the acts of the trustee he will be retained.¹²

20. Executors may renounce testamentary trust.

Section 1 of the act of April 13, 1859, P. L. 611, provides:

"In all cases of trusts provided by will, and annexed to the office of executor, he may decline to accept the trust, or be discharged therefrom without affecting his office of executor, and the Orphans' Court of the proper county shall have the power to fill the vacancy by appointment; and if a trust fund or estate is committed to an executor, or other trustee, in which several *cestuis que trust* have or are entitled to enjoy separate interests, and a vacancy should in any manner occur in the office of trustee thereof, the said courts may appoint one or more trustees of such estate or fund, for each of the said *cestuis que trust*, on his or her application; and the said trustee shall give security as is provided by existing laws."

This act does not apply to an executor to whose office a testamentary trust is attached.¹³

21. Appointment of trustees durante absentia.

Section 1 of the act of April 11, 1879, P. L. 21, as amended by act of March 30, 1905, provides:

"Whenever it shall be made known to the Orphans' Court of the proper county, by the petition, verified by affidavit, of the husband, wife, next of kin or other person interested, in the order named, of any person who has been a resident either of this commonwealth or of any other state, territory, or foreign country, and who has absented himself or herself from his or her usual place of abode, such petition being supported by the affidavit of at least one disinterested resident of the ward, borough or township, or other territorial sub-division, where such person was last known to reside, that such person has been absent from his usual place of abode for the space of one year, that his whereabouts is not and has not been known for a period of one year, and he has left an estate, either

⁸ Stevenson's Ap., 68 Pa. 101; Lancaster's Ap., 111 Pa. 524.

⁹ Parson's Ap., 82 Pa. 465; Kellberg's Ap., 86 Pa. 129; Mifflin's Est., 19 Phila. 200; Patterson's Est., 3 C. C. 236; Howell's Est., 16 Phila. 232; Hilles' Est., 14 Phila. 247.

¹⁰ Theis' Est., 20 Phila. 38.

¹¹ Keen's Est., 6 C. C. 645; Hurley's Est., 5 C. C. 574.

¹² Morgan's Est., 8 C. C. 260; Gray's Est., 4 Kulp, 157; Hurley's Est., 5 C. C. 575; Sproul v. Bloomer, 24 Pitts. L. J. 115; Syfert's Est., 9 Phila. 320; Hille's Est., 9 W. N. C. 421.

¹³ Strobel's Est., 2 W. N. C. 409.

real or personal, or both, situate, owing or belonging to him, within this commonwealth, without any person to take charge of or manage the same, it shall be lawful for said court to appoint one or more trustees, who shall take charge of and manage the estate of such person so being absent, and who shall be under the control and direction of said court: *Provided*, That in all cases of such absentees, who have been or may be nonresidents of this commonwealth, the aforesaid petition shall be supported by the affidavit of at least two such disinterested persons."

Section 2 of the act of 1905 provides:

"That in all cases of nonresident absentees the words 'the Orphans' Court of the proper county' as used in this act, shall be construed to mean the Orphans' Court of the county in which all or the greater portion of his estate, within this commonwealth, shall be found."

Section 3 made the act applicable to cases of absenteeism both before and after its passage.

22. Trustees to give bond.

Section 2 of the act of 1879, *supra*, provides:

"Such trustees, before taking charge of such estate, shall give bond in twice the amount of the personal property and seven years' rental of real estate, with sureties to be approved by said court, for the faithful discharge of his or their duties, and shall within thirty days after his or their appointment file an inventory of said estate, and render an account at least once in three years, or oftener, if required by said court."

23. Distribution of such estate.

Section 3 of said act, *supra*, provides:

"Distribution of said estate may be made under direction of said court, after seven years from the appointment of such trustee or trustees, or sooner, if the death of such absent person shall be established by evidence satisfactory to said court: *Provided*, That upon the return of such person, so being absent, before distribution as aforesaid, said trustee or trustees shall render an account and restore to him the estate, after deducting the reasonable expenses of said trust, and compensation of said trustee."

The validity of this section was once questioned,¹⁴ but the decision of *Cunnius v. Reading* under the act of 1885, *supra*, seems to maintain it.¹⁵

24. Form of petition for the appointment of a trustee to fill a vacancy.

To the Honorable, etc.

The petition of Mary Hewit respectfully represents:

1st. That A. Hewit, late of said county, died about the — day of —, 19—, testate, and by his will left certain real and personal estate to John Jay and James Fox, in trust for the use of your petitioner and others, as will appear by a copy of the will hereto attached.

¹⁴ Beck's Est., 15 C. C. 564; *Scott v. McNeal*, 154 U. S. 34.

¹⁵ *Cunnius v. School District of Reading*.

2d. That said John Jay and James Fox took upon themselves the burden of said trust, and James Fox died on the — day of —, 19—, leaving the said John Jay continuing in said trust, and that he, as well as your petitioner, is desirous to have this court appoint a trustee to fill the vacancy caused by the death of the said James Fox.

Your petitioner therefore prays the court to appoint William Shoemaker, or some other fit person, trustee, to supply the vacancy aforesaid, agreeably to the acts of Assembly in such case made and provided.

And she will ever pray, etc.

Mary Hewit.

Affidavit to the truth.

25. Trust *ex maleficio* under a will.

"Where a devise or bequest is induced by or made under a promise or agreement of the devisee or legatee to apply or hold the property for the benefit of another, or of the devisee and another, or to pay legacies, a trust is hereby created, which may be established by parol evidence, and is not contrary to the statute of wills; and declarations of the testator made contemporaneously with the making of his will are competent evidence to establish the trust in him to whom an absolute estate is devised, when followed by evidence of admissions by the devisee that the devise was obtained by his fraudulent procurement; the devisee or legatee in such case is a trustee *ex maleficio* for the parties for whose benefit his promise is made."¹⁶ But in the absence of fraud a devisee cannot be turned into a trustee *ex maleficio*, within the exception of the act of April 22, 1856, P. L. 532, although he did not keep his promises.¹⁷ A trust, however, may be created, which equity will enforce.¹⁸ In order to establish a trust it must be proved by clear testimony and not by dying declarations or requests of the testator.¹⁹ The Orphans' Court has complete jurisdiction to ascertain whether a parol trust has been created.²⁰

26. Limitation on resulting trusts.

It is provided in section 6 of the act of April 22, 1856, P. L. 532, among other things that the right of action shall be barred, "to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued with the right of entry, unless such contract shall give a longer time for its performance, or there has been in part a substantial performance, or such contract, equity of redemption or trust shall have

¹⁶ Pepper & Lewis Dig. of Dec., vol. 22, col. 38080, citing Hoge v. Hoge, 1 Watts, 163; Jones v. McKee, 3 Pa. 496; Church v. Ruland, 64 Pa. 432; Edwards v. Smedley, 1 Del. Co. 544; Forscht's Est., 2 D. R. 294. (See Kelsey's Ap., 113 Pa. 119, and McAuley's Est., 184 Pa. 124.)

¹⁷ Irwin v. Irwin, 34 Pa. 525; Schultz's Ap., 80 Pa. 396; Bonner v. Rowdybush, 3 Penny. 92; McCloskey v. McCloskey, 205 Pa. 491.

¹⁸ Brooke's Ap., 109 Pa. 188; Hoffner's Est., 161 Pa. 331.

¹⁹ Fox v. Fox, 88 Pa. 19; Smith's Est., 3 D. R. 247.

²⁰ Lowry's Ap., 114 Pa. 219. The act of June 4, 1901, P. L. 425, requiring a declaration of trust to be recorded, relates to resulting trusts in the purchase of real property.

been acknowledged by writing to subsist by the party to be charged therewith within the said period."

27. Time when it begins to run.

The act of 1856, *supra*, has been declared to be a statute of repose,²¹ and the old rule was that it began to run from the discovery of the fraud.²² But a new academic rule was laid down on the second presentation of *Smith v. Blachley*,²³ that the time begins to run under the statute from the act itself where it is complete and ends with the fraud. If, however, the fraud is continued by efforts or acts to conceal it, then it begins to run from the discovery of it. Each case should stand upon its own circumstances.²⁴ A distinction has been drawn between an active express trust and a resulting trust or a trust *ex maleficio*.²⁵

The statute of limitations begins to run only from the termination of the trust, when it is an express trust, subject to equitable principles, as between the trustee and *cestui que trust*; ²⁶ but as to an alleged constructive trust, the rule is different.²⁷ There is no such trust between an executor and a claimant as will toll the statute.²⁸

28. Active and passive trust.

It was said by Smith, J.:²⁹ "A trust is passive when the trustee has no duty to perform, or when the trust serves no purpose, or none that would be equally served without it. * * * A trust is active where the interposition of the trustee is necessary to carry out its purpose, with respect to immediate or remote beneficiaries; as the investment and care of property, a provision for a spendthrift or a person not *sui juris*, the maintenance of a separate estate for a wife, the preservation of estates for those in remainder, the exercise of discretionary powers respecting the subject of the trust." "Whenever it is necessary for the accomplishment of the object of the creator of the trust that the legal estate should remain in the trustee, then the trust is a special active one. * * * The true test is whether a court of Equity in Pennsylvania would decree a conveyance of the legal title."³⁰ Where the appointment of a

²¹ *Cochran v. Young*, 104 Pa. 333.

²² *Quinn's Est.*, 144 Pa. 444; *Smith v. Blachley*, 188 Pa. 550, and cases cited in the opinion by Dean, J.

²³ *Smith v. Blachley*, 198 Pa. 173; *Noonan v. Pardee*, 200 Pa. 474; *Taylor v. Hammal*, 201 Pa. 546; *Derr's Est.*, 203 Pa. 96; *States v. Bank*, 203 Pa. 69; *Banes v. Morgan*, 204 Pa. 185; *Franklin v. Franklin*, 22 Supr. C. 463.

²⁴ *Christy v. Sill*, 95 Pa. 380; *Frost v. Bush*, 195 Pa. 544; *Olinger v. Shultz*, 183 Pa. 469.

²⁵ *McClintock's Ap.*, 29 Pa. 360; *Kittle's Est.*, 156 Pa. 445. (When it begins to run from the death of the trustee, see *Preston v. Preston*, 202 Pa. 515.)

²⁶ *Johnston v. Humphreys*, 14 S. & R. 394; *App v. Driesbach*, 2 Rawle, 287; *Zacharias v. Zacharias*, 23 Pa. 452.

²⁷ *Ashurst's Ap.*, 60 Pa. 290; *Evans' Ap.*, 81 Pa. 278.

²⁸ *York's Ap.*, 110 Pa. 69.

²⁹ *Owens v. Naughton*, 23 Supr. C. 639.

³⁰ *Sharswood, J.*, in *Rife v. Guyer*, 59 Pa. 393. (See these illustrative

trustee is merely nominal it is a "dry" or passive trust;³¹ so, also, where the trust has no apparent use to accomplish and the *cestui que trust* is *sui juris*, and there are no limitations over, or contingent interests to protect, the use being executed in the beneficiaries.¹ On the other hand, where the duties imposed require the exercise of sound judgment and discretion, it is an active trust.²

29. Management of the estate.

It is an active trust when the will directs the trustees to manage the estate, as in the case of coal lands devised in trust during the lives of the children;³ or to manage, sell and invest, during the life of the *cestui que trust*;⁴ or collection of rents, etc., under similar uses.⁵ The same is true where the trust is for the purpose of educating and maintaining the beneficiary and the trustee has active duties to perform in such management of the estate, under the will.⁶ Where an absolute estate is given in the first instance, followed by a provision to be held in trust, without prescribing any active duties for the trustee, it is a dry trust⁷ and an absolute estate is given.⁸

30. Trust to protect remainders.

If a purpose of the trust is to preserve the corpus of the estate for the benefit of remaindermen taking as purchasers it will be upheld as active.⁹ A trust may be created to prevent the coalescence of the life estate, with the remainder to the heirs;¹⁰ thus breaking

cases: *Franciscus v. Reigart*, 4 Watts, 98; *Barnett's Ap.*, 46 Pa. 392; *Phillips' Ap.*, 80 Pa. 472; *Goehring's Ap.*, 81 * Pa. 283; *Rockhill's Est.*, 29 Supr. C. 28; P. & L. Dig., vol. 22, col. 38195.)

³¹ *Kohler's Est.*, 17 York, 127.

¹ *Pratt v. McCawley*, 20 Pa. 264; *Kay v. Scates*, 37 Pa. 31; *Kinsel v. Ramey*, 87 Pa. 248; *Carson v. Fuhs*, 131 Pa. 256; *Audenreid's Est.*, 4 D. R. 507; P. & L. Dig., vol. 22, col. 38197.

² *Beaumont's Est.*, 195 Pa. 1; *Bissell's Est.*, 47 Pitts. L. J. 242; *Krebs' Est.*, 184 Pa. 222; *Wallace v. Denig*, 152 Pa. 251; *Marshall's Est.*, 147 Pa. 77; P. & L. Dig., vol. 22, col. 38199; *Steinmetz's Est.*, 168 Pa. 171; *Harris v. Harris*, 205 Pa. 460; *Frantz v. Race*, 205 Pa. 150.

³ *Briggs v. Davis*, 81 * Pa. 470.

⁴ *Lightner's Ap.*, 11 W. N. C. 181.

⁵ *Myers' Ap.*, 49 Pa. 111; *Hemphill's Est.*, 180 Pa. 95; *Eschbach's Est.*, 197 Pa. 153; *Moorhead's Est.*, 180 Pa. 119. (There are numerous cases, for which see vol. 22, P. & L. Dig., cols. 38206-11.)

⁶ *Smith v. Myers*, 12 Luz. L. R. 183; *Shallcross' Est.*, 200 Pa. 122; *Fisher v. Wister*, 154 Pa. 65; *Beilstein's Est.*, 147 Pa. 85; *Mooney's Est.*, 205 Pa. 418; *McIntosh's Est.*, 158 Pa. 528; *Boies' Est.*, 177 Pa. 190; *Little v. Wilcox*, 119 Pa. 439.

⁷ *Arnold's Ap.*, 6 Atl. 751; *Harper's Ap.*, 111 Pa. 243.

⁸ *McCune v. Baker*, 155 Pa. 503; *Fell's Est.*, 6 Supr. C. 192, vol. 22, P. & L. Dig., col. 38222, *et seq.*; *Sproul's Ap.*, 105 Pa. 438; *Millard's Ap.*, 87 Pa. 457; *Martin's Est.*, 160 Pa. 32; *Ritter's Est.*, 190 Pa. 102.

⁹ *Mooney's Est.*, 205 Pa. 418; *Denis' Est.*, 201 Pa. 616; *Eshbach's Est.*, 197 Pa. 153; *Bacon's Est.*, 202 Pa. 535; P. & L. Dig., vol. 22, cols. 38227-30.

¹⁰ *Davis' Est.*, 6 D. R. 45; *Osborne's Est.*, 10 D. R. 191.

the course of descent.¹¹ A trust, otherwise passive, which is not necessary to protect any remainder, is executed.¹²

31. Termination of trust by accomplishment.

A trust created for a specific purpose, and without any clear intent shown to continue it beyond, terminates with the accomplishment of its purpose.¹³ The active duties of a trust having been performed, it becomes passive.¹⁴ But if some of the purposes for which it was created have become active it will not be terminated on that account alone.¹⁵

Section 4 of the act of May 3, 1855, P. L. 415, is:

"That whenever, by the agreement of competent parties, the further execution of any trust has become useless, it shall be lawful for such court to decree a reconveyance, as provided by the act to which this is a supplement, in case of a trust executed or expired."

If the only duty to be performed by a trustee under a will, is to transfer the property to the beneficiary the trust is executed in his favor.¹⁶ The rule here is not the same as in England under the statute of uses: the trustee being only an instrument to enable the *cestui que use* to acquire the legal estate, a conveyance is not necessary, here.¹⁷

32. Rights of the cestui que trust.

Where a will creates a clear and valid trust and the disposition of the property by the trustee is defined therein, the *cestui que trust* cannot change it by bill or otherwise.¹⁸ If the property is not within the trust, it is payable directly to the one entitled to it.¹⁹ The word "proceeds" has been held to be the income of the trust estate.²⁰ The will itself must determine what property the testator intended to include.²¹ The same is true when it is to be determined who are to be the *cestuis que trustent*; ²² and the quantity, extent and nature of their interest in the trust,²³ and the limit to the discretionary

¹¹ Still v. Spear, 45 Pa. 168; Ash's Ap., 80 Pa. 497.

¹² Dodson v. Ball, 60 Pa. 492; Yarnall's Ap., 70 Pa. 336; Bruch's Est., 185 Pa. 194.

¹³ Thayer, P. J., in Rea v. Girard, Etc., Co., 17 Phila. 357.

¹⁴ Keyser's Ap., 57 Pa. 236; Megargee v. Naglee, 64 Pa. 216; Roberts v. Unger, 2 Pearson, 239.

¹⁵ Bouvier's Est., 12 D. R. 149, P. & L. Dig., vol. 22, cols. 38236-44; Fidelity, Etc., Co.'s Ap., 5 W. N. C. 513; Forney's Est., 161 Pa. 209; Wolfinger v. Fell, 195 Pa. 12; Boyd's Est., 199 Pa. 487; Harris v. McElroy, 45 Pa. 216.

¹⁶ Stokes' Ap., 80 Pa. 337.

¹⁷ Strong, J., in Bacon's Ap., 57 Pa. 504; Forcey's Ap., 106 Pa. 508; P. & L. Dig., vol. 22, col. 38251.

¹⁸ Bujac's Ap., 76 Pa. 27; Elkins' Est., 12 D. R. 87; Hutchison's Ap., 82 Pa. 509.

¹⁹ Tyson v. Kratz, 3 Montg. 263.

²⁰ Thomson's Ap., 89 Pa. 36.

²¹ Phillips' Est., 12 D. R. 395; P. & L. Dig., vol. 22, col. 38257.

²² Nathans v. Morris, 4 Wharton, 389; Neal's Est., 13 D. R. 699; Pepper's Est., 166 Pa. 304.

²³ Arthur's Est., 41 Pitts. L. J. 28; Baeder's Est., 190 Pa. 606.

power of the trustee;²⁴ or whether a life estate or a fee is given;²⁵ and the extent of the trustee's control of the corpus and income;²⁶ or as to the right of survivorship among them;²⁷ or the defeat of a life estate by re-marriage by the widow;²⁸ and when a devise in fee is unaffected by a trust clause as to the residue;²⁹ and when a bequest is not cut down by a condition.³⁰

33. Time of vesting, etc.

The will controls the time of vesting of an estate in the beneficiaries, both principal and income.³¹ If discretionary power is vested in the trustee as to the time of allotment, the beneficiaries have only an estate in expectancy, and it does not vest until the allotment.³² But where the income is payable by the trustee to the mother for the minor children the right attaches at the death of the testator.³³ The trustees under a will take such title as is essential to support the trust.³⁴

34. Devolution of the legal title.

When a trustee dies, the legal title which he had descends to his heir.³⁵ Said Reed, J.:³⁶ "The trustee, *quoad* the continuing trust, like the king never dies; upon his demise of office, he is followed by his 'successor,' not his 'heir,' or 'representative,' though an heir or personal representative may chance to have a prior right to be such successor." Hence a deed of trust to B, in trust for C, should not read to his heirs and assigns, etc., but to his successors in the trust, with full power, etc.³⁷ The act of March 31, 1812, 5 Sm. L. 395, as to joint tenancy does not apply to trusts, it has been held.³⁸

35. Surviving trustees may execute trust.

Section 2 of the act of May 3, 1855, P. L. 415, provides:

"Whensoever any trust, power, or authority shall be, in manner provided in the act to which this is a supplement, conferred on two or more persons by name, and one or more of them shall die, renounce, or be legally discharged from fulfilling such trust, or exercising such power, the survivors or survivor, or remaining trustees, shall have

²⁴ Baeder's Est., 190 Pa. 614, 616.

²⁵ Nevins' Est., 192 Pa. 258; Briggs v. Davis, 81 * Pa. 470.

²⁶ Kelly's Est., 193 Pa. 45.

²⁷ Hart's Est., 7 C. C. 369.

²⁸ Walker v. Quigg, 6 Watts, 87.

²⁹ Lloyd v. Mitchell, 130 Pa. 205.

³⁰ Boies' Est., 177 Pa. 190. (See La Bar's Est., 181 Pa. 1; Gross v. Strominger, 178 Pa. 64.)

³¹ Barger's Ap., 100 Pa. 239.

³² Handy's Est., 182 Pa. 68; 167 Pa. 552.

³³ Jacoby's Est., 204 Pa. 188; Graham v. Graham, 66 Pa. 477.

³⁴ McBride v. Smyth, 54 Pa. 245.

³⁵ Crunkleton v. Evert, 3 Yeates, 570; Jenks v. Backhouse, 1 Binney, 91; Vaughan v. Barclay, 6 Wharton, 392; Morrison v. Bierer, 2 W. & S. 81. These cases were all decided before the acts of 1855 and 1861, *infra*.

³⁶ Jackson v. Penna. Co., Etc., 2 D. R. 225.

³⁷ See Bierly on Executors and Trustees for form.

³⁸ P. & R. R. Co. v. Lehigh, Etc., Co., 36 Pa. 204.

and exercise all the title and authority which the whole might have done, unless the trust or power conferred, shall require the whole number to act, in which case the vacancies shall be filled in the manner provided by the act to which this is a supplement."

Unless the whole number of trustees must act the survivors are fully competent to perform the duties devolving upon the trust.¹ Trustees are not liable primarily for funds which come into the hands of their co-trustees, unless guilty of some default in law.²

Section 2 of the act of May 1, 1861, P. L. 431, authorizes the survivors of executors, administrators or trustees to convey property and execute deeds for the same. On the death of a trustee, the appointment to fill the vacancy is in the sound discretion of the court.³

36. Deeds by surviving executor, etc.

Section 1 of the act of May 1, 1861, P. L. 431, provides:

"In all cases where a sale of the real estate of a decedent shall be made by executors or administrators, or guardians, under an order of the Orphans' Court, if one or more of such executors or administrators, or guardians, shall die or be discharged before a conveyance is made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale."

37. Right to follow trust funds.

"Property impressed with a trust cannot be divested thereof by change of state or form; equity will follow the trust fund through any number of transmutations, for the benefit of the *cestui que trust*, or owner, so long as it can be identified, and is in the hands of one who has received it with notice of the trust or without consideration."⁴ It may be followed even if mingled with the trustee's own money.⁵ The true owner need not identify it in specie all the way through.⁶ All that is required is substantial identity, as shown by the evidence.⁷ Where a sum is sought to be reclaimed as trust money out of any fund, it must be identified and shown to belong to the trust either specifically or as a substitute for or a product of the original money, and where the evidence fails to trace the money into any specific property left by the trustee, the *cestui que trust* has no right to payment in full to the prejudice of other creditors in the distribution of the estate of the trustee.⁸

¹ Hunter v. Anderson, 152 Pa. 386; P. & R. R. Co. v. Lehigh Nav. Co., 36 Pa. 204. (As to substituted trustees see Cresson v. Ferree, 70 Pa. 446; Magraw v. Pennock, 2 Grant, 89; Society's Ap., 154 Pa. 621.)

² Emlen's Est., 26 W. N. C. 341.

³ Milramow's Est., 18 D. R. 392.

⁴ Pepper & Lewis' Digest of Dec., vol. 22, col. 38299. (See cases cited there.)

⁵ Kleinhaus' Est., 19 D. R. 278.

⁶ Derbyshire's Est., 11 D. R. 315.

⁷ Farmers', Etc., Bank v. King, 57 Pa. 202.

⁸ Eby's Est., 5 Lanc. L. R. 389, Livingstone, P. J.; Columbian Bank's

38. Jurisdiction of the Orphans' Court.

The acts of March 29, 1832, P. L. 190, and June 16, 1836, P. L. 784, together with that of April 22, 1846, P. L. 483, conferred complete power over testamentary trusts in the Orphans' Court, both *nominatim* and to the executors *virtute officii*;⁹ in the latter case, exclusive.¹⁰ In the first case, the jurisdiction is concurrent with that of the Common Pleas,¹¹ and if the latter takes cognizance of it first, it will hold it.¹² The Orphans' Court has no jurisdiction of the matter of an executor *de son tort*;¹³ nor of a gift *inter vivos*; but in the case of *donatio mortis causa* in trust for the donor's children, in fraud of the widow, the trustee being also executor, the Orphans' Court has power to surcharge the executor with the gift.¹⁴

39. Termination of trust in various ways.

It has been seen that a special active trust may be terminated by the accomplishment of its purpose,¹⁵ although it be a devise to the trustees "and their heirs."¹⁶ When it is created for minors as they arrive at age, it will terminate severally as to each when he arrives at twenty-one years¹⁷ and he is then entitled to partition or division.¹⁸ The will regulates this, when it can be ascertained from it when the purpose has been fulfilled.¹⁹ A trust may be determined by the election of the widow to take against the will, where its purpose is to secure her an income for life or a portion of the estate.²⁰ All of the parties concerned may by their agreement terminate it, if *sui juris*.²¹ But when one is under disability it cannot thus be done.²² The objection of the trustee is of no avail in the former case.²³ If the purpose of the trust be the protection of

Est., 147 Pa. 422. (See P. & L. Dig., vol. 22, col. 38313, *et seq.*, for various cases.)

⁹ Brown's Ap., 12 Pa. 333; Wimmer's Ap., 1 Wharton, 96; Wapples' Ap., 74 Pa. 100; Wilbert's Est., 166 Pa. 113; Devlin's Est., 51 Pitts. L. J. 75; Kohler's Est., 17 York, 127.

¹⁰ Innes' Est., 4 Wharton, 179; Erie, Etc., Co. v. Vincent, 105 Pa. 315; Dewald v. Berkheiser, 19 Supr. C. 570; Johnson's Ap., 6 Pa. 416; Rahm's Est., 226 Pa. 594.

¹¹ St. Margaret, Etc., v. Penna. Co., Etc., 158 Pa. 441; Wapple's Ap., *supra*.

¹² Beck's Est., 3 W. N. C. 243; Apple's Est., 2 Phila. 171.

¹³ Delbert's Ap., 83 Pa. 468.

¹⁴ De Arman's Est., 32 Pitts. L. J. 182. (See P. & L. Dig., vol. 22, col. 38361, for divers cases in which the Orphans' Court has no jurisdiction.)

¹⁵ Mott's Est., 2 Kulp, 281.

¹⁶ Koenig's Ap., 57 Pa. 352; Ritter's Est., 190 Pa. 102.

¹⁷ Stoevers' Ap., 5 W. N. C. 467; Shallcross' Est., 9 D. R. 388; 200 Pa. 122.

¹⁸ Sheridan v. Sheridan, 136 Pa. 14.

¹⁹ For various cases see vol. 22, P. & L. Dig., col. 38399.

²⁰ Coover's Ap., 74 Pa. 143; Sharpe's Est., 2 W. N. C. 82; Woodburn's Est., 151 Pa. 586; Brubaker's Ap., 65 Pa. 317.

²¹ Culbertson's Ap., 76 Pa. 145; Wistar's Est., 13 Phila. 266; Seip's Est., 1 D. R. 26; Swaile's Est., 12 D. R. 692.

²² Twining's Ap., 97 Pa. 36.

²³ Seip's Est., 1 D. R. 26.

TESTAMENTARY

the remaindermen, the latter may by interests must unite and if it cannot titled to share in the corpus, the appl parties being *sui juris*, may also cor trust after the time when it would it may be continued in order to settle purpose of a trust is accomplished, as the law will execute the trust so as will creating a spendthrift trust, it tinued during the life of the *cestui qu* dren authorized by agreement to man share was given in trust, she was held as against her sister to whom the estate of her death.³⁰ A trust estate for heirs at law at the death of the life ten

40. Conveyance at end of trust.

When a trust is executed and the ac ended the legal title vests in the *cestu* ance is not essential;¹ but it may be clouded by a dry trust.²

41. Distribution.

Where the will provides that the chi to the sale or division partition will n consent.³ There being numerous benef have accrued and their interests must b be made until the trust is executed.⁴ A vest at an annual interest cannot be c more frequently than annually.⁵ A f drawn as to suspend payment in the beh port.⁶ Where the widow claims her her share impounded.⁷ In case the inc vested in her, at her death, and she di issue the income so due is payable to

²⁴ Sharpless' Est., 151 Pa. 214.

²⁵ Sim's Est., 130 Pa. 451; Bayard's Es

²⁶ Richards v. Lawrence, 12 D. R. 673;

²⁷ Riddle v. Kent, 10 Montg. 119; Reilly

²⁸ Kohler's Est., 17 York, 127.

²⁹ King's Est., 210 Pa. 435.

³⁰ Johnson v. Gaul, 228 Pa. 75.

³¹ Duval's Est., 228 Pa. 356.

¹ Westcott v. Edmunds, 68 Pa. 34; Wyant Rush v. Lewis, 21 Pa. 72.

² Nice's Ap., 50 Pa. 143; Bacon's Ap., 57 cols. 38412-3-4.

³ Harris v. Harris, 205 Pa. 460.

⁴ Richardson's Est., 16 Phila. 326; Penn

⁵ Conyngham's Est., 9 Lanc. Bar, 57.

⁶ Wilen's Ap., 105 Pa. 121.

⁷ Sharp's Est., 6 Phila. 389.

⁸ Leech's Est., 228 Pa. 311.

who has been absent and unheard of for seven years, should be paid to an administrator raised under the act of June 24, 1885, P. L. 155, rather than to a trustee under the act of April 11, 1879, P. L. 21, *supra*.⁹

42. Creation of separate use trust.

A separate use trust cannot be created for a male.¹⁰ It is intended to protect a woman only who is married or contemplates immediate marriage, to shield her from the importunities of her husband or the harassment of his creditors.¹¹ Strong, J., said:¹²

"Whatever may be the rule in the English courts, it is here too well established to be disturbed by anything else than a legislative enactment, that a separate use for a woman cannot be created unless she is covert or unless in immediate contemplation of marriage."

It must be a marriage in contemplation of the donor, although this fact need not appear in the instrument itself, since the creation of the trust itself in that form shows the purpose in view.¹³ It implies marriage to a particular person;¹⁴ so that if the engagement upon which it rests is ended, the purpose fails.¹⁵ The consummation of the marriage completes the anticipated consequence.¹⁶ The legality of such a trust must be determined as of the date of the making of the will; for, if the female is then unmarried and does not contemplate marriage at the time, the trust is invalid.^{16a} This principle has been applied in case of a devise to a wife for life and a separate use to her daughters in an absolute gift of the residue.^{16b} It is unaffected by the fact that she may become covert before the period of distribution.^{16c} A separate use trust cannot be created by a man for his wife, since she becomes discoverd at the moment it should take effect.^{16d} The legal title in such cases generally vests immediately in the beneficiary, unless there are active duties imposed in other respects than a sole and separate use.¹⁷ Ludlow, J., said: "Even when the decision in *Kuhn v. Newman*, 26 Pa. 227, shook the

⁹ *Zigler's Est.*, 25 C. C. 64. (For various cases illustrating the application of trust funds, see P. & L. Dig., vol. 22, col. 38420, *et seq.* See also "Distribution," *supra*, this volume.)

¹⁰ *Neal's Est.*, 13 D. R. 699.

¹¹ *Hamersley v. Smith*, 4 Wharton, 126; *Smith v. Starr*, 3 Wharton, 62; *Kuhn v. Newman*, 26 Pa. 227; *Whichcote v. Lyle*, 28 Pa. 73; *Kay v. Scates*, 37 Pa. 31; *McBride v. Smyth*, 54 Pa. 245; *Yarnall's Ap.*, 70 Pa. 335; *Ogden's Ap.*, 70 Pa. 501; *Yard v. Pitts, Etc., Co.*, 131 Pa. 205; *House v. Spear*, 1 W. N. C. 34; *Harrison's Est.*, 227 Pa. 134; *Gilbert's Est.*, 19 D. R. 460.

¹² *McBride v. Smyth*, 54 Pa. 245.

¹³ *Wells v. McCall*, 64 Pa. 207; *Snyder v. Snyder*, 10 Pa. 423; *Springer v. Arundel*, 64 Pa. 218.

¹⁴ *Quin's Est.*, 144 Pa. 444.

¹⁵ *Cozen's Est.*, 13 D. R. 49.

¹⁶ *Wells v. McCall*, 64 Pa. 207; *Eastwick's Est.*, 13 Phila. 350.

^{16a} *Neale's Ap.*, 104 Pa. 204, followed in *Quin's Est.*, 144 Pa. 444.

^{16b} *Hildeburn's Est.*, 8 C. C. 369.

^{16c} *Snyder's Ap.*, 92 Pa. 504; *Matthews v. Blackstone*, 35 Leg. Int. 484; *Dubs v. Dubs*, 31 Pa. 149.

^{16d} *King's Est.*, 147 Pa. 410.

¹⁷ *Kuntzleman's Est.*, 136 Pa. 142; *Gamble's Est.*, 13 Phila. 198; *Kuhn*

SEPARATE USE TRUSTS.

law of trusts to its foundation, in this commonwealth, married women escaped the blow."¹⁸ Such a trust requires activity on the part of the trustee.¹⁹

43. No particular words necessary.

No particular words or set form must be used to create a separate use trust;²⁰ but in order to exclude the husband's marital interest, the intention must be clearly expressed.²¹ It must not be left to conjecture;²² but when it is devised "as her own separate estate," the intention has been held to be clearly indicated.²³ It depends upon the evidence of intention expressed in the will; such as "for her own" use, being sufficiently distinct to show that she did not have it for the use of another.²⁴ The emancipation acts of 1887 and 1893, did not supersede separate use trusts.²⁵ A valid trust is created by the use of these words: "To be for her own sole and separate use, free from any claim of any present or future husband,"²⁶ or equivalent words.²⁷ When an absolute interest in fee is given, the words, "not to be liable for the debts of said husband" have been held insufficient to create a separate use trust. At this point, it may be noted that some confusion and misapprehension seem to have overtaken our court of last resort, as evidenced by the discussion in *Murray v. Lowrie*, 208 Pa. 1, 101 Pa. 1, 101 A. 1. The cases reviewed are *Keating v. McAdoo*, 180 Pa. 1, 101 Pa. 1, 101 A. 1; *Lewis v. Bryce*, 187 Pa. 362, 101 Pa. 362, 101 A. 362; in both of which a separate use trust was held to have been effectuated by the testator by words tantamount to those used in the codicil construed in *Murray v. Lowrie*.²⁹

v. Newman, 26 Pa. 227; P. & L. Dig., vol. 22, col. 38442.

¹⁸ *Craige v. Craige*, 9 Phila. 545.

¹⁹ *Craige v. Craige*, *supra*. (But see *Kinsel v. Ramey*, 87 Pa.

²⁰ P. & L. Dig. of Dec., vol. 22, cols. 38449-56; *MacConnell v. Lindsay*, 131 Pa. 476; *Peoples' Sav. Bank v. Denig*, 131 Pa. 241, 152 Pa. 241, 152 A. 241; *Steinmetz's Est.*, 168 Pa. 171, 175.

²¹ *Evans v. Knorr*, 4 Rawle, 66; *Tritt v. Colwell*, 31 Pa. 228; *Est.*, 1 D. R. 83.

²² *Torbert v. Twining*, 1 Yeates, 432; *Sharpless' Est.*, 151 Pa. 151, 151 A. 151; *Carson v. Fuhs*, 131 Pa. 256.

²³ *Scott v. Bryan*, 194 Pa. 41.

²⁴ *Jamison v. Brady*, 6 S. & R. 466; P. & L. Dig., vol. 22, col. 38449, *et seq.* (For form of separate use clause in a will see "Forms of Wills," *supra*.)

²⁵ *MacConnell v. Lindsay*, 131 Pa. 476, affirmed in *MacConnell v. Lindsay*, 150 Pa. 275, on this point, but overruled on the fact as to whether a separate use trust was created; *Hays v. Leonard*, 155 Pa. 474.

²⁶ *Wilbert's Est.*, 166 Pa. 113.

²⁷ *Holliday v. Hively*, 198 Pa. 335; *Bardsley's Est.*, 11 D. R. 11, 11 A. 11; *Shields v. McAuley*, 205 Pa. 45; *Samson's Est.*, 22 Supr. C. 93.

²⁸ *Morrison v. Dollar Savings Bank*, 26 Pitts. L. J. 119; *Kellner*, 99 Pa. 460; *Rank v. Rank*, 120 Pa. 191; *Murray v. Lowrie*, 208 Pa. 1.

²⁹ *Quære*, whether it would not be well for the legislature to settle unmistakably what the law is, on this subject. (See cases cited in P. & L. Dig., vol. 22, cols. 38467, *et seq.*)

44. Necessity for trustee.

It seems that it is not necessary to name a trustee in order to effectuate a separate use trust.³⁰ "The gift of an estate for the separate use of a married woman, implies *ex vi termini*, a trust, and it is immaterial that no trustee is appointed or that no active duties are imposed."³¹ It has been said Equity will raise a trustee, if necessary.³² But, it is evident, from what appears in the reports of cases, as to confusion of terms, that a testator who wishes to avoid plunging his estate into the vortex of legal guess-work, should not only create a trust in unequivocal terms, but name a trustee to carry it out, and prescribe his active duties therein. Unless this be done, the husband may be regarded as trustee³³ and his intention annulled by legal tergiversation.³⁴ The Orphans' Court, it seems, has power to appoint a trustee where none is named.³⁵ Section 11 of the act of April 25, 1850, P. L. 569, authorizes the Common Pleas to appoint another than her husband trustee.³⁶

45. Power of married woman over the estate.

Where a separate use trust is created for a married woman her powers over the estate are restricted within the compass of the will and she has only such powers as are by it conferred expressly or by necessary implication.³⁷ Unless clearly authorized by the instrument, she cannot convey,³⁸ or mortgage the estate.³⁹

A married woman has no power by will made during coverture, to pass title to real estate vested in her to her sole and separate use. The act of June 4, 1879, P. L. 88, does not authorize any such disposition; it only provides that a will shall speak and take effect as if executed immediately before the testator's death. The old rules still obtain from *Thomas v. Folwell*, 2 Wharton, 11, down to *Steinmetz's Est.*, 168 Pa. 175, and *Dallet v. Taggart*, 223 Pa. 180. The competency of the testator and the validity of his disposition are still determinable as of the date of making his will.⁴⁰

A power of appointment does not include a power to convey.⁴¹ Without such power given in the will she cannot bind her separate estate by any contract;⁴² nor can she assign the income while it

³⁰ *Wright v. Brown*, 44 Pa. 224.

³¹ *Penrose, J.*, in *Gamble's Est.*, 13 Phila. 198; *Sharswood, J.*, in *Reiff's Ap.*, 60 Pa. 361; *Reiff v. Mack*, 160 Pa. 265.

³² *Varner's Ap.*, 80 Pa. 140.

³³ *Bardsley's Est.*, 11 D. R. 337.

³⁴ *Murray v. Lowrie*, 208 Pa. 1, for illustration. (See also *Samson's Est.*, 22 Supr. C. 93, commenting upon the two *MacConnell* cases cited, *supra*.)

³⁵ *Wilbert's Est.*, 166 Pa. 113.

³⁶ *Burson's Ap.*, 22 Pa. 164; *Schott's Est.*, 11 Phila. 120.

³⁷ *Lancaster v. Dolan*, 1 Rawle, 231; *Wright v. Brown*, 44 Pa. 224; *McMullin v. Beatty*, 56 Pa. 389; *Maurer's Ap.*, 86 Pa. 380. *Sharswood, J.*

³⁸ *Shields v. McAuley*, 205 Pa. 45.

³⁹ *Hays v. Leonard*, 155 Pa. 474.

⁴⁰ *Neale's Est.*, 104 Pa. 214; *Quin's Est.*, 144 Pa. 444; *Packer v. Packer*, 179 Pa. 580.

⁴¹ *Rogers v. Smith*, 4 Pa. 93.

⁴² *Wallace v. Coston*, 9 Watts, 137.

remains in the hands of the trustee; hands of the trustee.⁴⁴ Whilst she c band's life, she may by her acts estop death their joint act.⁴⁵

46. Rights of husband.

The purpose of a separate use tru band from its management, control served by the intervention of a trust one of personalty for the sole and s will come in at her death for his shar erty" in an ante-nuptial agreement l covered by a trust.²

47. Rights and powers of trustee

The trustee of a separate use as wel powers as the will commits to him. subject to a judgment, he has power to of revival of the lien.³ The trustee v *cestui que trust*, by way of anticipatio will, may recover, though he will lose t

48. Termination of separate use

The terms of the instrument creati to its revocability.⁵ Where land is woman cannot throw off the trust by se purchase at a nominal consideration.⁶ it may be considered ended at the dea in it.⁷ It terminates by discoverture ar whether such discoverture is by the d absolute divorce.¹⁰ But the neglect of claring the wife a *feme sole* trader, do a separate use trust.¹¹ When once ter husband, it is not revived by remarriage

⁴³ Shanty's Est., 7 C. C. 199.

⁴⁴ Hays' Est., 201 Pa. 391.

⁴⁵ Jourdan v. Dean, 175 Pa. 618; Miller

¹ Faries' Ap., 23 Pa. 29.

² Hughes-Hallett v. Hughes-Hallett, 152 vol. 22, col. 38507.)

³ Dickerson's Ap., 7 Pa. 255.

⁴ King's Est., 147 Pa. 410. (For general

⁵ Chrisman v. Wagoner, 9 Pa. 473; With

⁶ McClurg's Est., 22 Pitts. L. J. 133.

⁷ Gay v. Gay, 1 W. N. C. 481. (See Ha

⁸ Smith v. Starr, 3 Wharton, 62; Stead Cassel, 13 Phila. 159; Harrison v. Brolask vol. 22, col. 38531.

⁹ Dodson v. Ball, 60 Pa. 492; Hepburn Ap., 83 Pa. 377; Kuntzleman's Est., 136 P

¹⁰ Koenig's Ap., 57 Pa. 352; Simond's 207 Pa. 218.

¹¹ People's Sav. Bank v. Denig, 131 Pa. 2

¹² Hamersly v. Smith, 4 Wharton, 126;

49. Spendthrift trusts.

Where a testator provides that the principal and income as well of a devise or bequest shall be held by a trustee and paid by him only to the beneficiary as needed during his life and after his death to vest in others, such devise or bequest to be and remain free from all debts, past, present or future of such beneficiary, it is called a spendthrift trust.¹³ It must be created by another than the debtor, who it seems cannot create such a trust distinctively for himself, which will be protected from attachment by his creditors.¹⁴ Where a trust is created to protect the *cestui que trust* from his creditors, with power in him to end it by notice to the trustee, such notice must be given in good faith and in the prescribed form.¹⁵ A valid trust may be created in a person to carry on a business free from liability to creditors, for his support and that of his family.¹⁶ A trust in the form of a spendthrift trust, for the period of three years, with power to the *cestui que trust*, then to direct conveyance, with power of appointment in case he does not so direct, has been held to give a fee, which passes subject to the claims of creditors.¹⁷ A spendthrift trust imposes active duties upon the trustee and the legal title will be kept separate from the equitable title.¹⁸ A spendthrift trust and a separate use trust for a married woman are not necessarily inseparable.¹⁹

50. Beneficiary of a spendthrift trust.

A woman may be the beneficiary of a spendthrift trust;²⁰ but the owner of property cannot so dispose of it as to put it out of the reach of his creditors.²¹ A married woman may create a spendthrift trust for her husband, it seems.²² It is important in this kind of trust that the intention of the donor appear on the face of the instrument to provide solely for the support or maintenance of the beneficiary,²³ and it is all the more so if the expenditures are put in

228; Wells v. McCall, 64 Pa. 207; Rea v. Cassel, 13 Phila. 159. (See Schoch's Ap., 33 Pa. 351, and Snyder v. Snyder, 10 Pa. 423.)

¹³ Fisher v. Taylor, 2 Rawle, 33; Vaux v. Parke, 7 W. & S. 19; Bachman v. Wolbert, 2 W. N. C. 438; P. & L. Dig., vol. 22, col. 38539.

¹⁴ Rank v. Haldeman, 31 C. C. 447.

¹⁵ Morgan's Est., 52 Pitts. L. J. 313.

¹⁶ Ashhurst v. Given, 5 W. & S. 323; Brown v. Williamson, 36 Pa. 338; De Roy v. Richards, 8 Supr. C. 119; Mellon v. Kress, 47 Pitts. L. J. 81; Holdship v. Patterson, 7 Watts, 547; Rees v. Livingston, 41 Pa. 113; Mehaffey's Est., 139 Pa. 276; Siegwarth's Est., 226 Pa. 591; McCandless' Est., 58 Pitts. L. J. 28.

¹⁷ Morgan's Est., 223 Pa. 228. (See Morgan's Est., *supra*.)

¹⁸ Still v. Spear, 45 Pa. 168; Rife v. Geyer, 59 Pa. 393; Carmichael v. Thompson, 6 Atl. 716, 122 Pa. 478; Mannerback's Est., 133 Pa. 342; P. & L. Dig., vol. 22, col. 38544; Fetherman's Est., 131 Pa. 349.

¹⁹ Dunn's Ap., 85 Pa. 94; Seitzinger's Est., 170 Pa. 500; Francis' Est., 4 D. R. 694; Shell's Est., 3 D. R. 734.

²⁰ Ashhurst's Ap., 77 Pa. 464; Cridland's Est., 7 Phila. 58; Hughes-Hallett v. Hughes-Hallett, 152 Pa. 590.

²¹ Mackason's Ap., 42 Pa. 330; Ghormley v. Smith, 139 Pa. 584; Patrick v. Smith, 2 Supr. C. 113; P. & L. Dig., vol. 22, col. 38547.

²² Wanner v. Snyder, 177 Pa. 208.

²³ Winthrop Co. v. Clinton, 196 Pa. 472, distinguishing Girard, Etc., Co. v. Chambers, 46 Pa. 485.

the discretion of the trustee.²⁴ If, on the other hand, the payments are to be made to the spendthrift himself to be expended in his own discretion, it is not a good trust.²⁵ The purpose being made clear and restrictive, no technical words are essential to create such a trust.²⁶ Without the necessary restrictions, however, a mere life estate, with remainder over, does not become a spendthrift trust.²⁷ Where a valid spendthrift trust is created in a will, the bequest in the codicil will be held on the same trust;²⁸ the same is true as to various trusts created in the same will in diverse words, but all intent on preserving the estate intact from the grab of creditors.²⁹ The insolvency of the beneficiary at the time is a factor in ascertaining the donor's intent,³⁰ and when a trustee is named to hold, manage and pay over the income of the estate it is well created;³¹ particularly when it is left entirely to his discretion.³²

51. Trust annexed to absolute estate.

To create an undoubted spendthrift trust the testator should not give an absolute estate in the first instance and then bungle it, by attempts to qualify it. Such efforts have been declared void for repugnancy.³³ If the intention to create a trust is clearly expressed, a limitation over is not essential.³⁴ Where the beneficiary for life is also the trustee and becomes the heir of the remainderman, the trust cannot be supported any longer.³⁵ The power of appointment given the *cestui que trust* does not destroy the efficacy of the trust.³⁶ As to personalty the rule applies where the executor is directed to retain possession and pay over to the *cestui que trust* in installments only;³⁷ but when paid in bulk, protection ceases when it leaves the hands of the executor.³⁸

²⁴ Keyser v. Mitchell, 67 Pa. 473; Marsteller's Est., 1 Lehigh Co. L. J. 136.

²⁵ Smeltzer v. Goslee, 172 Pa. 298; Harrison v. McCana, 11 W. N. C. 239.

²⁶ Winthrop Co. v. Clinton, *supra*; Stambaugh's Est., 135 Pa. 585; House's Est., 51 Pitts. L. J. 210; King's Est., 9 C. C. 74, 147 Pa. 410; Shower's Est., 211 Pa. 297.

²⁷ Ammon's Est., 51 Pitts. L. J. 364.

²⁸ Phillips' Est., 1 D. R. 311.

²⁹ Mehaffey's Est., 139 Pa. 276.

³⁰ Stambaugh's Est., 135 Pa. 585.

³¹ Eyrick v. Hetrick, 13 Pa. 488; Vaux v. Parke, 7 W. & S. 19; Smith v. Savidge, 4 Penny. 320.

³² Keyser v. Mitchell, 67 Pa. 473; Barker's Est., 2 D. R. 571.

³³ Reifsnyder v. Hunter, 19 Pa. 41; Walker v. Vincent, 19 Pa. 369; Kuhn v. Newman, 26 Pa. 227; Keyser's Ap., 57 Pa. 236; Willard v. Davis, 3 Penny. 86; Moore's Est., 198 Pa. 611.

³⁴ Minnich's Est., 206 Pa. 405; Ward's Est., 16 Phila. 259; Krebs' Est., 184 Pa. 222; Shower's Est., 211 Pa. 297.

³⁵ Miller v. Duncan, 2 Pearson, 32.

³⁶ Swaby's Ap., 14 W. N. C. 553.

³⁷ Ambler v. Bayly, 3 Montg. 107; Maffet's Est., 6 Kulp, 452.

³⁸ Beck's Est., 133 Pa. 51; Goe's Est., 146 Pa. 431; Wright's Est., 12 D. R. 321; Rockhill's Est., 13 D. R. 411.

52. Necessity for trustee.

The legal and equitable estates in a spendthrift trust must be separated and thus there must be a trustee apart from the *cestui que trust*, such as the executor who may be trustee for the purpose. If both estates unite in the *cestui que trust* the equitable is swallowed up in the legal estate and the trust is extinguished.¹ A married woman may create a spendthrift trust in her husband, where she directs the application of the income to the education of a legatee, with other restrictions, so that he virtually is trustee for the uses and purposes designated.²

A provision that the beneficiary may give orders or powers of attorney to others to collect the income of the estate for him is not repugnant and does not destroy the trust;³ nor a direction to the trustee to pay a part or whole of the fund, in his discretion, to the beneficiary.⁴ The title or right to income is not in the beneficiary until he receives it, and therefore, accrued income in the hands of the trustee at the death of the *cestui que trust* does not go to his executor.⁵ This is also true where the trustee has discretionary power and the beneficiary dies before it is exercised.⁶

53. Protection of trust fund.

A spendthrift trust would fail of its purpose if it were liable to attachment or execution of any kind, or if the spendthrift had power to convey or assign the income anticipatively.⁷ A power to appoint one to receive the income is merely a power of agency.⁸ Such a trust for a married woman is protected from her ante-nuptial agreement.⁹ A judgment for a tort has no higher right as against this form of trust than any other claim.¹⁰ Anomalous as it may seem, such a trust is immune from attachment proceedings in the Quarter Sessions, for the support of the wife and children of the *cestui que trust*;¹¹ and from attachment for alimony in divorce.¹² But if the trust provides that the entire income may be paid to the *cestui que trust*, and the principal as well, with his consent, he has such an interest as will make it liable for the support of his wife whom he has deserted,¹³ especially where the trust is impliedly for her sup-

¹ Ehrisman v. Sener, 162 Pa. 577; Stoner v. Beeler, 14 York, 11; Hahn v. Hutchinson, 159 Pa. 133; Patrick v. Smith, 2 Supr. C. 113; Francis' Est., 4 D. R. 694.

² Wanner v. Snyder, 177 Pa. 208.

³ Wright's Est., 12 D. R. 321.

⁴ Brubaker v. Huber, 2 D. R. 703.

⁵ Horwitz v. Norris, 49 Pa. 213.

⁶ Huber's Ap., 80 Pa. 348.

⁷ Shankland's Ap., 47 Pa. 113; Norris v. Johnston, 5 Pa. 287; Shanty's Est., 7 C. C. 199.

⁸ Mehaffey's Est., 139 Pa. 276.

⁹ Hughes-Hallett v. Hughes-Hallett, 152 Pa. 590.

¹⁰ Wright's Est., 12 D. R. 321; Thackara v. Mintzer, 100 Pa. 151.

¹¹ Board of Charities, Etc., v. Lockhard, 198 Pa. 572; Guardians, Etc., v. Mintzer, 16 Phila. 449. Legislation seems to be required here, in aid of common justice.

¹² Thackara v. Mintzer, 100 Pa. 151.

¹³ Decker v. Huntingdon, Etc., 120 Pa. 272.

port also.¹⁴ Although the beneficiary is allowed by the trustee to be in uncontrolled possession of the land, the income is protected.¹⁵

54. Trustee of a spendthrift trust.

Although the trustee of a spendthrift trust commits a *devastavit*, and the fund is subsequently recovered, it is impressed with the seal of the trust and shielded from creditors.¹⁶ The trustee cannot be accelerated by creditors to exercise his discretion to advance a portion of his share to the beneficiary;¹⁷ nor can a committee in lunacy for the beneficiary receive the fund,¹⁸ except where there is no express trust, but only a provision in restraint of alienation.¹⁹ The trustee cannot be surcharged with payments made to others at the instance of the beneficiary himself.²⁰

55. Attorneys.

The act of May 8, 1909, P. L. 475, referred to at page 256, Vol. I, Johnson's Practice, regulating admission of attorneys to practice throughout the state, has been held constitutional by the Supreme Court in *Hoopes v. Bradshaw*, appealed from Beaver County Court.

¹⁴ Phila. Board, Etc., v. Moore, 6 C. C. 66.

¹⁵ Morrison v. Good, 8 Lanc. L. R. 81; Phila. Trust, Etc., Co. v. Guillon, 100 Pa. 254.

¹⁶ Seitzinger's Est., 170 Pa. 500; Overman's Ap., 88 Pa. 276.

¹⁷ Baeder's Est., 190 Pa. 614.

¹⁸ Wilson's Est., 2 Pa. 325.

¹⁹ Royer v. Meixel, 19 Pa. 240. (See *Erisman v. Lancaster Co., Etc.*, 47 Pa. 509; *Stewart v. Madden*, 153 Pa. 445.)

²⁰ Jones' Est., 199 Pa. 143; King's Est., 147 Pa. 410; Robinson's Est., 43 Pitts. L. J. 204.

CHAPTER LVIII.

TRUSTEES, THEIR RIGHTS AND DUTIES

1. How to become a trustee.
2. Who may be a trustee.
3. Appointment of trustee.
4. Petition for appointment.
5. Notice to parties.
6. Who may be appointed.
7. Security by trustee.
8. Form of bond.
9. Form of certificate of appointment.
10. Rights and liabilities of sureties.
11. Right of surety to demand statement.
12. Personal representatives of sureties may cite trustees to account.
13. Citation to trustee to file account.
14. Removal for failure to give new bond.
15. Liability of surety preserved.
16. General powers of trustees.
17. Expenditure of trust fund, how authorized.
18. Powers over the estate.
19. Transfer of stocks and securities.
20. Power to contract debts, etc.
21. Assets in the hands of the trustee.
22. Liability for loss by negligence.
23. Liability for rents.
24. Liability for funds deposited.
25. Other liabilities and duties.
26. Expenditures by trustee.
27. Investments.
28. Liability for interest.
29. Control of trustee's discretion.
30. Control of discretion as to sales, etc.
31. Power of sale and mortgaging.
32. Duties in regard to sale.
33. Purchases by trustees.
34. Making deeds and mortgages.
35. Accounts of trustees.
36. By whom an account may be demanded.
37. Petition for citation.
38. Credits and allowances.
39. Interest and other expenses.
40. Charges to principal and income.
41. Counsel fees and legal expenses.
42. Compensation of trustee.
43. Commissions in discretion of the court.
44. Commissions on realty.
45. Increase or decrease of compensation.
46. Allowance of compensation.
47. Forfeiture of compensation.
48. Finality of account.
49. Orders to pay over.
50. Removal and discharge.
51. Removal in Philadelphia.
52. Insufficient grounds of removal.
53. Discharge of trustee on his own application.
54. Procedure by petition.
55. Liability of co-trustees.
56. Surviving trustees.
57. Successors in the trust.
58. Termination of a trust.
59. Power of conveyance by married woman.
60. Payment of funds to non-resident trustee.
61. Form of petition to improve real estate.

I. How to become a trustee.

In order to become a testamentary trustee it is not essential that one should be named a trustee. An executor who is by the will charged with the duties of a trustee becomes such, *ex necessitate*

rei; ¹ so, also, a testamentary guardian; ² or the mother of a grandson, who is charged with the duty of applying the income of a fund for his use during his life.³ One who has a trust imposed upon him for a minor, may be a trustee simply and not a guardian.⁴ Under a power of sale, and by virtue of section 13 of the act of February 24, 1834, P. L. 70, the executors become trustee for the heirs.⁵ A trusteeship in a will may be revoked by the codicil, though the office of executor is not affected.⁶ Where an executor, instead of paying over to the trustee funds as directed, assumes the duties of trustee as well, he will be held to the strictest accountability.⁷ An executor who renounces as such, because he cannot give the security, he being a nonresident, also relinquishes the office of trustee connected with it.⁸ As to a devise by a priest to his successor, the one entitled under the laws of the church as successor in the sacerdotal office, becomes the trustee.⁹ A commission for park improvement, rather than the city, will take a devise as trustee.¹⁰ The county becomes trustee for a fund put at interest in the county treasury, for the use of the county poor.¹¹ Where a fund is raised by subscription for the support of the widow and children of an official, the widow becomes the natural trustee for herself and the children.¹² A devise of "the use" of an interest in realty for life, and the interest in fee to another named as executor, does not constitute the latter trustee of the royalties on the coal underlying the land, for the life tenant, who was her own trustee.¹³

2. Who may be a trustee.

Under section 10 of the act of April 26, 1855, P. L. 328, the Court of Common Pleas is authorized to act as trustee under a will bequeathing a sum to charity and to select the object of the bounty of the testator.¹⁴ A life tenant under a will, being executrix, who receives the proceeds of an Orphans' Court sale, becomes trustee of the fund by operation of law.¹⁵ Prior to the acts of 1887 and 1893, even, a married woman might be a trustee, subject to legal incapacity.¹⁶ A lunatic has been held to be competent to take title as trustee for another.¹⁷ In an ordinary (not spendthrift) trust the

¹ Sheets' Est., 52 Pa. 257; Oliver's Est., 4 C. C. 209; Dewey's Est., 33 C. C. 307; Hepburn's Est., 11 Phila. 80.

² Colehower's Est., 12 Phila. 78; Cass' Est., 30 C. C. 660.

³ Branin's Est., 5 D. R. 464.

⁴ Pott's Pet., 1 Ashmead, 340; Bentel's Est., 33 Pitts. L. J. 177.

⁵ Jones' Ap., 3 Gr. 250; Dundas' Ap., 64 Pa. 325.

⁶ Howell's Est., 12 D. R. 193.

⁷ Mayberry's Ap., 33 Pa. 258; Martin's Est., 35 Pitts. L. J. 248.

⁸ Strobel's Est., 11 Phila. 122.

⁹ Browers v. Fromm, Addison, 362. (But see Donaldson's Est., 1 D. R. 235, for a different phase.)

¹⁰ Long's Est., 204 Pa. 60.

¹¹ Lawrence County v. Leonard, 83 Pa. 206.

¹² Fitzgerald's Est., 11 D. R. 628.

¹³ Duffy's Est., 17 Supr. C. 244.

¹⁴ Mann v. Mullin, 84 Pa. 297.

¹⁵ Dewey's Est., 33 C. C. 307.

¹⁶ Still v. Ruby, 35 Pa. 373.

¹⁷ Eyrick v. Hetrick, 13 Pa. 488; Kneedler's Est., 4 W. N. C. 575.

cestui que trust may himself be trustee, because, in equity a settlor may settle a trust upon himself for himself.¹⁸ The reasons why a man cannot settle a spendthrift trust upon himself to defeat his creditors are obvious.¹⁹ The insolvency of a person is no bar to being a trustee, except as above qualified.²⁰ Under the laws trustees are appointed for various purposes, with which this treatise is not concerned. A corporation may be a trustee;²¹ also a municipal corporation;²² a cemetery company;²³ but a bank of discount and deposit under the act of May 13, 1876, P. L. 161, has no power to act as trustee in a corporate mortgage, in the opinion of a late attorney general.²⁴ By various acts, *infra*, trust companies are authorized to act as trustees.

3. Appointment of trustee.

It has been seen that by law, *supra*, no trust shall fail for want of a trustee, and if the will does not appoint one or indicate upon whom the duties of the trust shall devolve, Equity will supply the trustee.²⁵ If no useful purpose is served, however, the appointment is not imperative under section 23 of the act of June 14, 1836, P. L. 628.²⁶ The testator, of course, may name his trustee or charge his executor to carry out the trust;²⁷ and if a trust company is named, although improperly, the appointment will hold.²⁸ Where an executor has been appointed to perform duties as trustee and declines to perform them, after having discharged his duties as executor, the court will vacate his letters and appoint a trustee for the purpose.²⁹ The Orphans' Court has power to appoint testamentary trustees to fill vacancies, and will use its discretion whether it appoints one or more.³⁰ But there must be active duties to perform, in order to justify the appointment to fill a vacancy.³¹ Where an executor is also trustee, independently, on his death, the court will appoint a successor to the trust, since this does not pass to the administrator *d. b. n.*³² But if the duties are annexed to his office as executor, it has been held otherwise.³³ An appointment of trustee is, however,

¹⁸ Bouvier's Est., 12 D. R. 149; Littell's Est., 18 Phila. 67; Duffy's Est., 17 Supr. C. 244; Kenderdine's Est., 12 W. N. C. 423.

¹⁹ Patrick v. Smith, 2 Supr. C. 113.

²⁰ Shryock v. Waggoner, 28 Pa. 430; De Roy v. Richards, 8 Supr. C. 119; Gillespie v. Miller, 37 Pa. 247.

²¹ Columbia Bridge Co. v. Kline, Brightly, 320.

²² Phila. v. Elliott, 3 Rawle, 170; Phila. v. Fox, 64 Pa. 169; Cresson's Ap., 30 Pa. 437; Long's Est., 18 Lanc. L. R. 269; 204 Pa. 60.

²³ Boyer's Est., 17 D. R. 417.

²⁴ Bank as trustee, 16 D. R. 255.

²⁵ Fox's Est., 1 W. N. C. 402.

²⁶ Fisher's Est., 1 Berks Co. 98.

²⁷ Dulles' Est., 218 Pa. 162.

²⁸ Kettle's Est., 17 D. R. 411.

²⁹ Van Dusen's Ap., 102 Pa. 224.

³⁰ Physic's Est., 2 Phila. 278. (See acts, *supra*, Bergdoll's Est., 9 D. R. 162; Myers' Est., 12 D. R. 721.)

³¹ Delbert's Ap., 83 Pa. 462.

³² Ebert's Ap., 9 Watts, 300; Hapburn's Est., 8 Phila. 206.

³³ Sander's Est., 5 Kulp, 521; Comth. v. Barnitz, 9 Watts, 252.

not necessarily void, then.³⁴ Where the trust is of a personal character, it may end with the death or resignation of the trustee and no appointment is necessary.³⁵ If it be necessary to continue the trust, the court may appoint.³⁶ If a widow, being surviving trustee under her husband's will, remarries, a successor will be appointed, on cause being shown.³⁷

4. Petition for appointment.

A petition for the appointment of a trustee can only be made by a party interested;¹ and such party may be a trust company holding an interest.² But where some have no interest and others who join in the petition have, the petition will be sufficient.³ Although a will gives a legatee for life power to nominate a trustee the appointment, on refusal to act, under the acts of April 22, 1846, P. L. 483, and April 13, 1859, P. L. 611, should be made by the court, in accordance therewith.⁴ When the executor and trustee has been removed and ordered to pay over to his successor the trust funds, the administration is vacant, and a petition to appoint a trustee is premature, until an *admr. d. b. n.* is appointed and the fund is paid to him.⁵ On the death of a trustee of personal property his personal representative may petition for an appointment.⁶ Upon a petition to appoint a trustee the court will not go into the question of title by adverse possession. It will appoint a trustee and leave the parties to their remedies.⁷ The same rule applies, where the executors, trustees, etc., file an answer denying the existence of the trust.⁸ When the petition avers that the trustee named in the will has declined to act, he must be made a party to the proceeding.⁹ Where the will names a trustee by way of substitution, and the one for whom he is substituted declines to act, the court cannot on petition alleging unfitness, procure the appointment in lieu of the substituted one, before he qualifies. The remedy is to petition for removal after he has qualified.¹⁰

5. Notice to parties.

The court will, upon petition, give notice to all persons interested, of the application and fix a time when they may be heard.

³⁴ Finch's Est., 43 Pitts. L. J. 142. Sheets' Est., 215 Pa. 164, illustrates ill-considered practice.

³⁵ Slemmon's Est., 173 Pa. 156; Shoemaker's Ap., 91 Pa. 134; Best's Est., 22 Lanc. L. R. 6.

³⁶ Woodward's Est., 8 Phila. 211.

³⁷ Meyer's Est., 8 C. C. 374.

¹ Bardsley's Est., 11 D. R. 337.

² Guarantee, Etc., Co. v. Scott, 199 Pa. 471.

³ Nixon's Est., 7 Phila. 505.

⁴ Schott's Est., 11 Phila. 120; Lafferty's Est., 198 Pa. 433.

⁵ Hart's Est., 11 D. R. 783.

⁶ Fisher's Est., 1 Berks Co. 98.

⁷ McCloskey's Est., 15 D. R. 428.

⁸ McMaster's Case, 32 C. C. 387.

⁹ Kettle's Est., 17 D. R. 411.

¹⁰ Taylor's Est., 24 Montg. 123.

¹¹ Lancaster's Ap., 111 Pa. 524; Glaser's Est., 13 D. R. 198. (See

If an appointment be made without notice, it will be revoked.¹¹ In case of a lunatic, his committee must be notified.¹² Parties cannot complain, after an appointment, that they had no notice, when they were represented by counsel.¹³ The Common Pleas may appoint under the act of April 14, 1828, P. L. 453, to fill a vacancy caused by death.¹⁴

6. Who may be appointed.

In a preceding paragraph is pointed out who may be a trustee. It will be briefly added who may be appointed. A *cestui que trust* of a life estate may be appointed, if it appears to be for the best interest of those who are entitled to the remainder.¹⁵ A guardian should not be appointed trustee of an estate in which his wards are interested, but having been appointed, will not be removed solely because of it.¹⁶ Where the parties are jangling out of accord, the court may appoint a disinterested one of its own choice;¹⁷ or it may appoint the one chosen by those having preponderating interests.¹⁸ Where the will contemplated three trustees, on the death of one, the court will not appoint his son.¹⁹ A decree appointing a new trustee, if unappealed from, is conclusive upon all parties.²⁰

7. Security by trustee.

A trustee appointed by will cannot, ordinarily, be required to give security as such;²¹ so, also, when appointed by a voluntary deed.²² Section 49 of the act of February 24, 1834, P. L. 70, and the act of April 17, 1869, P. L. 70, do not apply to a case of this kind, but provide for giving security to protect the interests of remaindermen or those having contingent interests in personal property.²³ If a trustee be wasting or mismanaging the estate, he comes within the act of May 1, 1861, P. L. 680, and may be required to give security or be removed.²⁴ Where a testamentary trustee who is insolvent

Stevenson's Ap., 68 Pa. 101, as to the Phila. act of April 9, 1868, P. L. 785. See *contra*, Finch's Est., 43 Pitts. L. J. 142.)

¹² Erb's Est., 14 D. R. 286.

¹³ Patterson's Est., 3 C. C. 236.

¹⁴ Haines v. Hall, 209 Pa. 104.

¹⁵ Kenderdine's Est., 12 W. N. C. 423.

¹⁶ Wallace's Est., 206 Pa. 105.

¹⁷ Patterson's Est., 3 C. C. 236; Gaul's Est., 12 Phila. 13; Mifflin's Est., 19 Phila. 200.

¹⁸ Hanbest's Est., 12 D. R. 114.

¹⁹ Lafferty's Est., 198 Pa. 433. (For a case where the court preferred an attorney at law to a trust company, see Adams' Est., 14 D. R. 127; and another where an executrix was preferred to a trust company, see Playford's Est., 8 Del. Co. 290.)

²⁰ Kneass v. Mifflin, 25 Leg. Int. 132.

²¹ Branin's Est., 5 D. R. 464.

²² Neal v. Black, 177 Pa. 83.

²³ Sherer's Ap., 3 Walker, 284; Keene's Est., 81 Pa. 133; Lindsay's Est., 14 Phila. 269; Mason's Est., 12 D. R. 717. (But see Clevestine's Ap., 15 Pa. 495; Reiff's Ap., 60 Pa. 361; Freedley's Ap., 60 Pa. 344.)

²⁴ Sharp's Ap., 9 Atl. 860; McDowell's Est., 10 D. R. 223; Denlinger's Est., 12 D. R. 592; P. & L. Dig., vol. 22, col. 38621.

petitions the court for an order upon the executor to pay over the trust fund, he may be required to give security first.²⁵ The proceeding to require executors acting as trustees to give security should be an independent application to the court setting forth fully the reasons.²⁶ A trustee may be dismissed for failure to give security, but cannot be attached.²⁷

8. Form of bond.

Know all men by these presents: That we, Jason Clark, principal, and James Watt and John Brill, sureties, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of — dollars lawful money of the United States, to be paid to the said Commonwealth for the use of all persons interested in the Estate of Evelyn Swayne, deceased, to which payment well and truly to be made and done, we bind ourselves, jointly and severally, our and each of our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with our seals, dated the — day of —, in the year of our Lord one thousand nine hundred and —.

The condition of the above obligation is such, that if the above bounden Jason Clark, who — on the — day of —, A. D. 19—, appointed by the Orphans' Court of Lancaster County, as trustee of the said estate, shall and do well and faithfully perform the trust reposed in him as aforesaid, and shall truly and duly account for such estate, property, or funds of the said Evelyn Swayne, deceased, as may or shall come into his hands, without fraud or delay, then the above obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of }	Jason Clark, [Seal.]
— —,	James Watt, [Seal.]
— —.	John Brill. [Seal.]

9. Form of certificate of appointment.

Lancaster County, ss.

At an Orphans' Court held at the City of Lancaster, Pa., in and for said county, on the — day of —, A. D. 19—, before the Honorable Eugene G. Smith, President Judge, presiding:

In the matter of the petition of — — for the appointment of a trustee for — — of — —, late of the — of —, in the County of Lancaster and State of Pennsylvania, deceased:

And now, April 7, A. D. 1910, the Court, on motion of S. V. Hosterman, Esq., appoints John B. Snyder, Esq., Trustee of the said — —, to do and perform all the duties of the said trusteeship, according to law, and under the provisions of the last will and testament of the said — —, deceased.

By the Court.

Attest:

— —,
Assistant Clerk of Orphans' Court.

²⁵ Deaven's Est., 32 Supr. C. 205.

²⁶ Hano's Est., 8 D. R. 353; Mason's Est., 12 D. R. 717.

²⁷ Fuller's Est., 4 W. N. C. 494.

10. Rights and liabilities of sureties.

Sureties on the bond of a trustee are liable only to the extent that a competent court has decreed the principal to be liable.¹ When the liability of the principal upon a *devastavit* is conclusively established an action on the bond against the sureties is ripe.² The surety cannot defend on the ground that the appointment of the trustee was made in the Common Pleas and ought to have been made in the Orphans' Court.³ The sureties who have been compelled to pay are entitled to subrogation.⁴

11. Right of surety to demand statement.

Section 1 of the act of June 3, 1893, P. L. 273, provides as follows:

"That in case any surety or sureties, or the representatives of any surety or sureties upon the bond of any trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds in his hands, or any person interested in the trust, shall apply to the trustee, committee, guardian, assignee, receiver, administrator, executor, or other person, having trust funds, in his hands, for a complete and detailed statement of the nature and character of the securities in which the said trust funds are invested, and the said trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds in his hands, shall fail for the space of ten days to furnish such statement, or if such statement having been furnished, it shall appear to the said surety or sureties or the representatives of said surety or sureties, or other person interested in said trust, that the funds in the hands of the said trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds in his hands, are badly invested so as to be likely to result in a loss to the trust, the said surety or sureties or the representatives of said surety or sureties, or other person interested in the trust, may present a petition to the court having jurisdiction of said trust, praying that an order issue requiring the said trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds in his hands, to file in said court a complete and detailed statement of the manner and securities in which said trust funds are invested within twenty (20) days after service of said order, unless the time be enlarged by the court; whereupon the said court shall issue said order, and if, upon such statement being filed, it shall appear to the court that the said trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds in his hands, has used the said trust funds himself, or has invested them in securities outside of the State of Pennsylvania, or in securities which are likely to cause a loss to the trust, shall order a final account, and upon payment of the fund to his successor, or into court, the said court shall remove the said trustee, committee, guardian, assignee, receiver, administrator, executor, or other person having trust funds, in his hands, unless in the

¹ Comth. v. Smith, 4 Phila. 51.

² Comth. v. McDonald, 170 Pa. 221; Boyd v. Comth., 36 Pa. 355.

³ McConomy's Est., 170 Pa. 140.

⁴ Johns' Est., 2 Chester Co. 77.

case of investments of the fund outside of this state, it shall appear to the court that such investments are safe and good and not likely to result in a loss to the trust, in which case the court may by its decree approve such investments.

"Section 2. This act shall apply to all trusts, whether the same be within the jurisdiction of the Orphans' Court, of the Court of Common Pleas, or of a Court of Equity."

12. Personal representatives of sureties may cite trustees to account.

Section 1 of the act of April 17, 1866, P. L. 111, provides:

"The petition which by the act of assembly to which this is a supplement, 'the sureties of trustees or trustee of a trust created to continue for or during a life or lives, or marriage,' are authorized to present, may, in the event of the death of such sureties or of any one of them, be presented by their personal representatives of such surety, or sureties, with like effect in all respects, as if the petition had been presented by the deceased surety, or sureties in his or their lifetime."

13. Citation to trustee to file account.

The act of May 10, 1881, P. L. 14, provides:

"It shall be lawful for the Court of Common Pleas or the Orphans' Courts of the county which shall be the residence of any trustee or trustees of a trust to continue for or during a life or lives, or marriage, on the petition of any surety of such trustee or trustees, at the return thereof, during any regular term of the Court of Common Pleas, or Orphans' Court, not less than thirty days' notice to be given of the presentation of said petition, to file an account of his or their management of the trust, and the said citation, upon such petition of the surety, and affidavit filed of the facts connected with the execution and position of the trust funds, shall further direct the said trustee or trustees, to show cause why the petitioner should not be discharged from all further liability, if the court after due notice to all parties interested, deem it reasonable and proper; and the trustee or trustees, shall thereupon give a new bond, with surety or sureties as the court shall order: *Provided*, That the petition, authorized by this act, shall not be presented until after the expiration of three years from the time of the appointment of such trustee."

Such petition may be presented by some of a large number of sureties, when a part of the sureties have become insolvent.⁵

14. Removal for failure to give new bond.

Section 2 of the act of 1881, *supra*, provides:

"If, in the case specified in the preceding section, the trustee or trustees, shall not give such new bonds within such time as is ordered by the court, he or they shall be removed from the trust, and some other person appointed."

⁵ Schnurman's Ap., 15 W. N. C. 280.

15. Liability of surety preserved.

Section 3 of the act of 1881, *supra*, provides:

"When a new bond is required, as above provided, the sureties in the prior bond shall be liable for all breaches of the conditions, committed before the new bond is approved according to law."

16. General powers of trustees.

The powers of a testamentary trustee must be derived from the will, either express or implied. He is entitled to receive the estate committed to him, with the powers mentioned, free from such acts of the *cestui que trust* as would hamper them.⁶ If the will postpones his right of possession, it governs.⁷ Being charged with a duty to "keep, support and maintain out of said trust funds," a person who has a committee appointed subsequently, the trustee is entitled to hold the corpus, as against such committee.⁸

Before a decree is entered transferring funds to trustees, the *cestuis que trustent* should be made parties and the authority of the trustees to act as such should be produced.⁹ If a trustee agrees that counsel for the beneficiaries shall be notified of future investments and join in signing the checks, it will be binding upon him as a very proper check.¹⁰ He cannot, however, bind the estate for agent's fixed commissions for the sale of lands. The test is what were the services worth.¹¹ He cannot use the money of the remainderman to save the life tenant's estate from sale under liens.¹²

Whilst an administrator *d. b. n. c. t. a.* succeeds the executor in his trust duties, the trustee appointed by the will is the proper receiver of funds from the sale of the real estate in the trust.¹³ When a trustee appoints an agent he must look to the trustee, not the estate, for his pay.¹⁴

17. Expenditure of trust fund — How authorized.

Section 3 of the act of 1855, P. L. 415, provides:

"That it shall be lawful for the Court of Common Pleas of the proper county, upon notice to the parties in interest, whenever, in the opinion of the court, it will promote the interest of any estate held in trust, composed of both real and personal property, to order on the petition of the trustee and beneficial owner, for at least a life estate, that the personal property, or a portion thereof, shall be applied for the improvement and greater productiveness of the real estate; and it shall be the duty of the trustee to keep an account of such expenditure, and if the personal and real estate shall go to different persons in remainder or reversion; there shall be no change of the rights of such persons, but such expenditure shall be a charge

⁶ Reeser v. Reeser, 5 Atl. 445.

⁷ Barry's Ap., 103 Pa. 130.

⁸ Rudy's Ap., 20 W. N. C. 241.

⁹ Lehigh, Etc., Co.'s Ap., 88 Pa. 499.

¹⁰ Hunter's Est., 11 D. R. 761.

¹¹ Smith's Est., 53 Pitts. L. J. 123.

¹² Metzger v. Lehigh, Etc., Co., 220 Pa. 535.

¹³ Singerly's Est., 16 D. R. 391.

¹⁴ McHenry's Est., 15 D. R. 302.

on such realty, in favor of those entitled to the personalty, and be recoverable by decree in such court, and if necessary, an order or decree of sale, as in the case of Orphans' Court sales." By act of May 12, 1911, legal notices may be published in daily papers in counties having less than one million population.

Under this section and the act of April 13, 1854, P. L. 368, the court may authorize sale or mortgage of real estate to make permanent improvements, and if the trustee, acting in good faith, exceeds the allowance, the court will ratify it. The income should be charged only with the costs of filing the account and the fees of the clerk.¹⁵

18. Powers over the estate.

Where the will confers power to control, manage and lease an estate which embraces coal lands, the income to be divided, the trustee has power to operate the mines and need not lease.¹⁶ But, under a power to sell, an option to buy will not be enforced.¹⁷ An extreme stretch of power in the letting of a trust estate for maintenance of an orphanage has been sustained.¹⁸ A power to transfer stock is discretionary and cannot be delegated to another.¹⁹ Although no express power is given to make investments, or change and sell securities, the power is implied where necessary to the purposes of the trust.²⁰ A testamentary trustee has power to sell and transfer a mortgage belonging to the estate and an innocent purchaser for value has a good title regardless of the misapplication of the proceeds by the trustee.²¹

19. Transfer of stocks and securities.

The act of May 23, 1874, P. L. 222, provides:

"All certificates of stocks and loans which have been or may hereafter be issued by this commonwealth, or by any municipal or other corporation, shall be transferable by the legal owner thereof, without any liability on the part of the transfer agents of the commonwealth, or the municipal or other corporation permitting such transfers, to recognize or see to the execution of any trust, whether express, implied or constructive, to which such stocks or loans may be subject, unless when such transfer agents of the commonwealth, or officers of such municipal or other corporation, charged with the duty of permitting such transfer to be made, shall have previously received actual notice in writing, signed by or on behalf of the person or persons for whom such stocks or loans appear by the certificate thereof to be held in trust, that the proposed transfer would be in violation of such trust."

Unless the *cestuis que trustent* give written notice to the contrary, as above required, the trustees are free to demand a transfer of stock.²²

¹⁵ Lee's Est., 17 W. N. C. 110.

¹⁶ Hays' Est., 32 Pitts. 375.

¹⁷ Hickock v. Still, 168 Pa. 155.

¹⁸ Frey's Est., 2 Pearson, 142.

¹⁹ Bohlen's Est., 75 Pa. 304.

²⁰ Kaiser's Est., 33 Pitts. L. J. 62.

²¹ Cochrane's Est., 202 Pa. 415.

²² Stockton v. Lehigh, Etc., Co., 14 Phila. 77.

20. Power to contract debts, etc.

When a trustee is charged with the duty of managing the estate and using the income for maintenance, keeping the principal intact, he is not authorized to borrow money on the same.²³ A judgment confessed by a trustee as such, in a transaction not concerning the estate, does not bind it.²⁴ Where a trustee under a direction in the will continues the business and becomes insolvent, he cannot by confession of judgment or conveyance, prefer one creditor over another.²⁵ A trustee is liable for breach of contract where he has bought in a property at foreclosure and agreed to sell it to another at a stipulated price, and then sells it to a third party at a higher price, and his substituted trustee may be sued for it.²⁶ Unless the will authorizes it, a trustee cannot make an assignment for the benefit of creditors.²⁷ A trustee cannot refuse to pay a debt due another estate, on the ground that the estate is indebted to him.²⁸ Where one borrows assets of a trust estate from the trustee, he will be compelled to indemnify.²⁹ If the trustee incurs liability in the protection of his trust he is entitled to indemnity.³⁰

21. Assets in the hands of a trustee.

Assets, generally, which come into the hands of a fiduciary have been explained in a preceding chapter. The same general rules apply to a trustee, who is chargeable only with what property comes into his hands, in the absence of fraud, misconduct or gross negligence.³¹ He will be surcharged with a discrepancy between the amount awarded him and the amount on hand;³² and may be charged interest.³³ He may be charged with the estimated receipts, where his account is not complete or satisfactory.³⁴

22. Liability for loss by negligence.

If by his negligence a part of the estate is lost the trustee will be surcharged.³⁵ The loss must be shown, however.³⁶ The *cestuis que trustent*, being minors, will not be chargeable with contributory negligence.³⁷ The rule of responsibility required of a trustee is the ordinary skill, prudence and care which a man would use, in his

²³ Maloney's Est., 27 Pitts. L. J. 193.

²⁴ Williams v. Tozer, 185 Pa. 302.

²⁵ Young v. Weed, 154 Pa. 316; Woddrop v. Weed, 154 Pa. 307.

²⁶ Yerkes v. Richards, 170 Pa. 346.

²⁷ Woddrop v. Weed, 154 Pa. 307.

²⁸ Chew v. Rawle, 2 Phila. 282.

²⁹ Abbott v. Reeves, 49 Pa. 494.

³⁰ Silvius' Est., 18 Phila. 133; Woodward's Ap., 38 Pa. 322.

³¹ Moore's Ap., 10 Pa. 435; Witmer's Ap., 87 Pa. 120; Lightner's Est., 187 Pa. 237.

³² Sinkler's Est., 10 D. R. 399.

³³ Lowrie's Ap., 1 Grant, 373.

³⁴ Cassel's Ac., 3 Watts, 408; Dickey v. McCullough, 2 W. & S. 88. (See P. & L. Dig., vol. 22, col. 38646, for other cases.)

³⁵ Wolgamuth's Est., 16 Lanc. L. R. 229; Hart's Est., 203 Pa. 480.

³⁶ Maloney's Est., 27 Pitts. L. J. 193.

³⁷ Allen's Est., 9 C. C. 329.

own business.³⁸ He will not be held for failure to collect assets, where he does all that he can do in the matter;³⁹ nor will he be charged with failure to collect a claim, when the *cestui que trust* pleaded for forbearance;⁴⁰ nor where he acts in pursuance of a family agreement made by all the parties in interest.⁴¹ But if he permits a note given to the testator by an attorney who is also his attorney, to be lost, he will be surcharged.⁴²

23. Liability for rents.

If the trustee uses ordinary diligence in the collection of rents, he will not be liable for the loss of some of them.¹ It is not sufficient to show that more rent might have been received, unless there be also fraud or negligence shown.² If the trustee denies the receipt of rents the burden of proof is upon him who avers that he received them.³ Where an executor acts without authority, collecting rents, etc., as trustee he becomes chargeable with the highest rate obtainable.⁴ If a trustee himself occupies the property he will be charged with a fair rental.⁵ If he allows a tenant to remain in possession for a long time without paying rent, he will be surcharged.⁶

24. Liability for funds deposited.

It has been decided that a trustee is not liable for funds deposited by him as trustee in a bank of "good standing" when he made the deposit, but which was not in "good standing," when he needed it;⁷ nor is this changed by the fact that two weeks' notice was required and interest allowed on the deposit.⁸ But if it is a loan or investment instead of a deposit the trustee is then held for it;⁹ or if he deposits it in his own name and not in the character of trust funds.¹⁰

³⁸ Moore's Ap., 10 Pa. 435; Naglee's Est., 6 Phila. 28; Springer's Ap., 4 W. N. C. 23; Witmer's Ap., 87 Pa. 120; Cridland's Est., 132 Pa. 479; Bailey's Ap., 5 Atl. 49; Old's Est., 176 Pa. 150; P. & L. Dig., vol. 22, cols. 38654-5.

³⁹ James' Est., 3 D. R. 373; Wade's Est., 18 Lanc. L. R. 91.

⁴⁰ McClean's Aps., 31 Pitts. L. J. 148.

⁴¹ Lightner's Est., 187 Pa. 237. (See Old's Est., 176 Pa. 150; 150 Pa. 529.)

⁴² Carr's Est., 24 Supr. C. 369.

¹ Patterson's Est., 35 Pitts. L. J. 192; Brooke's Est., 36 Supr. C. 334; Ryan's Est., 8 Lack. L. N. 186.

² Beck's Est., 12 Phila. 74; Pleasanton's Ap., 99 Pa. 362.

³ Fox v. Weckerly, 1 Phila. 320.

⁴ Landis v. Scott, 32 Pa. 495.

⁵ Sill's Est., 39 Pitts. L. J. 292; Holt's Est., 11 D. R. 731.

⁶ Mansfield's Est., 19 Supr. C. 26. (See Carlile's Ap., 38 Pa. 259; Myers v. Bryson, 158 Pa. 246; Holloway's Est., 1 D. R. 58.)

⁷ Union, Etc., Cong. v. Strauch, 1 Leg. Rec. 313. There is no guaranty of deposits in any bank, except its solvency. The law in some progressive states requires guaranty of deposits.

⁸ Law's Est., 144 Pa. 499.

⁹ Frankenfield's Ap., 11 W. N. C. 373; Baer's Ap., 127 Pa. 360.

¹⁰ Comth. v. McAlister, 28 Pa. 480; 30 Pa. 536. (See Lukens' Est., 10 D. R. 294.)

25. Other liabilities and duties.

A trustee is liable for the acts of his agent in the management of the trust and he will not be relieved by bill of review upon slight and unsatisfactory representations to mitigate his own negligence.¹¹ A testamentary trustee will be allowed for keeping the trust property insured,¹² and in reasonable repair.¹³ A trustee in a spendthrift trust will not be surcharged with a property encumbered to its full value, when he lets it go for the payment of the settlor's debts.¹⁴ Where the trustee is given active duties to perform the trust is an active one and cannot be treated as executed.¹⁵ Where the property is in possession of another and the trustee has no control over it, he is not responsible for trespasses upon it, by the erection of unlawful structures.¹⁶ Where the trust is a dry one, with no active duties to perform, the responsibilities of the trustee are nominal only.¹⁷ But where it is one for support and maintenance the duties are active and the trustee is required to perform them.¹⁸ Where, upon the audit of an executor's account, a fund is awarded to the trustee and no appeal has been taken it becomes *res judicata*; and cannot be opened on the audit of the trustee's account.¹⁹ A trustee holding funds solely as trustee and not as executor, his liability to account may be enforced against him personally wherever found, after service in a proper manner.²⁰

26. Expenditures by trustee.

A trustee of a special fund cannot expend it in any other way than that directed by the terms of the trust.²¹ Where the trustee received the *cestui que trust* into his family to board and take care of him, being an imbecile and invalid, his expenditures in that behalf, will be allowed, the estate being ample.²² An allowance will be made when the trustee pays out income for the support of the minor child of the life tenant after the latter's death.²³ Where the trustee is charged with the duty of preserving the corpus of the estate intact, he cannot pay out any of it by way of advances, unless authorized by a court of competent jurisdiction.²⁴ But if the

¹¹ Hale's Est., 9 D. R. 389.

¹² Hurley's Est., 13 Phila. 276.

¹³ Raber's Est., 11 Kulp, 197.

¹⁴ Merriman v. Munson, 134 Pa. 114.

¹⁵ Xander v. Easton Trust Co., 217 Pa. 485; Spring's Est., 216 Pa. 529; Gibbons v. Connor, 220 Pa. 395. (For a recent case of "dry" trust, see Marsh v. Platt, 221 Pa. 431. A trust in personalty may be established by parol.) (Washington's Est., 220 Pa. 204.)

¹⁶ Eisenbrey v. Penna., Etc., Co., 141 Pa. 566.

¹⁷ Jack's Est., 17 D. R. 491; Baker v. Keystone Coal Co., 14 Luz. L. R. 5.

¹⁸ Mather's Est., 17 D. R. 127.

¹⁹ McCown's Est., 221 Pa. 324.

²⁰ Martin v. Martin, 214 Pa. 389.

²¹ Kelly v. Shillingsburg, 2 Supr. C. 576.

²² Griffith's Est., 147 Pa. 274; Bentel's Est., 33 Pitts. L. J. 177.

²³ Bierman's Est., 5 York, 57. (See vol. 22, P. & L. Dig., cols. 38673-4; and see *supra*.)

²⁴ Andress' Est., 14 Phila. 240; Maloney's Est., 29 Pitts. L. J. 169; Stambaugh's Est., 135 Pa. 585.

will allows him to use the principal or portions of it, he will be held only to the exercise of sound discretion;²⁵ and where the remaindermen, being *sui juris*, assent to his expenditures for the support of widow and children, they cannot afterwards surcharge him.²⁶

27. Investments.

It is one of the duties of a trustee of an active trust to keep the trust fund working so as to produce an income and if he fails herein, he will be surcharged with interest.²⁷ It has been held he cannot invest it in buying the land of the life tenant to prevent its sale under liens.²⁸ Having invested in lawful securities, he cannot be charged with their depreciation in the market.²⁹ He cannot be allowed to hold the fund in idleness;³⁰ but he will not be held either to the strictest requirements of "high finance" for results.³¹ For the acts of assembly authorizing legal investments see preceding chapter of this volume. An investment by a trustee in Philadelphia, made in Camden, N. J., mortgages, has been approved by the Supreme Court of this state.³² An investment in marsh lands of a speculative character has been disapproved.³³ So, also as to "advance building or bonus mortgages";³⁴ or a loan to the trustee on his own land;³⁵ or on mere personal securities, which will be made at the risk of the trustee.³⁶ The Orphans' Court cannot ratify investment in any securities except those authorized by law.³⁷ Under section 2 of the act of April 13, 1854, P. L. 368, a decree authorizing investment of stocks held in trust, in real estate, is valid.³⁸ If the trustee is grossly negligent, in making investments he will be surcharged.¹ Power to make investments may be implied from the character of the trust.² Investments directed to be made by a will must comply with its provisions or authority from the court.³

²⁵ Gochenauer v. Froelich, 8 Watts, 19; Hubley's Est., 11 Lanc. L. R. 329; Beaumont's Est., 195 Pa. 1; Martin's Est., 160 Pa. 32; Crane's Est., 174 Pa. 619; Bailey's Est., 208 Pa. 594; Cooper's Est., 1 D. R. 304.

²⁶ Armitage's Est., 195 Pa. 582.

²⁷ Stearly's Ap., 38 Pa. 525; Hower's Ap., 1 Mona. 24; Pray's Ap., 34 Pa. 100; Rhoades' Est., 50 Pitts. L. J. 224; Stambaugh's Est., 135 Pa. 585; Whitecar's Est., 147 Pa. 368; P. & L. Dig., vol. 22, col. 38685.

²⁸ Metzger v. Lehigh, Etc., Co., 220 Pa. 535.

²⁹ Kunzi's Est., 24 Montg. 175.

³⁰ Hess' Est., 22 Lanc. L. R. 372.

³¹ Weir's Est., 53 Pitts. L. J. 147. (See 2 C. R. A., Pep. & Lew., col. 4233.)

³² Gouldey's Est., 201 Pa. 491. (See Pownall's Est., 2 Lanc. Bar, No. 47.)

³³ Sime's Est., 9 D. R. 31.

³⁴ Girard, Etc., Co.'s Ap., 13 W. N. C. 367.

³⁵ Sinkler's Est., 10 D. R. 399.

³⁶ O'Reilly's Ap., 3 Atl. 836; Winter's Est., 21 Lanc. L. R. 265; Johnson's Ap., 9 Pa. 416; Baer's Ap., 127 Pa. 360.

³⁷ Noble's Est., 33 Pitts. L. J. 113; Makin's Est., 7 D. R. 126.

³⁸ Derr's Est., 203 Pa. 96.

¹ Pray's Aps., 34 Pa. 100; Hart's Est., 203 Pa. 480. (See P. & L. Dig., vol. 22, cols. 38695-6, for cases showing different investments construed.)

² Kaiser's Est., 33 Pitts. L. J. 62; Gernert v. Albert, 160 Pa. 95.

³ Ihmsen's Ap., 43 Pa. 431; Conyngham's Est., 25 Pitts. L. J. 23; P. & L. Dig., vol. 22, col. 38698, *et seq.*

A trustee who has acted in good faith and according to the wishes of his *cestui que trust* may be relieved of liability;⁴ although the securities depreciated in value.⁵ The will may confer power on the trustee to work conversion of personalty into realty and *vice versa*.⁶

28. Liability for interest.

When the trustee acts in good faith with the trust funds he is liable only for interest at six per cent. from the receipt of the funds to time of filing his account.⁷ The rate of six per cent. is the maximum and it may be less, under given circumstances.⁸ Where the trustee withholds funds when he should pay them over he will be surcharged the interest.⁹ In proper cases the trustees will be charged only with the interest received and not at the full legal rate, nor for the entire time.¹⁰ But where he failed to invest, he was charged at the full rate and the whole time.¹¹ When a trustee acts in good faith and does his best to procure investment of the funds he will not be held for interest from the time he receives them, but from the time he invests.¹² Two months' time to procure investment has been held to be reasonable;¹³ although the circumstances of each case will govern, and three months have been allowed.¹⁴ If he commingles trust funds with his own, he will be charged with interest,¹⁵ up to the filing of his account,¹⁶ and at the rate of six per cent.¹⁷ When a trustee dies his estate is liable for interest until the death of the life tenant.¹⁸ Interest will be calculated upon a surcharge the same as the principal sum admitted to be due.¹⁹ The doctrine of charging interest upon interest, by compounding annually is not countenanced in Pennsylvania, except where the fund actually earned compound interest.²⁰ If the

⁴ Clermontel's Est., 12 Phila. 139.

⁵ Armitage's Est., 195 Pa. 582; Pile's Est., 10 D. R. 356; Old's Est., 176 Pa. 150.

⁶ Ingersoll's Est., 167 Pa. 536.

⁷ Bishop's Est., 1 Lanc. L. R. 115.

⁸ Roberts' Est., 8 D. R. 303; Cole's Est., 2 Lehigh V. R. 387; English v. Harvey, 2 Rawle, 305; Dugan's Est., 18 Phila. 89; Patterson's Est., 3 D. R. 796; Grover's Ap., 50 Pa. 189.

⁹ Sinkler's Est., 10 D. R. 399; Bosler's Est., 161 Pa. 457; P. & L. Dig., vol. 22, col. 38713.

¹⁰ Beal v. Kline, 186 Pa. 381; Brennan's Est., 14 D. R. 807; Weir's Est., 53 Pitts. L. J. 147.

¹¹ Hess' Est., 22 Lanc. L. R. 372.

¹² Luken's Ap., 47 Pa. 356; Griffith's Est., 147 Pa. 274.

¹³ Witmer's Ap., 87 Pa. 120.

¹⁴ Luken's Ap., *supra*; P. & L. Dig., vol. 22, col. 38717.

¹⁵ Wistar's Ap., 54 Pa. 60; Kidder's Est., 3 Kulp, 443.

¹⁶ Sharp's Est., 5 Lanc. L. R. 176; Ashton's Est., 18 W. N. C. 102; Whitaker v. Peck, 4 Kulp, 320.

¹⁷ Bierman's Est., 5 York, 57; Flynn's Est., 21 Supr. C. 126; Harlacher's Est., 5 Northam. 101.

¹⁸ Semple's Est., 33 Pitts. L. J. 267. (See Hertzler's Est., 192 Pa. 548, as an exceptional case.)

¹⁹ Landis v. Scott, 32 Pa. 495; Sinkler's Est., 10 D. R. 399.

²⁰ Light's Ap., 24 Pa. 180; Pennypacker's Ap., 41 Pa. 494; Robinson's Est., 1 Pearson, 423; Waylan's Est., 1 C. C. 366; Norris' Ap., 71 Pa. 106.

trustee refuses to account for the interest, it has been held that interest may be compounded as a *quasi* penalty.²¹

29. Control of trustee's discretion.

If a trustee fails or refuses to act he may be removed and another put in his place.²² If discretionary power be given him, the court will not interfere, as a rule; ²³ except when fraud is shown,²⁴ and clear proof of a threatened loss or damage that would be irreparable.²⁵ If the power is absolute the court will not interfere;²⁶ but if limited, it may be called in to aid the trustee.²⁷ It will not order an increased allowance to the *cestui que trust*, unless a clear abuse of discretion be shown,²⁸ or an unlawful withholding for accumulation.²⁹ A trustee will not be permitted to defeat the purpose of his trust and put money into his own pocket.³⁰ When the trust raises a question of legal discretion the court has power to direct and restrain it.³¹

30. Control of discretion as to sales, etc.

Under the acts of assembly regulating sales of property, the court may control the conduct of the trustee so as to require him to perform his duty.³² This is especially the case when there is more than one trustee and they cannot agree upon the extent of their powers or the mode of exercising them.³³ The power to sell is not generally connected with a trust, and when it is absolute, the court will not interfere.³⁴ If it is not given in the instrument creating the trust, it will not be exercised except upon clear proof of necessity.³⁵ The court will restrain an undue and disadvantageous sale.³⁶ Where the question concerns purely business matters in the execution of the trust, the court will ordinarily consult the interests of the beneficiaries.¹

²¹ Roberts' Ap., 92 Pa. 407; Noble's Est., 178 Pa. 460.

²² Stevens' Est., 200 Pa. 318.

²³ Soc. of the Cincinnati's Ap., 154 Pa. 621; Chandler v. Gardner, 2 C. C. 407.

²⁴ Jones' Est., 12 D. R. 113.

²⁵ Chase's Est., 4 Lack. Jur. 365.

²⁶ Williams' Ap., 73 Pa. 249; Geiger's Est., 9 D. R. 457.

²⁷ Jones' Est., 12 D. R. 113; Kinike's Est., 10 C. C. 522.

²⁸ Wistar's Case, 2 Phila. 377; Rankin's Est., 35 Pitts. L. J. 224.

²⁹ Levy's Est., 2 Phila. 138.

³⁰ Clark's Est., 4 C. C. 611.

³¹ Stewart v. Madden, 153 Pa. 445; P. & L. Dig., vol. 22; Fleming's Est., 53 Pitts. L. J. 97, cols. 38730-1.

³² Hutchinson's Ap., 82 Pa. 509; Dundas' Ap., 64 Pa. 325; Scott's Est., 12 D. R. 252.

³³ Negley's Est., 23 Pitts. L. J. 21.

³⁴ Knight v. Church, 219 Pa. 184.

³⁵ Cotton's Est., 21 C. C. 451.

³⁶ Smith's Est., 53 Pitts. L. J. 123, 55 Pitts. L. J. 179; Roberts' Pet., 11 Montg. 184.

¹ Gebbie's Est., 9 D. R. 711; Lafferty's Est., 154 Pa. 430; Woddrop v. Weed, 154 Pa. 307; Young v. Weed, 154 Pa. 316; P. & L. Dig., vol. 22, col. 38737.

31. Power of sale and mortgaging.

The powers of fiduciaries in the sale and mortgaging of property have been discussed in preceding chapters, in immediate connection with the acts of assembly regulating the subject. It is only necessary, here, to refer to the interpretation relating to the power of trustees, especially. A general power of sale in a will as to testator's real estate applies to all of it,² and is limited only by the duration of the trust.³ A power to sell is implied where the will works conversion and the court will confirm a sale in such case.⁴ The executors having performed all the duties as such, and died, the administrator *d. b. n. c. t. a.* is not the proper party to act as trustee, but the court will appoint a trustee to take charge of the trust estate.⁵ A successor in the trust in another state may act within this state, if a copy of the will is filed here as required by law.⁶ Where a residuary estate is given in trust to executors, they will exercise the power of sale as trustees and when they are removed as trustees, their power ceases.⁷ If the will gives the trustee ample power to sell, the court will not grant an order.⁸ Where the will requires the written consent of the *cestui que trust*, neither parol consent nor acquiescence will suffice.⁹ A sale made without such consent will not be binding.¹⁰

32. Duties in regard to sale.

When a trustee undertakes a sale he must obtain the best price possible, and if he does not, he will be liable for the loss.¹¹ His liability extends as far as the market value of the land when the conveyance was made.¹² He will not be held liable, however, where the proceeds were devoted to the payment of debts by the widow, under the power given to the trustee.¹³

33. Purchases by trustees.

A trustee who purchases lands at a judicial sale to protect the trust estate, and save a debt due it, takes it as personalty,¹⁴ and he can make a valid title without sanction by the court.¹⁵ The Orphans' Court will not interfere.¹⁶ But where the trustee conveys the land to another at the instance of the *cestui que trust*, it is then realty.¹⁷

² Cresson v. Ferree, 70 Pa. 446.

³ Andrews' Est., 6 D. R. 24.

⁴ Waddington's Est., 7 D. R. 697.

⁵ Gehr v. McDowell, 206 Pa. 100.

⁶ Hoysradt v. Tionesta Gas Co., 194 Pa. 251.

⁷ Henson's Est., 12 D. R. 326. (See Duval's Ap., 38 Pa. 112.)

⁸ York Trust Co.'s Pet., 12 York, 78.

⁹ Clemens v. Heckscher, 185 Pa. 476.

¹⁰ Moss v. Cleary, 5 Phila. 364.

¹¹ Vankirk's Est., 49 Pitts. L. J. 146.

¹² Dilworth's Ap., 108 Pa. 92.

¹³ Duval's Ap., 38 Pa. 112.

¹⁴ Richardson v. Remington, 1 Lack. Jur. 431.

¹⁵ Bilyeu v. Gerstley, 2 C. C. 114.

¹⁶ Barber's Ap., 125 Pa. 564.

¹⁷ Dean v. Russell, 1 Lack. Jur. 400. The trustee will hold the property

A trustee, however, who purchases at his own sale, acquires the land on the same trust, subject to disaffirmance by those interested.¹⁸ He is affected with a trust notwithstanding that he files a declaration of trust which is recorded four years afterwards.¹⁹ Purchases by trustees with leave of court, at their own sales were permitted prior to the act of 1878,²⁰ the practice under which is fully given in a preceding chapter of this volume. The rule here stated does not apply to purchases by a trustee at adverse sales;²¹ unless he brings about the sale to the disadvantage of his trust.²² A purchase by a trustee is not void but voidable;²³ and may be ratified by the *cestui que trust*,²⁴ with full knowledge of all the circumstances.²⁵

34. Making deeds or mortgages.

When the trustee executes a deed in pursuance of a sale he should recite the authority by which it is made; if he omits stating the mode of making it, the presumption is that he complied with the law under which it was made.²⁶ After a long lapse of time, it has been held, that a misrecital does not affect the title of the vendee.²⁷ Where the power of sale is exercised under a will, the purchaser is not obliged to see to the application of the purchase money.²⁸ As to a description of land in a will, the court must make out the intention, from such description.²⁹ After a sale, the proceeds stand for the same purposes and uses as the property.³⁰

An absolute power in a will, to sell, also confers the power to mortgage, which was formerly considered as a conditional sale.³¹

35. Accounts of trustees.

A trustee is held to a very strict accountability, in the same manner as a guardian, and the duty is upon him to keep accounts itemized and with such detail and accuracy as will enable him to

in trust. (Kenworthy v. Equit. Trust Co., 218 Pa. 286; Tanner's Est., 218 Pa. 361.)

¹⁸ Church v. Winton, 196 Pa. 107; Hallman's Est., 13 Phila. 562; Han-num's Ap., 2 Penny. 103; P. & L. Dig., vol. 22, cols. 38760-1. (See also Reid v. Clendenning, 193 Pa. 406.)

¹⁹ Freas' Est., 19 D. R. 735.

²⁰ Dundas' Ap., 64 Pa. 325; Cadwalader's Ap., 64 Pa. 293.

²¹ Lusk's Ap., 108 Pa. 152; Chorpenning's Ap., 32 Pa. 315.

²² Parshall's Ap., 65 Pa. 224; Rickett's Ap., 21 W. N. C. 229; Hay's Est., 35 Pitts. L. J. 437; Mullen v. Doyle, 147 Pa. 512.

²³ Willet's Est., 18 Phila. 167.

²⁴ Bruner v. Finley, 187 Pa. 389; Colburn's Est., 12 D. R. 45; Church v. Winton, 196 Pa. 107.

²⁵ Campbell v. McLain, 51 Pa. 200; Miggett's Ap., 109 Pa. 520; Reid v. Clendenning, 193 Pa. 406; P. & L. Dig., vol. 22, col. 38775.

²⁶ Robins v. Bellas, 4 Watts, 255.

²⁷ Clark v. Miller, 89 Pa. 242.

²⁸ Penna. Co., Etc., v. Austin, 42 Pa. 257; First Natl. Bank, Etc., v. Peebles, 51 Pitts. L. J. 158.

²⁹ Thewlis v. Fenton, 224 Pa. 25.

³⁰ McAleer's Ap., 99 Pa. 138.

³¹ Zane v. Kennedy, 73 Pa. 182; P. & L. Dig., vol. 22, col. 38754; Gernert v. Albert, 160 Pa. 95.

exhibit his entire management of the trust.¹ If he does this, files his account and it is audited and confirmed, he can be required to do no more.² If there be more than one *cestui que trust* he should keep a separate account with each.³ The nature, form and manner of filing and passing accounts of fiduciaries have been fully detailed in previous chapters. It is in order, however, to consider some points in the practice, briefly, which have arisen particularly in trust accounts.

Like any other account in the Orphans' Court, a trustee's account must state particularly the receipts as well as expenditures.⁴ If he is executor or administrator *c. t. a.*, as well, he must keep the business of the two offices distinct.⁵ When an estate is decreed to him by court, he should charge himself with the entire fund, and if any portion of it fails to come into his hands, claim credit for it.⁶ If there are insurance policies upon the property, he should attach a schedule, and claim credit for the investment.⁷ Items wrongly included in a partial account may be stricken out to await a final adjudication.⁸ Although an account is only pertaining to the income it should show the amounts invested, the return of interest and the dates when paid.⁹ Aside from credits claimed as to a fund decreed to him, above stated, a trustee should not claim credit except for actual disbursements.¹⁰ Where a trustee for a lunatic takes the person into her own home and maintains her, she is entitled to be paid out of the trust estate, although the lunatic has an independent estate.¹¹

As to claims against which the statute has run, in order to remove the bar, an acknowledgment and promise to pay, must be clear, distinct and unequivocal.¹² As to interest, the merchant's rule may be adopted, computing interest upon the entire fund, and upon each payment from the time made until settlement and deducting the total amounts of these from the sum total above; or, each year may be taken by itself, when annual income is concerned and one set off against the other.¹³ An account must be complete. Said Penrose, J.:¹⁴ "It is a manifest misapplication of the term, to style that an account which does not exhibit all the transactions with regard to the fund; and a decree of confirmation, as it is conclusive only as to matters which appear, can, in such case, be of

¹ Bockius' Est., 10 C. C. 183; Mintz v. Brock, 193 Pa. 294; Syfert's Est., 9 Phila. 320.

² Gelbach's Est., 11 D. R. 183.

³ Bentel's Est., 33 Pitts. L. J. 177.

⁴ Myers v. Loveland, 10 Kulp, 457.

⁵ Simon's Est., 9 D. R. 59; Hart's Est., 10 D. R. 421; 203 Pa. 480.

⁶ Bockius' Est., 10 C. C. 183.

⁷ Harrison's, 15 D. R. 117. (See Winter's Est., 23 Lanc. 307; Middleton's Est., 17 D. R. 394.)

⁸ Ryan's Est., 8 Lack. L. N. 186.

⁹ Hildebrand's Est., 14 D. R. 729.

¹⁰ Culp's Est., 26 W. N. C. 78.

¹¹ Longenecker's Est., 226 Pa. 1.

¹² Farrell's Est., 44 Supr. C. 474.

¹³ Moore's Est., 15 Lanc. L. R. 202; Bailey's Est., 208 Pa. 594.

¹⁴ Keen's Est., 16 Phila. 208.

little practical utility." It is improper to charge ground rents, as if cash.¹⁵ A trustee is not necessarily invested, as cash.¹⁶ An account should be one dealing wholly with the principal, and a balance is sufficient.¹⁷ An involved and lengthy account examined in the appellate court, where it was thrown out.¹⁸ Rhone, P. J., said: "A trustee should state of the accounts, (1) as between the trustee and, (2) as between them and each other." An account should not mix the principal and income.²⁰ An act approved May 12, 1901, providing exceptions in all courts of record.

36. By whom an account may be rendered.

The acts of assembly, giving a right to an account, have been given, *supra*. The act of 1869 has been construed to apply to a trustee, whether his interest depending on his survival, or on his disability.²³ One entitled to a share in the trust may ask for an account.²⁴ In order to get an account under the act of 1869, the interest must be clearly established.²⁵ An administrator cannot cite the surety of a trustee on an account, until she has filed an account showing a balance in his favor.²⁶ Where a widow is named in the will she cannot cite the trustees, but has a definite right.²⁸ General trustees are not required to render accounts, like guardians, and trustees of a judgment. A judge said a testamentary guardian or trustee must render an account at least once every three years.³⁰ It does not matter if the trust,³¹ and whether or not the trustee is a trustee.

If he acts *mala fides*, he may be relieved.

¹⁵ Pile's Est., 10 D. R. 356.

¹⁶ Baskin's Ap., 34 Pa. 272.

¹⁷ Hays' Est., 32 Pitts. L. J. 375. (See also note on mode of stating account.)

¹⁸ Hart's Est., 203 Pa. 492.

¹⁹ Kidder's Est., 3 Kulp, 443; Hanna, 100 Pa. 343.

²⁰ Fabian's Est., 14 Phila. 284.

²¹ Hartman's Ap., 90 Pa. 203.

²² Dugan's Est., 17 Phila. 454; Sloan's Ap., June 3, 1893, P. L. 273.)

²³ Wagener's Est., 190 Pa. 513.

²⁴ Holloway's Est., 1 D. R. 58.

²⁵ Wagener's Est., 191 Pa. 566.

²⁶ Scott's Est., 202 Pa. 389.

²⁷ McClernan's Est., 11 D. R. 163.

²⁸ Stehman v. Campbell, 4 D. R. 441; Leach v. Casely's Est., 12 D. R. 46; Weber's Est., 10 D. R. 177.

²⁹ Casely's Est., 12 D. R. 46; Weber's Est., 10 D. R. 177.

³⁰ Bentel's Est., 33 Pitts. L. J. 177.

³¹ Sharp's Est., 6 Phila. 389.

³² Conlon's Est., 49 Pitts. L. J. 424; Bergdoll's Est., 6 D. R. 7.

³³ Tritt v. Crotzer, 13 Pa. 451.

A remainderman has a standing to ask for an account.³⁴ An answer that all the property has been divided among the parties entitled thereto is not sufficient.³⁵ If the answer alleges that petitioner was shown by the books and papers that there was nothing to account for, the petition will be dismissed.³⁶ But if there is a proper question as to the application of the fund, an account will be ordered,³⁷ unless there be great delay and evidence of acquiescence.³⁸

37. Petition for citation.

The practice in obtaining a citation to account is the same as already detailed for administrators, executors and guardians in preceding chapters, where the forms are also given. Whilst a petition should show the nature of the claim and the right of the petitioner, if it be lacking in form and no objection be taken in the proceeding, the appellate court will not consider it.¹ One who was not a party to the original proceeding, will not be allowed to intervene years after a settlement was made.² When one trustee dies the survivor is the proper party to file an account.³ But the personal representative of the deceased trustee who managed the entire estate should file an account to the date of his death.⁴ A party interested may proceed against the legal representative without first citing the survivor.⁵ A petition for an account by a surviving trustee is sufficient if it avers the death of the co-trustee, without giving the date.⁶ An auditor who is appointed to settle the account of a trustee must confine himself to the account.⁷ Where a person is appointed by the will both guardian and trustee, the account as trustee should be first filed and considered.⁸ If one dies who is executor and trustee the account as trustee should be filed by his personal representative.⁹ The account as trustee should be filed with the clerk of the Orphans' Court and not the register.¹⁰ The statute of limitations has no application to express trusts cognizable in equity.¹¹

38. Credits and allowances.

A trustee is entitled to allowances for all proper disbursements in the administration of his trust; such as taxes required by law

³⁴ Smith's Est., 7 D. R. 754.

³⁵ Myers v. Loveland, 10 Kulp, 289, 457.

³⁶ Weber's Est., 14 D. R. 126.

³⁷ Cooper's Est., 20 Phila. 178; Frisard's Est., 1 Del. Co. 113; Long v. Perdue, 83 Pa. 214; Biss' Est., 4 D. R. 251; Mason's Est., 12 D. R. 324.

³⁸ Rist's Est., 192 Pa. 24.

¹ Morton's Case, 3 Wharton, 170.

² Parker's Est., 50 Pitts. L. J. 172.

³ Jackson's Est., 16 W. N. C. 50.

⁴ Emlen's Est., 8 C. C. 508.

⁵ Shoch's Est., 15 Phila. 519; P. & L. Dig., vol. 22, col. 38815.

⁶ Walker's Est., 15 D. R. 190.

⁷ Ashman's Est., 218 Pa. 509.

⁸ McHenry's Est., 15 D. R. 302.

⁹ Fenstermacher's Est., 25 Lanc. L. R. 151.

¹⁰ Mather's Est., 17 D. R. 457.

¹¹ Horine v. Mengel, 30 Supr. C. 67.

to be paid;¹² or necessary and reasonable repairs,¹³ but not where the repairs are extensive and made without the approval of the life *cestui que trust*.¹⁴ If the court has ordered the improvements and the trustee exceeds the amount, the court may relieve him.¹⁵ But he should be careful to keep within the income,¹⁶ and not voluntarily seek to charge the estate when it is already heavily encumbered.¹⁷ If the court is satisfied that the estate has been benefited by the improvements, the credit will be allowed.¹⁸ The expenses are properly chargeable to the income and not the principal.¹⁹ The presumption favors the accountant when the claim arose in the furtherance of the trust.²⁰ Credit will not be allowed for commissions to counsel for sale of real estate, where he had no license as a broker and no special contract.²¹

39. Interest and other expenses.

Where all the trust funds were invested and improvements became necessary, so that the trustee was obliged to borrow money, he was allowed a credit for the interest on the loan.²² So, also, where he advanced money to the *cestui que trust*.²³ Simple interest is the rule.²⁴ All the necessary expenses, including traveling, are proper subjects of credit in a trustee's account;²⁵ but not for unnecessary traveling expenses.²⁶ If he has been guilty of gross misfeasance, he may be refused his expenses as well as commissions.²⁷

40. Charges to principle and income.

When the trustee files an account before the trust is finished the expenses are to be charged to the income;²⁸ but when filed at the end, to the principal.²⁹ Counsel fees and other expenses incident to the protection of the estate are chargeable to the principal.³⁰ After the death of the life tenant, the costs of an account demanded

¹² Bierman's Est., 5 York, 57.

¹³ Haffley's Est., 7 Lanc. Bar, 153; Rankin's Est., 5 C. C. 603.

¹⁴ Schmitt's Est., 11 D. R. 399.

¹⁵ Patterson's Ap., 104 Pa. 369; Lee's Est., 18 Phila. 2; Griffith's Est., 4 D. R. 495.

¹⁶ Martin's Ap., 23 Pa. 433.

¹⁷ Mansfield's Est., 19 Supr. C. 26

¹⁸ Weber's Est., 17 D. R. 516.

¹⁹ Gilmer's Est., 15 D. R. 59; Hildebrand's Est., 14 D. R. 729.

²⁰ Wade's Est., 22 Lanc. L. R. 257.

²¹ Brennan's Est., 14 D. R. 807.

²² Gelbach's Est., 14 D. R. 51; 29 Supr. C. 446.

²³ Williamson's Est., 12 Phila. 64.

²⁴ King's Est., 147 Pa. 410; Carpenter's Ap., 2 Grant, 381; Moore's Est., 15 Lanc. L. R. 202.

²⁵ Shiver's Est., 15 Phila. 611; Fox v. Weckerly, 1 Phila. 320; Wade's Est., 11 Lancaster Bar, 47.

²⁶ Berryhill's Ap., 35 Pa. 245.

²⁷ Hanna v. Clark, 204 Pa. 145; Reeve's Ap., 3 Walker, 199; P. & L. Dig., vol. 22, col. 38825.

²⁸ Butterbaugh's Ap., 98 Pa. 351; Sinkler's Est., 10 D. R. 399.

²⁹ Miller's Est., 12 D. R. 719; Semple's Est., 33 Pitts. L. J. 267.

³⁰ Lawrence's Est., 13 D. R. 257.

by the remaindermen are chargeable to them.³¹ Costs of improvement may be divided between income and principal³² unless it is a permanent improvement, when it will be charged to the corpus.³³ The collateral inheritance tax on the life tenant's interest should be paid out of the income and not tacked on the principal.³⁴ But premiums paid on investments must come out of the principal.³⁵ The interest on money borrowed to purchase land for the protection of the trust must come out of the increase before it is added to the corpus when sold at a profit.³⁶ A trustee who pays money over to his *cestuis que trustent* should protect himself with proper receipts, as vouchers, when he comes to a settlement.³⁷

41. Counsel fees and legal expenses.

A trustee may be allowed counsel fees for services necessary to protect the estate,¹ the amount of which will be determined by the court with reference to the nature of the estate, and the skill, labor and success in the services rendered.² The court having fixed the compensation, it cannot be later reviewed by the auditor;³ nor will the appellate court disturb it.⁴ But where the trustee is litigating adversely to the estate, he is not entitled to tax the estate for his counsel fees.⁵ The same rules govern the allowance of the expenses of litigation.⁶ The amounts allowed counsel are usually fixed by rules of court, which differ in the various jurisdictions.

42. Compensation of trustee.

Section 1 of the act of March 17, 1864, P. L. 53, provides:

"In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission, upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: *Provided*, That any such trustee shall be al-

³¹ Buckingham's Est., 12 Phila. 105.

³² Phillips' Est., 12 D. R. 690; Barger's Ap., 100 Pa. 239.

³³ Schmitt's Est., 11 D. R. 399.

³⁴ Penn-Gaskell's Est., 208 Pa. 342.

³⁵ Furness' Est., 12 Phila. 130; Boyer v. Chauncy, 12 Supr. C. 526; Penn-Gaskell's Est., 208 Pa. 346.

³⁶ Neel's Est., 207 Pa. 446.

³⁷ Fabian's Est., 14 Phila. 284.

¹ Biddle's Ap., 83 Pa. 340; Suplee's Est., 18 Phila. 95; P. & L. Dig., vol. 22, col. 38840, *et seq.*, for numerous cases; Brennan's Est., 14 D. R. 807, 215 Pa. 272; Tidball's Est., 29 Supr. C. 363; Whiteside v. Whiteside, 35 Supr. C. 481.

² Heckert's Ap., 24 Pa. 482; Dugan's Est., 16 Phila. 251; Keen's Est., 16 Phila. 208.

³ Weed's Est., 163 Pa. 595.

⁴ Caseby's Est., 23 Supr. C. 646.

⁵ Raybold v. Raybold, 20 Pa. 308; P. & L. Dig., vol. 22, col. 38841.

⁶ See numerous cases, vol. 22, P. & L. Dig., cols. 38840-50; Manderson's Ap., 113 Pa. 631; Kennedy's Est., 141 Pa. 479; Mayer's Est., 17 D. R. 677; Mylin's Est., 32 Supr. C. 504.

lowed to retain a reasonable commission on the interest he may receive from any sum held by him in trust as aforesaid."⁷

43. Commissions in discretion of the court.

The commission allowed a trustee for his services in managing the estate is in the discretion of the court and will be determined according to the nature and amount of the estate and the labor and skill required to administer it with success.⁸ Each case must be decided upon its own merits and no inflexible rule can be laid down.⁹ The ordinary rate per cent. is five,¹⁰ but where the estate is very large three has been held to be sufficient.¹¹ In another case three and one-half was fixed;¹² and for the collection of rents, five to the agent and three to the trustee;¹³ on income, three and one-half has been held a fair rate.¹⁴ On the death of the trustee, his estate was allowed five per cent. on income and two and one-half on the real estate.¹⁵ Commissions will not be allowed on the corpus, except on distribution;¹⁶ or except when there is a long drawn out trust and exceptional care required.¹⁷ Where, for the purpose of making distribution, the balance of income is added to the principal, commissions should not be allowed on the whole sum, if they have already been deducted from the principal.¹⁸ It was said in a recent case that frequently compensation is determined by allowing a percentage of the fund under the control or in the possession of the trustee, but this rule is not universally adopted and in many cases a gross sum is awarded. The rule as to commissions in all cases is compensation for the responsibility incurred and the service and labor performed. Said Mestrezat, J.:¹⁹ "It should be understood by trust companies, as well as individuals that the position of trustee is not to be sought for nor granted for the purpose of profit. Fair compensation, to be ascertained under the rule suggested, is all that the trustee has a right to demand and all that any court should award."

44. Commissions on realty.

When a trustee sells real estate the general rule is to allow two and one-half per cent. on the sum realized;²⁰ and three per cent.

⁷ Glesenkamp's Est., 51 Pitts. L. J. 155; Keller's Est., 21 Lanc. L. R. 183; Waylan's Est., 1 C. C. 366; Cole's Est., 2 Lehigh V. L. R. 387; Evans' Est., 21 Lanc. L. R. 50.

⁸ Heckert's Ap., 24 Pa. 482.

⁹ Wernle's Est., 13 Phila. 328; Perkins' Ap., 108 Pa. 314.

¹⁰ Smith's Ac., 41 Pitts. L. J. 109.

¹¹ Hay's Est., 32 Pitts. L. J. 375; Wade's Est., 22 Lanc. L. R. 257.

¹² Lafferty's Est., 184 Pa. 502.

¹³ Milnamow's Est., 18 D. R. 778.

¹⁴ Milliken's Est., 5 Schuylkill Co. 206.

¹⁵ Moul's Est., 24 York, 19.

¹⁶ Atterbury's Est., 57 Pitts. L. J. 685.

¹⁷ Weiser's Est., No. 2, 24 York, 21.

¹⁸ Bower's Est., 12 D. R. 59.

¹⁹ Harrison's Est., 217 Pa. 207. (See also Tidball's Est., 29 Supr. C. 363; Winter's Est., 23 Lanc. L. R. 307.)

²⁰ Carrier's Ap., 79 Pa. 230.

has been allowed, where no great difficulty was encountered in the matter.²¹ In a case where the trustee employed an agent, the rate was fixed at two per cent. for the agent and three per cent. for the trustee.²² In many cases three per cent. was allowed;²³ even where the trustee purchased at his own sale.²⁴ Where the amount of the corpus was very large the commission was reduced to one and one-fourth per cent. What the trustee received on income will be considered in making the rate on the corpus.²⁵ If the assets are unconverted, the commission will be based on the proceeds when sold.²⁶ A trustee who does not charge any commissions will have his claim allowed for clerical services.²⁷ When the surety is obliged to pay for the trustee, an assignment of commissions to him, will be respected.²⁸

45. Increase or decrease of compensation.

In exceptional cases the court may increase the rate per centum above five, as where unusual care and diligence are required in the management of the estate.²⁹ And, on the other hand, where the duties are light and the estate large, the rate has been reduced as low as one per cent.³⁰ Compensation may be allowed in a round sum instead of percentage.³¹

46. Allowance of compensation.

Compensation will only be allowed in the form of commissions, upon funds actually received by the trustee.³² Where the estate passes at once on the death of the *cestui que trust*, a substituted trustee at his death, is not entitled.³³ Where trustees lease lands, providing for the tenants to pay the taxes, etc., they are entitled to the usual commissions.³⁴ If the trustee is himself the tenant he is not entitled to commissions on the rent.³⁵ Commissions will not be based on fictitious values;³⁶ nor upon the corpus, except when it is in distribution.³⁷ Commissions may be allowed on sums bor-

²¹ Duval's Ap., 38 Pa. 112; Van Kirk's Est., 49 Pitts. L. J. 146; Gelbach's Est., 14 D. R. 51; 29 Supr. C. 446.

²² McHenry's Est., 15 D. R. 302.

²³ Kuhn's Est., 38 Pitts. L. J. 378; Snyder's Ap., 54 Pa. 67; Wistar's Ap., 125 Pa. 526; Nathan v. Morris, 4 Wharton, 389.

²⁴ Crump's Est., 2 D. R. 478.

²⁵ Hemphill's Est., 9 Phila. 486; Pedrick's Est., 5 Phila. 478.

²⁶ Bowers' Est., 12 D. R. 59.

²⁷ Crow's Est., 19 D. R. 120.

²⁸ Scott's Est., 223 Pa. 526.

²⁹ Vastine's Est., 190 Pa. 443; Marsteller's Ap., 4 Watts, 267; Lowrie's Ap., 1 Grant, 373; Ashman's Est., 218 Pa. 509.

³⁰ Dorrance's Est., 186 Pa. 64; Carrier's Ap., 79 Pa. 230; Girard, Etc., Co. v. Bedford, Etc., Co., 20 Supr. C. 304.

³¹ Perkins' Ap., 108 Pa. 314; Robinson's Est., 1 Pearson, 423.

³² Hower's Ap., 1 Mona. 24; Old's Est., 150 Pa. 529; Sharp's Est., 11 Phila. 92.

³³ Stokes' Ap., 80 Pa. 337.

³⁴ McCallum's Est., 211 Pa. 205.

³⁵ Landis v. Scott, 32 Pa. 495; Waylan's Est., 1 C. C. 366.

³⁶ Hildebrand's Est., *supra*.

³⁷ Mylin's Est., 22 Lanc. L. R. 411; 32 Supr. C. 504.

rowed for the use of the estate;³⁸ but not on loans made by the trustee to the *cestui que trust*.³⁹ A trustee who is also an attorney may be allowed his commissions and an attorney fee besides.⁴⁰

47. Forfeiture of compensation.

A trustee may forfeit his right to any compensation by acting in bad faith, wasting and mismanaging his estate and betraying his trust. This he may do by acting dishonestly towards the *cestui que trust*.¹ He cannot charge for services performed in his own wrong;² or when he makes illegal investments.³ If he opposes the trust and seeks to invalidate it, he is not entitled to compensation;⁴ nor where he acts *ex maleficio*.⁵ Where his derelictions are slight, he will not be wholly stripped of compensation.⁶ He may be deprived of his commissions by mingling trust funds with his own so that his account was mixed and hardly intelligible;⁷ and where he fails to account;⁸ or uses the money in speculation;⁹ or by failure and loss of funds;¹⁰ or by failure to invest the fund.¹¹ If he acts in good faith, however, he will not be deprived of his commissions because he has mixed the funds with his own, if no loss be occasioned.¹²

He may be deprived of his commissions where he was negligent and paid very little attention to the estate,¹³ and mismanaged it.¹⁴ If his derelictions are slight, he may still have his compensation.¹⁵ Laches of a co-trustee loses his right to object to the commissions of his colleagues in the trust.¹⁶ The Orphans' Court will not apportion commissions between co-trustees.¹⁷ When the acting trustee has lost his commissions by his negligence, they will not fall into the idle laps of those who did nothing.¹⁸

³⁸ Gelbach's Est., *supra*; Lowrie's Ap., 1 Grant, 373.

³⁹ Bower's Est., 12 D. R. 59.

⁴⁰ Perkins, Ap., 108 Pa. 314; Lowrie's Ap., *supra*.

¹ Swartswalter's Ac., 4 Watts, 77; Berryhill's Ap., 35 Pa. 245; Robinett's Ap., 36 Pa. 174; Hart's Est., 203 Pa. 496; Whiteside v. Whiteside, 35 Supr. C. 481.

² Stearly's Ap., 38 Pa. 525.

³ Roberts' Est., 8 D. R. 303.

⁴ Greenfield's Est., 24 Pa. 232; Hanna v. Clark, 204 Pa. 145.

⁵ Fellows v. Loomis, 204 Pa. 227.

⁶ Weber's Est., 17 D. R. 516; McHenry's Est., 15 D. R. 302.

⁷ Willit's Est., 18 Phila. 167.

⁸ Holman's Ap., 24 Pa. 174; Norris' Ap., 71 Pa. 106.

⁹ Richardson's Est., 12 W. N. C. 387.

¹⁰ Hildebrand's Est., 14 D. R. 729; Mylin's Est., 22 Lanc. L. R. 411.

¹¹ Hess' Est., 22 Lanc. L. R. 372.

¹² Ahls' Ap., 129 Pa. 26; Patrick's Est., 162 Pa. 175.

¹³ Nagle's Est., 12 Phila. 25; Clauser's Est., 84 Pa. 51.

¹⁴ Hart's Est., 203 Pa. 496; Cassel's Case, 3 Watts, 408. (But see Bechtel's Ap., 7 Supr. C. 451.)

¹⁵ Fahnestock's Ap., 104 Pa. 46; Page's Est., 18 Phila. 102; Myer's Ap., 62 Pa. 104; Kilgore v. Hoffman, 8 Atl. 441; Dugan's Est., 18 Phila. 89; Hanbest's Est., 11 D. R. 345; 22 Supr. C. 419.

¹⁶ Walsh's Est., 18 D. R. 214.

¹⁷ Greble's Est., 16 Supr. C. 42; Bower's Est., 12 D. R. 59.

¹⁸ Lafferty's Est., 184 Pa. 502.

48. Finality of account.

When an account has been audited and the report of the auditor confirmed, the appellate court will not reverse the findings of fact.¹⁹ A *cestui que trust's* acquiescence in an account, after she had employed counsel and experts to examine the books, is binding upon her.²⁰ As to an account the court, in a proper case, will apply the maxim that what ought to be done is done.²¹ When trustees collect rents for the devisees they do so as their agents and are accountable to them alone.²² A trustee who has filed his account with a view to a discharge, may change his mind, and hold on to the trust.²³

49. Orders to pay over.

A trustee who is indebted for trust funds may be ordered to pay over and if he fails to comply with the decree, be attached as for contempt, and thrust into jail notwithstanding the act of July 12, 1842, P. L. 339.²⁴ But in the milder exercise of its equitable powers, the court, tempering justice with mercy, as "God tempers the wind to the shorn lamb,"²⁵ will not cast the unfortunate insolvent into *durance vile*.²⁶ Where the act is willful and the dereliction gross, however, the duty of the court is plain.²⁷ An insolvent trustee committed, cannot be discharged from jail, except under the provisions of the insolvent debtors' laws.²⁸ However, some courts have held otherwise, and apparently with an equitable reason;²⁹ since, after a discharge from prison, the power of attachment still remains in the court.³⁰ The payment of costs in a trust affair may be enforced by attachment.³¹ A married woman may be attached for contempt in disobeying the order of the court to pay over.³² An order to pay over should not be made without notice to the trustee; and if so made, on appeal, will be reversed.³³ In an action in account render against a trustee, judgment being entered for the *cestui que trust*, a *capias ad satisfaciendum* may issue to enforce it.³⁴ The court will not recall an attachment in aid

¹⁹ Puterbaugh's Est., 44 Supr. C. 102.

²⁰ Nax's Est., 18 D. R. 423.

²¹ Bruner's Est., 27 Lanc. L. R. 37.

²² Riley's Est., 18 D. R. 483.

²³ Devlin's Est., 19 D. R. 431.

²⁴ Chew's Ap., 44 Pa. 247; Wilvert's Est., 4 D. R. 514; Hugg's Est., 1 Clark, 237; Peter's Est., 1 W. N. C. 526; Blumer's Case, 86 Pa. 371; Morrison v. Blake, 33 Supr. C. 290; Wilson v. Wilson, 142 Pa. 247.

²⁵ Sterne.

²⁶ Kelly's Est., 2 C. C. 151, Penrose, J.; Hamilton's Est., 12 Phila. 21.

²⁷ Croop v. Freas, 8 C. C. 107; Leiter's Ap., 10 W. N. C. 225.

²⁸ Batdorff's Case, 13 W. N. C. 417. (See vol. 4, for the practice.)

²⁹ Hilles' Case, 13 Phila. 340; Kuntz's Est., 2 Lehigh V. L. R. 241; Stevenson's Est., 7 W. N. C. 65.

³⁰ Spear's Est., 1 W. N. C. 637.

³¹ Church's Ap., 103 Pa. 263.

³² Gilchrist's Est., 6 Luz. L. R. 57; Klein's Est., 11 Phila. 34. (But see Nagley's Ac., 1 Ashmead, 373.)

³³ Owen's Ap., 78 Pa. 511.

³⁴ Harris v. Sheldon, 1 Mona. 188.

of a compromise between the *cestui que trust* and the family of the trustee;³⁵ but it may do so, in a proper case.

The court may make an order on a trustee to pay over to his successor the amount found due, without serving a formal demand and a certified notice of the award upon him.³⁶ The *cestui que trust* of an insolvent trustee cannot by attachment force him to elect to take against the will of his wife which creates a spendthrift trust for him.³⁷

50. Removal and discharge.

The statutes providing for the removal and discharge of fiduciaries, embracing trustees, have been given *supra*. The act of May 1, 1861, P. L. 680, applies to a testamentary trustee as well as any other trustee;³⁸ and, although, on demurrer, a petition has been held insufficient for want of proper parties, if a second petition is filed, which is good, an answer must be filed, even if the trustee has meanwhile given a bond approved by the court.³⁹ The Orphans' Court will not revoke the appointment of a non-resident trustee, in the absence of a charge of unfitness, except by his consent and of all the parties interested.⁴⁰ A trustee may be removed for neglect of duty entailing loss¹ and also for incompetency;² but not for a mere error of judgment;³ nor mere age and infirmity which do not incapacitate him.⁴ The loan of trust funds on personal security, although some of the *cestuis que trust* assented, has been held to be ground for removal.⁵ The court must use its discretion and not remove for every little irregularity complained of.⁶ But where one is guardian as well as trustee and sacrifices the interests of the guardianship for the trust, he will be removed.⁷ An insolvent trustee may be removed under the act of 1861, although he has not been guilty of any fraud.⁸ But one will not be removed because he did not keep a separate bank account until some time elapsed after his appointment, either by virtue of the act of 1861, or that of 1893 *supra*.⁹

51. Removal in Philadelphia.

Under the act of April 9, 1868, P. L. 785, applying only in Philadelphia,¹⁰ and then only on the petition of a majority of the *cestuis*

³⁵ Reiff's Est., 10 D. R. 450.

³⁶ Boning's Est., 217 Pa. 306.

³⁷ Fleming's Est., 217 Pa. 610.

³⁸ Frey's Est., 23 York, 141.

³⁹ Frey's Est., *supra*.

⁴⁰ Holmes' Est., 19 D. R. 121.

¹ Simon's Est., 155 Pa. 215.

² Drum's Est., 15 Phila. 510; Wood's Est., 41 Pitts. L. J. 222.

³ Hurley's Est., 5 C. C. 574.

⁴ Dugan's Est., 2 D. R. 190; Stevenson's Est., 15 D. R. 798.

⁵ Johnson's Ap., 9 Pa. 416; Bradish's Est., 8 D. R. 38; Wolgamuth's Est., 16 Lanc. L. R. 220.

⁶ Theis' Est., 8 C. C. 257; Syfert's Est., 9 Phila. 320.

⁷ Mansfield's Est., 206 Pa. 64.

⁸ Dannerhower's Est., 14 D. R. 787.

⁹ Strickler's Est., 28 Supr. C. 455.

¹⁰ Patterson's Est., 3 C. C. 236.

que trustent of the life estate,¹¹ the court has ample room to exercise its discretion, and some substantial reason must be set forth in the petition and shown upon hearing.¹² Mere differences of opinion between the trustee and his correlatives are insufficient.¹³ This applies with the greater force to a testamentary trustee.¹⁴ The question of inharmonious relations is one of fact for the judge to weigh well, having in view always the good of the estate,¹⁵ and he may remove, although it may not be imperiled.¹⁶

52. Insufficient grounds of removal.

A guardian who is also trustee will not be removed from his trusteeship, after the minors are of age, simply because the appointment was irregular;¹⁷ nor because the testator gave the trustee, orally, powers which he promised to exercise.¹⁸

53. Discharge of trustee on his own application.

A testamentary trustee and executor may be removed on his own petition where he finds himself embarrassed by his duties in the dual relation.¹⁹ When he has performed all his duties, settled his account and paid over, he is entitled to a discharge.²⁰

54. Procedure by petition.

The proceedings to remove a trustee are by petition sworn to, setting forth all the facts which constitute the reasons. It should embrace all the parties interested, and if it does not, will be dismissed without prejudice.²¹ Where there is an irreconcilable antagonism between the trustees themselves a trustee may be removed upon petition of his co-trustee,²² but not for a mere difference of opinion.²³ A trustee should not be removed, however, until his accounts are settled and a successor is appointed,²⁴ and all matters closed up.²⁵ The proceedings by petition, citation, etc., have been covered, with forms, in the preceding chapters, reference to which is here made.²⁶ The costs of the proceedings may be divided between the trustee and the petitioners.²⁷

¹¹ Miffin's Est., 19 Phila. 200.

¹² Stevenson's Ap., 68 Pa. 101; Keen's Est., 6 C. C. 645; Price's Est., 209 Pa. 210; Bergdoll's Est., 9 D. R. 162; Neafie's Est., 199 Pa. 307, overruling Nathan's Est., 191 Pa. 404; McInnes' Est., 11 D. R. 149.

¹³ Price's Est., *supra*.

¹⁴ Theis' Est., 8 C. C. 257.

¹⁵ Martin's Est., 4 D. R. 219.

¹⁶ Marsden's Est., 166 Pa. 213; Howell's Est., 16 Phila. 232; Price's Est., *supra*. Neafie's Est., *supra*.

¹⁷ Wallace's Est., 206 Pa. 105; Glaser's Est., 13 D. R. 198.

¹⁸ Williams' Ap., 73 Pa. 249.

¹⁹ Malone's Est., 9 D. R. 115.

²⁰ Greble's Est., 9 D. R. 89.

²¹ Elton's Est., 15 D. R. 91.

²² Myers' Est., 205 Pa. 413.

²³ Morgan's Est., 8 C. C. 260.

²⁴ Myers v. Loveland, 10 Kulp, 457.

²⁵ Longstreth's Est., 12 Phila. 86.

²⁶ See also Morrow's Est., 16 Phila. 387; Simon's Est., 155 Pa. 215; Price's Est., 209 Pa. 210; Miller's Est., 174 Pa. 362; Vastine's Est., 190 Pa. 443.

²⁷ Cooney's Est., 18 D. R. 301.

TRUSTEES.

55. Liability of co-trustees.

Although as to third persons, a trustee may be responsible for the default of his co-trustee, it is clear that he is not as agent or defaulter himself, or those claiming through him.¹ Until a loss there can be no liability.² He is not an insurer of funds as a surety for his co-trustees, and hence, generally, is liable for the loss only so far as funds come into his hands.³ Where trustees' services are joint they will be held jointly liable.⁴ If one is cognizant of the mismanagement or malversation of his co-trustee, it is his duty to interfere and prevent a *devastavit* and if he does not, he is liable for the loss.⁵ He will be equally liable for failure to get funds, on the ground of supine negligence.⁶ When one of a class of trustees dies, the management of the whole estate devolves on the survivors, and they alone have a right to compel an account on the part of the estate of the deceased trustee.⁷

When trustees join in an account or acquiesce in an account by one, they are all jointly liable.⁸

56. Surviving trustees.

Under section 2 of the act of May 3, 1855, P. L. 415, the survivors in a trust are charged with the duties of the trust,⁹ and must perform them unless the whole number are required to act. A single survivor may be required to file an account without joining a personal representative of the deceased trustee.¹¹

57. Successors in the trust.

The successors of trustees, under the act of April 22, 1846, P. L. 483, have the same powers as the original trustees.¹² It is the duty to recover from the former trustee any deficit in the fund.¹³ They are only liable, however, in case of loss.¹⁴ A discretionary power connected with an estate, which is not personal, passes to the successor in the trust.¹⁵ But a power of appointment in a will goes only to those named and the successor thus appointed takes no extension of the power.¹⁶ And so a

¹ Hinkle's Est., 16 Phila. 376. Penrose, J.

² Stell's Ap., 10 Pa. 149.

³ Patrick's Est., 162 Pa. 175; Fesmire's Est., 134 Pa. 67; Birely v. D. R. 395; Hatch's Ap., 12 Atl. 593.

⁴ Irvine's Est., 203 Pa. 602; P. & L. Dig., vol. 22, col. 38943.

⁵ Adams' Est., 221 Pa. 77.

⁶ Beatty's Est., 214 Pa. 449; Aspell's Est., 16 D. R. 424.

⁷ Graham's Est., 218 Pa. 344.

⁸ Sinkler's Est., 10 D. R. 399; Lafferty's Est., 184 Pa. 502; M. v. Mansfield, 32 Supr. C. 119.

⁹ Magee's Est., 32 Pitts. L. J. 401.

¹⁰ Phila., Etc., Co. v. Lehigh, Etc., Co., 36 Pa. 204; Hunter v. Ar. 152 Pa. 386; P. & L. Dig., vol. 22, col. 38949.

¹¹ Walker's Est., 15 D. R. 525; Graham's Est., 218 Pa. 344.

¹² Cresson v. Ferree, 70 Pa. 446; Magraw v. Pennock, 2 Gra. Woodward's Est., 8 Phila. 211; Semple's Est., 33 Pitts. L. J. 267.

¹³ Rahm's Est., 49 Pitts. L. J. 283; Appleton's Est., 203 Pa. 80.

¹⁴ Maloney's Est., 27 Pitts. L. J. 193.

¹⁵ Carpenter's Est., 17 D. R. 170.

¹⁶ Boning's Est., 214 Pa. 19.

given, once exercised, cannot be reviewed by the successor in the trust.¹⁷

58. Termination of a trust.

A trust created by a will terminates with the completion of its purpose.¹⁸ When its object is attained it is ended. Strong, J., said:¹⁹ "Even a devise to trustees and their heirs will be cut down to an estate for life or even for years if such less estate be sufficient for the purpose of the trust." A trust *pur autre vie* is as valid as an estate *pur autre vie*, and does not necessarily terminate when the beneficiary comes of age.²⁰ The relation of trustee and *cestui que trust* is not terminated by a change of form of the estate.²¹ Where the trust is created to protect a contingent remainder, it may be terminated at the instance of the only persons interested in the estate.²² Where the birth of other children is admitted to be impossible the trust may be extinguished by agreement and the interests of possible children unborn protected by refunding receipts.²³ "The manner of termination of a trust is of little moment, whether by a joint conveyance or transfer to all the parties in interest, or by assignment by the *cestui que trust* for life to the remainderman, or *vice versa*."²⁴ A trust for beneficiaries as they attain full age, terminates as to each as he arrives at that age.²⁵ Where the will fixes the time of termination it must govern.²⁶

59. Power of married woman as trustee, to convey.

Section 1 of the act of April 22, 1891, P. L. 25, provides:

"When any lands, tenements and hereditaments, or a power to sell any lands, tenements and hereditaments, shall be vested in any woman, either as sole trustee or as trustee jointly with some other person or persons, she may, subject to the powers and conditions given and imposed in the creation of or by such trust estate, grant and convey such lands, tenements and hereditaments as if she were a *feme sole*."

Section 2 validates former conveyances made by a married woman trustee.

60. Funds may be paid over to non-resident trustees.

The act of May 8, 1889, P. L. 123, provides:

"When all the persons for whose benefit a valid trust shall have been created by deed or will, for a term of years or for life, shall

¹⁷ Stiles v. Easton Natl. Bank, 33 Supr. C. 57.

¹⁸ Mott's Est., 2 Kulp, 281.

¹⁹ Koenig's Ap., 57 Pa. 352. (See also Coover's Ap., 74 Pa. 143; Ritter's Est., 190 Pa. 102.)

²⁰ Spring's Est., 216 Pa. 529.

²¹ Morrison v. Blake, 33 Supr. C. 290.

²² Brooke's Est., 214 Pa. 46; Clermontel's Est., 17 D. R. 25.

²³ Snyder's Est., 17 D. R. 270; Baldwin's Est., 16 D. R. 380.

²⁴ Coward's Est., 17 D. R. 85. Lamorelle, J.

²⁵ Dimond v. Dimond, 9 Phila. 215; Sheridan v. Sheridan, 136 Pa. 14; Stoever's Ap., 5 W. N. C. 467; Shallcross' Est., 9 D. R. 388; 200 Pa. 122.

²⁶ Thouron's Est., 18 W. N. C. 56, 15 Phila. 521; Biddle's Ap., 99 Pa. 525; P. & L. Dig., vol. 22, col. 38400, for numerous cases.

have removed from this state into any other state or territory of the United States, to permanently reside therein, the court having cognizance of such trust is hereby authorized and empowered, on application by or on behalf of all the persons interested in said trust, to direct the trustee or trustees appointed in and by said deed or will, to pay over said trust moneys, or transfer the securities in which they may have been invested, to a trustee or trustees duly appointed by the court of such other state or territory: *Provided, however,* It shall be made to appear to the satisfaction of the court making such order or decree of transfer, that the trustee or trustees so appointed by the court of such other state or territory, have given security in double the amount of the trust funds to be transferred, and that such security has been approved by such court."

61. Form of petition by trustee for authority to improve the real estate of his cestui que trust.

To the Honorable, etc.

The petition of John Jay respectfully represents:

1st. That Isaac Wood, late of said county, died on the — day of —, 19—, testate, and by his will devised to your petitioner a lot of land in the City of Wilkesbarre, which he denominated his "Homestead," in trust, as follows:

(A.) To collect and receive the annual income, rents and profits arising therefrom, and to apply the same to the use of my granddaughter, Ruth W. Mills, for and during her natural life, and at her death to convey the same to the child or children of the said Ruth W., who shall be living at the time of her death, and their heirs, in equal parts, the issue of any deceased child or children to take as the representative of their parent.

(B.) In trust after the death of the said Ruth W., in the event of her not leaving any child or children living at the time of her death, then to convey the same to my son John and my daughter Elizabeth, or their heirs, as will more fully appear by a copy of the will hereto attached.

2d. That said lot of land is more particularly described as follows:
(Here follow description.)

3d. That the said Ruth W. is now a minor, and has B. M. Espy, Esq., as her guardian, and that said John and Elizabeth are living.

4th. That the buildings on said lot consist of a frame dwelling-house and small out-buildings, all of which are in a dilapidated condition, unfit to occupy and unproductive; the entire rent from the buildings not exceeding \$500, while the land alone is worth at least \$20,000, and the annual taxes and other charges on the same amount to about \$200.

5th. That under the will of the said Isaac Wood, there was placed in the hands of your petitioner the sum of \$10,000 in cash, in trust, for the same uses and purposes, and to the same persons hereinbefore set forth concerning the real estate.

6th. That your petitioner believes and knows, that if the said property could be improved by the (set out what repairs, improvements, etc.), said real estate would be of greater productiveness, and that it will promote the interest of the said trust estate if the said

personal property or a portion thereof shall be applied for the improvement and greater productiveness of said real estate.

The petitioner therefore prays the court, upon notice to the parties in interest, to order the said personal estate, or such portion of it as may be necessary, to be applied as aforesaid.

And he will ever pray, etc.

John Jay.

(Affidavit of truth.)

For other forms applicable, see Guardian and Ward, Sales of Real Estate, and The Price Act.

CHAPTER LIX.

TRUST COMPANIES.

1. Origin of trust companies as administrators, etc.
2. Authority to act as executors, etc.
3. Deposit of money by order of court.
4. Power to act as sole surety.
5. Capital to be liable.
6. Executors, etc., authorized to deposit.
7. Court may appoint an examiner.
8. Trust funds to be kept separate.
9. Oath in execution of trust.
10. Burial companies may accept trusts.
11. Distribution of assets of trust companies.
12. Rules in Allegheny County.
13. Regulation of deposits and withdrawals.
14. Foreign surety companies.
15. Trust funds to be kept separate.
16. Trust funds and investments.
17. Qualification of trust companies.
18. Examiners.
19. Special examinations — revocation.
20. Rule in Philadelphia — petition, etc.
21. Annual statement.
22. How approved.
23. Examiners, reports, fees.
24. Effect of report.
25. Capital of corporations.
26. Trust and surety docket.
27. List of estates.
28. Application as surety.

1. Origin of trust companies, as administrators, etc.

The origin of corporate executors, administrators, guardians, etc., called trust companies, may be traced to the acts authorizing the Pennsylvania Company for Insurances on Lives and Granting Annuities (February 26, 1836, P. L. 49) and the Girard Life Insurance, Annuity and Trust Company of Philadelphia, March 17, 1836, P. L. 99). It is not the purpose of this volume to deal with the law in regard to trust companies generally, but only so much thereof as concerns them in their relations as fiduciaries, coming within the purview of the Orphans' Court, and the rules of this court.

2. Authority to act as executors, etc.

The power of trust companies to act as fiduciaries was contained in clause four of the 29th section of the act of April 29, 1874, which was amended several times, and the last form on record is that of April 21, 1903, P. L. 223, which conferred powers—

“Four. To act as assignees, receivers, guardians, executors, administrators and to take and receive and execute trusts of every description not inconsistent with the laws of this state or of the United States, and to receive deposits of moneys, and to issue their obligations therefor; to invest their funds, other than funds committed to their care by the Orphans' Court, in and to purchase real and personal securities, and to loan money on real and personal se-

curities, and to invest funds committed to their care by the Orphans' Court in such securities as shall be approved by such courts."

3. Deposit of money by order of court.

"Section 2. That every court into which money may be paid by parties, or to be placed by order or by judgment, may, by order, direct the same to be deposited with any such corporation."

4. Power to act as sole surety.

Clause 6th as re-enacted by the act of June 27, 1895, P. L. 399, provided:

"Sixth. To become sole surety in any case where by law one or more sureties may be required for the faithful performance of any trust, office, duty, action or engagement."

5. Capital to be liable.

It was provided by the act of May 9, 1889, P. L. 159, and in the same words, by the act of 1895, *supra*, that —

"Whenever such companies shall receive and accept the office or appointment of assignees, receiver, guardian, executor, administrator, or to be directed to execute any trust whatever, the capital of the said company shall be taken and considered as the security required by law for the faithful performance of their duties as aforesaid and shall be absolutely liable in case of any default whatever."

6. Executors, etc., authorized to deposit.

The same acts, *supra*, further provided:

"Any executor, administrator, guardian or trustee, having the custody or control of any bonds, stock, securities or other valuables belonging to others, shall be authorized to deposit the same for safe keeping with said companies."

7. Court may appoint examiner.

It was also provided in the same acts:

"Whenever any court shall appoint said companies assignees, receiver, guardian, executor, administrator, or to execute any trust whatever, the said court may in its discretion, or upon the application of any person interested, appoint a suitable person to investigate the affairs and management of the company so appointed, who shall report to such court the manner in which its investments are made and the security afforded to those by or for whom its engagements are held, and the expense of such investigation shall be defrayed by the said company; or the court may, if deemed necessary, examine the officers of said company under oath or affirmation as to the security aforesaid."

8. Trust funds to be kept separate.

The same acts provided:

"Said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so desig-

nated as that the trust to which su
be clearly known."

9. Oath in execution of trust.

The act of February 16, 1877, P. 1

"That in all cases where a corpor
the execution of any trust, the presi
secretary, treasurer or actuary of a
usual oath or affirmation directed t
such other like cases."

10. Burial companies may acc

The act of May 16, 1891, P. L. 88

"That it shall and may be lawful
or cemetery company within this cor
are hereby authorized and empower
persons, by the terms of any deed, w
or bequest, in trust for the uses an
order and repair the family burial
graves and lot improvements, as w
ers, trees or shrubbery, or general
such lots or graves of such granto
and authority shall not extend to a
ever: *Provided, however,* That such
upon receipt of any such gift, devise
to the Court of Common Pleas of th
approval of the court as to the inve
gift, devise or bequest requires a
held in trust by such company."

11. Distribution of assets of tr

Section 1 of the act of May 8, 18
acts as follows:

"That in case of any distribution
or other assets whatsoever, of any t
or otherwise, distribution shall be i
lowing order, namely:

First. To pay all deposits in the

Second. To the payment and disc
bilities of such trust company or cor

Third. The residue, if any, shal
holders of the trust company or cor
spective legal rights: *Provided, how*
property shall be kept separate, as
mented, as aforesaid, and distribut
ingly."

12. Rules as to trust companie

Section 1 of rule 21 provides:

"Trust or surety companies apply
pany to be authorized to act as trust
or as surety on bonds, shall in the
the charter, the names of its officers

liabilities, the authority and purpose for which it intends to do business, its acceptance of the acts of assembly relating to such companies, as well as its acceptance of all rules or orders of this court now in existence, or that may hereafter be made with reference to such companies; also that it will submit to this court in the first weeks of January and July of each year, a statement duly verified showing its financial condition; also that it will at any and all times furnish to the examiner appointed by this court, full and complete reference to all its books and assets, and give all detailed information with respect to the condition of its business, and pay the costs of such examiner's fees."

13. Regulation of deposits and withdrawals.

Section 2 of rule 21, provided:

"All trust and surety companies authorized by this court to become trustee, guardian or other fiduciary and to become official surety on bonds, shall adopt and submit copy of a rule providing that no deposits of money received by such trust or surety company shall be withdrawn except upon notice, which notice or notices shall be printed in the deposit books of all depositors setting forth the terms thereof; the enforcement of such rule, however, may be optional with such company and may be exercised by it only in preventing sudden withdrawals of deposits, or embarrassment to it, in times of monetary stringency."

This rule was amended November 16, 1906, and again April 30, 1907, leaving it optional with trust or surety companies to accept it. By the first amendment they were required "to print in conspicuous place on the deposit books of customers a notice reserving the right to pay out on check funds which may hereafter be placed on deposit, only in the following manner, viz.:

1. For sums of \$500 or under, in any one week payable on demand.
2. For sums of over \$500, and not exceeding \$1,000, in any one week, one week's notice.
3. For sums of over \$1,000, and not exceeding \$2,500, in any two weeks, two weeks' notice.
4. For sums of over \$2,500, and not exceeding \$5,000, in any three weeks, three week's notice.
5. All sums exceeding \$5,000, on thirty days' notice and limited to one payment during this time.
6. The enforcement of the foregoing rule is optional with this company, to be exercised by it only in preventing sudden withdrawal of deposits or embarrassment to it in times of monetary stringency."

14. Foreign surety companies.

Rule 21½, Allegheny county, provides:

"Surety companies having their location and principal place of business outside of Allegheny county, now recognized or applying for authority to act as surety on fiduciary bonds, in addition to the requirements of rule 21, so far as applicable thereto, shall be subject to the following provisions:

1. The paid up capital and surplus of such applying company must not be less than \$1,000,000.
2. The names and residence of its local officers, and place of busi-

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ness of its local board, if any, and accredited representative upon whom shall be set forth in the petition.

3. No suretyship in any single case exceeding ten per cent. of the combined surplus of the surety company.

4. In no case shall any surety company have control of the trust assets for which it is chargeable, without the express authority of the court.

15. Trust funds to be kept separate

Section 3 of rule 21, provides:

"All deposits of trust funds made by the principal of the bond upon which the trust is to be kept separate from their general deposits by such company in a separate account. If the company, not doing a surety business, or if the account is to be designated as a trust account."

16. Trust funds and investments in general assets.

Section 4 of rule 21 provides:

"Said trust or surety companies shall keep their investments separate and apart from their other assets, and all investments made by such company shall be so designated as that the trust shall belong shall be clearly known. 27 June, 1895, P. L. 399."

17. Qualification of trust companies

"No company will be approved that has not been in existence at least one year, and if located in a city, shall have a stock of not less than \$250,000; if located elsewhere, not less than \$125,000."

18. Examiners of trust companies

Section 6 of rule 21 provides:

"When an application for recognition is made, all the requirements of the acts of a general nature, the foregoing rules, the court will appoint a special examination and report of the court. If such applying company, the fees for such company, whether it be approved or surety companies under these rules."

19. Special examinations — Review

Section 7 of rule 21 provides:

"Examination of such trust or surety company by the examiner duly appointed by this court. If ever in the judgment of the court to be necessary. The examination shall contain all matters upon which information is required. The examination shall be made without prejudice."

surety company to be examined; the fees for such examination shall be fixed by the court and paid by the company examined. Any unfavorable condition in the report of such examination may be sufficient cause without further notice to cancel the authorization of such company to act in further fiduciary capacity in this court, especially if it appear that the directors of such company individually or otherwise are borrowers from said company, or are under obligations direct or conditional, approaching the limit fixed by the act of assembly."

20. Rule of court in Philadelphia.

It is provided by rule 16, as amended April 5, 1909, striking out section 3, and inserting, in lieu thereof, the following:

(A.) *Petition for leave.*

"On and after June 1, 1909, no corporation, whether it has already justified or not, will be accepted as surety in this Court nor appointed as trustee or guardian or in any other fiduciary capacity, unless it shall present to the Court a petition for leave to be approved under this rule, which petition shall contain a statement, verified by the oath or affirmation of an executive officer thereof, setting forth:—

1. The date of its incorporation, the state or other authority by which it was incorporated and a copy of its charter.

2. The names of its officers and directors.

3. The total amount of assets and the general items composing the same, and specifying whether such assets include commercial or negotiable paper, and if so, how much.

4. The amount of its authorized capital stock; the amount issued and outstanding; the number of shares issued and the par value thereof; whether the same was paid for in cash or other property, and how much was paid in cash.

5. Whether any reserve has been set aside for the payment of anticipated losses, or for the re-insurance of its contracts and obligations or for any other purpose, and if so, the amount, or amounts thereof.

6. The amount of deposits in its deposit department.

7. The amount of bills payable.

8. The amount of surplus and undivided profits.

9. The total amount of liabilities.

10. The total amount of trust funds, invested and uninvested, held by the company as trustee, guardian or other fiduciary.

11. The character of the business conducted by the company and the total amount for which the company is surety.

12. The date of the last known sale of the company's stock, the number of shares sold, the price per share realized for the same, and whether the stock was sold at public or private sale or the sale made on a stock exchange.

13. The date when the last dividend was declared and the amount thereof.

14. A copy of the last report of the Banking Commissioner of Pennsylvania (or the Insurance Commissioner, as the case may be) relative to the corporation offered as surety."

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Stipulation to be filed.

"With said petition shall be filed securities and other property received in a fiduciary capacity and from the time it is surety, shall not be taken out of the trust and shall be kept separate and apart from the property of said company, so that it is easily identified as belonging to the company whose account the same has been received by said company, either as fiduciary for persons for whom it is surety, shall be kept in or accounts in a bank or banks or trust other than the petitioner of good standing.

At the time of the filing of said petition, if the funds of the applicant aggregate less than \$5,000,000 and its principal business is not that of becoming a surety, the clerk of this Court the sum of \$5,000,000 and upwards is that of becoming surety, then it shall be a sum of \$100, and thereupon said petitioners and examiners appointed under this rule, shall make a thorough examination into the financial condition of the company and into its methods of conducting its business and care and management of the trusts committed to it and report to the Court with their recommendations. If the examiners shall approve the application the company shall be allowed to offer itself in any capacity for examination under paragraph (C) hereof, so long as it continues to be a surety. That Court and until a decree is made to the contrary. That corporations which justified previously may offer themselves as heretofore and until otherwise ordered by the Court and the examiner's report has been received.

Provided further, That any company examined within a year prior to the time of the filing of the petition be re-examined within a year after the time of the filing of the petition unless otherwise ordered by the Court.

21. Annual statement.

"(B) Every company approved under this rule as a surety or fiduciary, if it desires to continue in any of the capacities aforesaid, shall file annually a statement on or before the first day of February next following a sworn statement similar to the one already required, showing facts and figures given as of the 31st day of December, and shall also at the time of filing the statement its assets and trust funds together aggregated and its principal business is not that of becoming a surety, the clerk of the Court the sum of \$5,000,000 and upwards is that of becoming surety, then it shall be a sum of \$100. Said annual statement shall be made by examiners, who shall thereupon make a report on the financial condition and also ascertain

the rules of this Court. If the examiners are of the opinion that a detailed examination is not necessary, they shall mark their approval on the statement and file the same with the clerk of the Court; but if of the contrary opinion, they shall present to the Court a report setting forth the conditions as they find them, with their recommendation thereon, and thereupon the Court shall make such order as it shall see fit: *Provided, however*, That every company shall be examined thoroughly and in detail once every three years, unless the time be extended by the Court. After every examination in detail the examiners shall report thereon to the Court, and oftener, if required by the Court, or if they consider a report necessary. For the purpose of keeping themselves informed as to a company's condition, the examiners shall have access to it at any time, irrespective of the date of its last examination."

22. How approved.

"(C) Corporations of the State of Pennsylvania may be approved as surety, trustee, guardian, or in any other fiduciary capacity. Foreign corporations will be approved as surety only."

23. Examiners, reports and fees.

"(D) The petitions and statements filed under this rule shall be referred to two standing examiners, who shall be appointed by the Court in January of each year or as soon thereafter as may be convenient, to hold office until the 31st day of the December following the date of their appointment, unless removed by the Court, which the Court may do at any time. For the purposes of their appointment, they shall have all the powers of examiners and masters. The examiners' fees for each examination shall be paid by the company examined. They shall receive as compensation the sums of \$50 and \$100 respectively, deposited with the clerk as hereinbefore provided, which shall be equally divided between them. When the examination shall require more than two days, each examiner shall receive the additional sum of \$25 for each and every day that he is actually engaged in making an examination. Where the home office of the company is not in the City of Philadelphia, the time spent in such examination shall include the time necessarily spent by the examiners in traveling to and from the home office of the company, and the company shall also pay them their reasonable traveling and hotel expenses. In companies where the Court is of the opinion that the examination of a particular company will be facilitated by the appointment of an assistant or assistants to the examiners, such assistant or assistants may be appointed by the Court at compensation to be fixed by the Court, and such compensation shall be paid by the company in addition to the fees to be paid the examiners, as hereinbefore provided. All fees and other moneys due by a company shall be deposited by it with the clerk of the Court or paid by the company to the examiners before they will be compelled to file their report. Moneys deposited with the clerk shall be paid the examiners in the way and manner provided for payment of money out of Court. At the end of each calendar year the examiners shall present to the Court a report setting forth the fees which they have received, the companies examined, and any other matters con-

cerning which the Court should be informed. It shall not be necessary for both examiners to examine a particular company; one may do so and report thereon with the same force and effect as though both did so; but both examiners may examine a particular company where they consider it desirable to do so, or where it will facilitate the examination of a company in a shorter time than could be done by one examiner alone."

24. Effect of report, advisory, only.

"(E) No opinion or recommendation of the examiners, nor the approval of their report as a general justification, shall affect the right of the Court to exercise its discretion as to the approval of the surety offered in particular cases; and nothing herein contained shall be construed as preventing the Court from ordering an examination of any company at any time."

25. Capital of corporations.

"(F) Corporations of the State of Pennsylvania, except as hereinafter provided, must have a full-paid, unimpaired capital of at least \$125,000, and foreign corporations and corporations of the State of Pennsylvania whose principal business is that of becoming surety must have a full-paid, unimpaired capital of at least \$250,000 and a surplus over all liabilities of at least \$100,000. No corporation will be approved as surety in any one case for an amount greater than ten per cent. of its combined capital and surplus."

26. Trust and surety docket.

"(G) The clerk of the Court shall keep a separate docket, to be known as 'Trust and Surety Docket,' indexed in the names of the companies, in which accurate record shall be kept of the names of all estates for which a particular company is surety or has been appointed in a fiduciary capacity."

27. List of estates.

"(H) A company which has applied to be approved under this rule shall, when so required by the Court, file with the clerk of the Court a list of the number of trust estates of every character in which it is surety, as well in which it is fiduciary, either by testamentary appointment or by appointment of the Court, classifying each, and stating the amount of money or securities involved."

28. Application as surety.

"(I) A company which has been approved and which desires to become surety in a given case shall present an application, verified by oath, setting forth:

1. The name of the corporation, the state or other authority by which it is incorporated, and the location of its principal office.

2. The name of the particular estate, with the term and number thereof, the name of the person or persons for whom it offers to become surety, and whether as trustee, guardian, etc.

3. The amount of the bond required.

4. A statement of its assets and liabilities as of a date not over three months previous.

5. A copy of the last decree or order made by the Court with respect to the company offered.

The same information, or so much thereof as is applicable, shall be furnished the Court with respect to a company suggested for appointment in a fiduciary capacity.

All such applications shall have noted on them by the clerk of the Court the date of the last decree made with respect to the company offered, and whether the company is in default for any statement required to be filed or fees required to be paid.

TABLE OF CASES

A

Abbey's Est., 16 Phila. 291.....	720	Alsop's Ap., 9 Pa. 374.....	585, 679, 848
Abbott v. Reeves, 49 Pa. 494.....	635-640	Aldorfer's Est., 17 D. R. 690, 721..	723
Abel's Est., 23 Supr. C. 531.....	719	Aldorfer's Est., 225 Pa. 136.....	683
Abel v. Abel, 201 Pa. 543.....	665, 800	Alter's Ap., 67 Pa. 84.....	549
Abraham's Est., 19 W. N. O. 451..	358	Alter's Est., 4 C. C. 558.....	574
Ackerman v. Ackerman, 84 Supr.		Alton's Est., 220 Pa. 258.....	485, 491
C. 162.....	754, 808	Amberson's Est., 204 Pa. 397.....	559
Adam's Est., 17 Phila. 481.....	662	Ammon's Est., 51 Pitts. L. J. 864..	925
Adam's Est., 85 Pitts. L. J. 285..	687	Amole's Est., 32 Supr. C. 636.....	570
Adams' Est., 44 Pitts. L. J. 331		Amrhein v. Cope, 9 Northam. 142..	529
.....	309, 412	Anderson's Ap., 86 Pa. 476.....	646
Adam's Est., 148 Pa. 895.....	823	Anderson's Ap., 102 Pa. 258.....	865
Adam's Est., 183 Pa. 134.....	401	Anderson's Est., 50 Pitts. L. J.	
Adam's Est., 201 Pa. 502.....	611	199.....	425
Adam's Est., 220 Pa. 531.....	608, 611	Anderson's Est., 185 Pa. 174.....	645
Adam's Est., 221 Pa. 77.....	957	Anderson v. Anderson, 188 Pa. 480	
Addams v. Heffernan, 9 Watts, 529.	698	.....	46, 372
Adolph's Est., 11 Phila. 157.....	851	Andrade's Will, 7 Phila. 251.....	598
Adolph's Est., 58 Pitts. L. J. 38..	642	Andrew's Est., 14 Phila. 240.....	940
Affolter v. May, 115 Pa. 54.....	756	Andrew's Est., 6 D. R. 21.....	826
Agnew's Ap., 87 Pa. 467.....	562	Angle v. Brosius, 43 Pa. 187.....	722
Agnew's Est., 8 D. R. 699.....	865	Anon, 1 Dallas, 20.....	460
Agnew's Est., 17 Supr. C. 201.....	46, 177	Anshutz's Ap., 84 Pa. 375.....	190
Ahl's Ap., 129 Pa. 26.....	953	Anspach's Est., 16 D. R. 176, 110.	690
Ahl v. Bosler, 175 Pa. 526.....	801	Anspach v. Lightner, 31 Supr. C.	
Ake's Ap., 21 Pa. 320.....	868	218.....	530
Ake's Ap., 74 Pa. 116.....	24	Anthracite Sav. Bk. v. Lees, 176	
Albert's Ap., 128 Pa. 613.....	239	Pa. 402.....	279
Alberti's Est., 1 W. N. O. 559.....	689	App v. Driesbach, 2 Rawle, 287..	913
Albertson's Est., 20 Phila. 82.....	21	Apple's Est., 2 Phila. 171.....	918
Albright's Est., 6 Lack. L. N. 108..	139	Apreece v. Apreece, 1 Vesey &	
Albright's Est., 17 York, 109.....	549, 611	Beames, 364.....	672
Albright v. Albright, 128 Pa. 381..	734	Arble's Est., 161 Pa. 373.....	850
Alburger's Est., 8 D. R. 114.....	23, 408	Arbuckle's Est., 16 Phila. 404..	510
Alden's Ap., 93 Pa. 182.....	184	Armitage's Est., 195 Pa. 582, 941, 942	
Alexander's Est., 156 Pa. 368, 256,	265	Armitage v. Metcalf, Cases in Ch.	
Alexander's Est., 45 Pitts. L. J.		74.....	636
465.....	667, 691	Armstrong's Ap., 68 Pa. 312.....	678
Alexander's Est., 49 Pitts. L. J.		Armstrong's Ap., 68 Pa. 409.....	364, 829
127.....	611	Armstrong's Est., 14 Phila. 320.....	323
Alexander's Est., 18 D. R. 459.....	414	Armstrong's Est., 2 O. C. 166, 534,	585
Alexander's Est., 206 Pa. 47.....	611	Armstrong's Est., 16 Montg. 9.....	878
Alexander's Est., 214 Pa. 369.....		Armstrong v. Lancaster, 5 Watts,	
.....	433, 498, 507	67.....	178
Alexander v. Paxson, 47 Pa. 12.....	660	Armstrong v. Michener, 160 Pa.	
Alexander v. Shalala, 228 Pa. 297..		21.....	756
Algaier's Est., 16 D. R. 913.....	665	Armstrong v. Walker, 150 Pa. 585	
Allaire v. Allaire, 8 Vroom, 312;		.....	435, 479, 790
10 Vroom, 113 (N. J.).....	541, 542	Arndt's Ap., 117 Pa. 120.....	166
Allegheny Natl. Bank's Ap., 99 Pa.		Arney v. Miller, 2 Atkyna, 599.....	563
148.....	845	Arnold's Ap., 6 Atl. 751.....	914
Allen's Est., 9 C. O. 329.....	938	Arnold v. College, 227 Pa. 221.....	747
Allen's Est., 16 Phila. 269.....	844	Arnson's Est., 24 Lanc. L. R. 382..	693
Allen's Est., 192 Pa. 170.....	745	Arrott's Est., 9 O. C. 535.....	729, 822
Allen's Est., 20 Supr. C. 32.....	377, 524	Arrott, Etc., Co. v. Way Mfg. Co.,	
Allen's Est., 207 Pa. 325.....	121	143 Pa. 435.....	118
Allen v. Gault, 27 Pa. 473.....	866	Arthur's Est., 28 Pitts. L. J. 248..	584
Allen v. Markle, 36 Pa. 117.....	756	Arthur's Est., 41 Pitts. L. J. 28.....	915
Allentown's Ap., 109 Pa. 77.....	51, 640	Arundel v. Springer, 71 Pa. 398..	175
Allis v. Cleland, 37 O. C. 190.....	722	Asay v. Hoover, 5 Pa. 21.....	583
Allison's Est., 210 Pa. 22.....	608	Ash's Est., 12 D. R. 72.....	170
Allshouse's Est., 23 Supr. C. 146..	823	Ash's Est., 8 W. N. O. 28.....	677
Allshouse v. Kelly, 219 Pa. 652..	610	Ashburner's Est., 159 Pa. 545.....	727
		Ashby and Child, Style, 384.....	638

Ashenbach v. Carey, 224 Pa. 303.....	877
Ashford v. Ewing, 25 Pa. 218.....	693
Ashhurst's Ap., 77 Pa. 464.....	924
Ashoff's Est., 14 D. R. 333.....	866
Ashurst's Ap., 60 Pa. 290.....	918
Ashman's Est., 218 Pa. 509.....	948
Ashman's Est., 218 Pa. 513.....	25
Ashman's Est., 218 Pa. 519.....	431
Ashman's Est., 223 Pa. 543.....	877
Ashton's Est., 18 W. N. C. 102.....	942
Aspell's Est., 16 D. R. 424.....	957
Atcheson's Est., 10 D. R. 297.....	599
Atherton v. Atherton, 2 Pa. 112.....	182
Atterbury's Est., 57 Pitts. L. J. 685.....	951
Auberle's Est., 50 Pitts. L. J. 186.....	562, 564
Aubert's Ap., 109 Pa. 447.....	579, 582
Aubert's Ap., 119 Pa. 48.....	414, 696
Audenreid's Est., 4 O. C. 128.....	557
Audenreid's Est., 4 D. R. 507.....	914
Auman v. Auman, 21 Pa. 843.....	719
Aurand's Ap., 34 Pa. 151.....	130
Aurand v. Wilt, 9 Pa. 54.....	540, 541
Avery v. Home, Etc., 228 Pa. 58.....	573
Axtell's Ap., 43 Leg. Int. 476.....	524

B

Backenstoss v. Stahler, 33 Pa. 251.....	161
Bacon's Ap., 57 Pa. 504.....	758-759, 919
Bacon's Est., 202 Pa. 535.....	756, 758, 914
Baeder's Est., 24 Montg. 57.....	758
Baeder's Est., 190 Pa. 606-614.....	832, 915, 916, 927
Baer's Ap., 127 Pa. 360.....	939
Baer's Est., 20 Lanc. L. R. 126.....	107
Baer's Est., 11 D. R. 471.....	583
Bagg's Ap., 43 Pa. 512.....	458
Baily's Ap., 32 Pa. 40.....	148, 154
Bailey's Est., 153 Pa. 402.....	679
Bailey's Est., 28 O. C. 139.....	690
Bailey's Est., 18 York. 186.....	112
Bailey's Est., 23 C. C. 139.....	796
Bailey's Est., 208 Pa. 594.....	401, 528, 941, 946
Bailey v. Comth., 41 Pa. 473.....	845
Bailey v. Pitts., Etc., E. Co., 208 Pa. 45.....	802
Bainbridge's Ap., 97 Pa. 482.....	108
Bair's Est., 14 Lanc. Bar. 186.....	848
Baird, in re, 1 W. & S. 288.....	908
Baird's Est., 4 D. R. 123.....	539
Baker's Ap., 59 Pa. 843.....	96, 704-706, 893
Baker's Ap., 107 Pa. 881.....	535, 538, 539
Baker's Est., 11 Northam. 9.....	106
Baker's Est., 27 Lanc. L. R. 276.....	642
Baker v. Keystone Coal Co., 14 Lux. L. R. 5.....	940
Baker v. Leibert, 125 Pa. 106.....	361
Baker v. Reese, 150 Pa. 44.....	127
Baldrige v. George, 216 Pa. 231.....	189
Baldwin's Ap., 81 Pa. 441.....	631
Baldwin's Ap., 112 Pa. 2.....	526
Baldwin's Est., 17 Phila. 458.....	540
Baldwin's Est., 16 D. R. 880.....	958
Baldy's Ap., 40 Pa. 328.....	49
Ballard v. Ward, 89 Pa. 358.....	470
Ballentine's Est., 42 Pitts. L. J. 416.....	650
Balliet's Ap., 14 Pa. 451.....	582
Balliet's Ap., 2 Walker, 268.....	259
B. & O. R. Co. v. Veltri, 37 Supr. C. 399.....	876

Balz v. Kircher, 192 Pa. 63.....	739
Bamber's Est., 2 D. R. 536.....	463
Banes v. Finney, 209 Pa. 191.....	464
Banes v. Morgan, 204 Pa. 185.....	913
Bank as Trustee, 16 D. R. 255.....	930
Bank v. Halderman, 31 C. C. 447.....	924
Bank v. Ins. Co., 186 Pa. 333.....	904
Baptist Church v. Robbarts, 2 Pa. 110.....	582
Barber's Ap., 125 Pa. 564.....	17, 944
Barber's Est., 142 Pa. 476.....	416
Barbey v. Boardman, 202 Pa. 185.....	607
Barclay v. Kerr, 110 Pa. 130.....	312
Barclay v. Lewis, 67 Pa. 316.....	75
Bard's Est., 58 Pa. 398.....	650, 690
Bard's Est., 21 York. 142.....	108
Bardale's Est., 11 D. R. 337.....	921-922, 931
Barger's Ap., 100 Pa. 239.....	293, 916
Barhite's Ap., 126 Pa. 404.....	114
Barker's Est., 159 Pa. 518.....	855, 869
Barker's Est., 2 D. R. 571.....	802
Barker v. McFerran, 26 Pa. 211.....	556
Barker v. Pearce, 30 Pa. 173.....	724
Barkley's Est., 10 Pa. 390.....	3
Barkley v. Adams, 158 Pa. 396.....	344, 356
Barnes' Est., 221 Pa. 399.....	94
Barnett's Ap., 104 Pa. 342.....	681-684, 690
Barnhart v. Barnhart, 18 Lanc. L. R. 12.....	719
Barr's Est., 2 Pa. 428.....	685
Barr's Est., 33 O. C. 647.....	696
Barr's Est., 1 Mona. 764.....	47
Barr's Est., 43 Supr. C. 540.....	401
Barrett's Est., 22 Supr. C. 74.....	677-678
Barry's Est., 13 Phila. 310.....	647, 688
Barry's Est., 18 Phila. 31.....	425
Barry's Ap., 88 Pa. 131.....	630
Barry's Ap., 103 Pa. 130.....	986
Bartholomew's Ap., 71 Pa. 291.....	339
Bartholomew's Ap., 75 Pa. 169.....	661
Bartholomew's Est., 155 Pa. 283.....	416, 791
Bartley's Est., 19 O. C. 599, 20 O. C. 451.....	429
Barton's Est., 3 Del. Co. 338.....	223
Barton's Est., 25 Lanc. L. R. 390.....	442, 452
Bash v. Bash, 9 Pa. 260.....	115
Bashore v. Whisler, 3 Watts. 490.....	160
Baskin's Ap., 3 Pa. 304.....	461, 719
Baskin's Ap., 34 Pa. 272.....	250, 259, 947
Basset v. Basset, 3 Atkyns. 203.....	804
Batlone's Est., 186 Pa. 307.....	408, 649, 650, 791
Battenfield v. Kline, 228 Pa. 91.....	828
Bauer's Est., 1 D. R. 484.....	255
Baugh's Est., 12 D. R. 803.....	616, 688, 699
Baum's Ap., 4 Penny. 25.....	311
Baum's Est., 15 Montg. 58.....	688
Bauman's Est., 5 O. C. 579.....	107
Bayard's Est., 6 D. R. 206.....	919
Bayard's Est., 7 D. R. 279.....	176, 796
Bayley's Ap., 60 Pa. 354.....	14
Beach's Est., 30 Supr. C. 572.....	524
Beal v. Kline, 186 Pa. 381.....	942
Bealafeld v. Slangenaupt, 213 Pa. 565.....	724
Beam's Ap., 96 Pa. 74.....	241
Bean's Ap., 2 Walker, 512.....	189, 161
Bear's Est., 9 Supr. C. 492.....	453
Bearmer's Ap., 126 Pa. 77.....	526
Beaston v. Garman, 18 D. R. 257.....	123, 642

Beatty's Est., 193 Pa. 304....	558, 597	Beck's Est., 23 York, 107....	892
Beatty's Est., 214 Pa. 449.....	957	Best's Est., 14 D. R. 307.....	624
Beaumont's Est., 195 Pa. 1.....	914	Best's Est., 19 D. R. 237.....	875
Beaumont's Est., 214 Pa. 445, 530, 648		Best v. Hammond, 55 Pa. 409...	583
Beaumont's Est., 216 Pa. 350.....		Beswick's Est., 13 D. R. 711....	547
..... 529, 539, 567, 579		Beyer v. Keylor, 27 Lane. L. R.	
Beaumont v. Perkins, 1 Phill. Ec-		203	641
clesiastic R. 78.....	545	Beyerbach's Est., 18 Lane. L. R.	
Beaver's Est., 18 Phila. 90.....	16	381	371
Beaver's Will, 17 W. N. C. 259..	600	Michael's Est., 68 Pitta. L. J. 257.	829
Bebout's Est., 50 Pitta. L. J. 279.	690	Bickley's Est., 15 C. C. 284....	882
Beck's Ap., 116 Pa. 547.....	906	Bickley's Est., 13 D. R. 461....	870
Beck's Est., 12 Phila. 74.....	79	Bickley's Est., 14 D. R. 258....	895
Beck's Est., 122 Pa. 51.....	925	Bickley v. Biddie, 23 Pa. 276...	161
Beck's Est., 15 C. C. 564.....	911	Biddle's Ap., 69 Pa. 190.....	759
Beck's Est., 4 D. R. 223.....	852	Biddle's Ap., 83 Pa. 340.....	950
Beck's Est., 225 Pa. 578....	482, 633	Biddle's Ap., 99 Pa. 325....	294, 953
Beck v. Ulrich, 13 Pa. 636.....	830	Biddle v. Hoover, 120 Pa. 321...	446
Becker's Est., 3 D. R. 513.....	433	Biddle v. Moore, 3 Pa. 161.....	184
Becker v. Kehr, 49 Pa. 323.....	729	Bierer's Ap., 92 Pa. 265.....	
Bedford's Ap., 40 Pa. 16.....	849	..... 407, 482, 546, 588	
Bedford's Ap., 126 Pa. 117.....	796	Bierly's Est., 81* Pa. 419.....	
Becher's Est., 4 D. R. 677.....	796	..... 116-119, 525, 526, 568	
Babee's Est., 8 Kulp, 187.....	110	Bierly's Ap., 3 W. N. C. 210....	373
Bechler v. Smith, 3 Grant, 141..	696	Bierman's Est., 5 York, 27.....	940
Been's Est., 13 D. R. 695.....	828	Biesacker v. Cobb, 13 Supr. C. 56.	429
Beeson v. Beeson, 9 Pa. 279....	502	Biggart's Est., 30 Pa. 17.....	374
Beeson v. Breeding, 77 Pa. 156..	823	Bigley v. Jones, 114 Pa. 510....	886
Beeton v. Gots, 5 Supr. C. 71....	49	Bile's Est., 3 Phila. 587.....	244
Beilstein's Est., 147 Pa. 25....	862, 914	Bile's Ap., 119 Pa. 105.....	376
Beilstein v. Beilstein, 194 Pa. 297		Bilger's Est., 28 C. C. 513....	540, 597
..... 752, 792-793		Billman's Est., 9 D. R. 723....	369
Belcher's Est., 205 Pa. 152.....	534	Bilyeu v. Gerstley, 2 C. C. 114..	944
Belcher's Est., 211 Pa. 615.....	756	Binder's Est., 9 Phila. 305.....	728
Bell's Ap., 66 Pa. 498....	85, 297, 623	Bippus' Est., 15 D. R. 469.....	887
Bell's Ap., 71 Pa. 465.....	3, 189	Birbeck's Est., 215 Pa. 323.....	483
Bell's Est., 2 Parsons, 200.....	264	Birchard's Est., 154 Pa. 89.....	466
Bell's Est., 1 Woodward, 226....	741	Bird's Est., 2 Parsons, 168.....	693
Bell's Est., 8 C. C. 454.....	677	Bird's Est., 132 Pa. 164.....	687
Bell's Est., 147 Pa. 329.....	478	Biraly's Est., 7 D. R. 395.....	987
Bell's Est. (No. 2), 44 Supr. C.		Birkbeck v. Wadsworth, 222 Pa.	
62	634	154	792
Bell v. Newman, 5 H. & R. 30....	124	Bishop's Est., 10 Pa. 469.....	400
Bellas' Est., 6 Kulp, 189.....	240	Bishop's Ap., 26 Pa. 470.....	826
Bellas' Est., 176 Pa. 122.....	907	Bishop's Est., 300 Pa. 598.....	820
Bender v. Bender, 225 Pa. 434..	804	Bishop v. Sharpe, 3 Vernon, 469..	618
Bender v. Bender, 226 Pa. 607..		Biss' Est., 4 D. R. 251.....	805
..... 723, 743		Blaasell's Est., 47 Pitta. L. J. 242.	914
Bender v. Fleurie, 3 Grant, 245..	733	Bitler's Est., 30 Supr. C. 54....	116
Bender v. Lukenbach, 162 Pa. 16.	174	Bitner v. Bitner, 85 Pa. 247....	604
Benjamin's Est., 12 Luz. L. R. 28.	17	Bitner v. Boona, 123 Pa. 567....	119
Bennett's Est., 16 Phila. 204....	19	Bittinger's Est., 129 Pa. 323....	199
Bennett's Est., 122 Pa. 201....	414-415	Bixenstein's Est., 6 D. R. 19 ...	690
Bennett's Est., 148 Pa. 139.....	709	Bixler v. Blankenbiller, 8 Watta,	
Bennett's Est., 201 Pa. 425.....	606	64	711
Bennett's Est., 41 Supr. C. 579..	794	Black's Est., 13 Phila. 109.....	320
Bennett v. Williams, 57 Pa. 404..	119	Black's Est., 12 D. R. 720.....	
Benson's Ap., 48 Pa. 159.....	96	..... 116, 431, 790	
Benson's Est., 15 D. R. 355.....	728	Black's Est., 223 Pa. 282.....	677
Benson's Est., 209 Pa. 108.....	871	Black v. Black, 24 Pa. 354....	895, 509
Bentel's Est., 33 Pitta. L. J. 177.	946	Blackburn's Est., 20 Phila. 160...	865
Bentley's Est., 16 Phila. 263....	33	Blackstone v. Blackstone, 3 Watta,	
Bentley v. Kauffman, 86 Pa. 99..	792	835	676
Bentzel v. Wambaugh, 16 York,		Blagge v. Balch, 162 U. S. 439..	463
141	306	Blake's Est., 134 Pa. 240....	430, 713
Beus's Est., 221 Pa. 380....	682, 725	Blaney's Est., 37 Supr. C. 76....	95
Berg's Est., 43 Pitta. L. J. 90...	834	Blauzer v. Diehl, 90 Pa. 250....	223
Berg's Est., 172 Pa. 647....	548, 557	Bleedinghaiser v. Cramrine, 24	
Bergdoll's Est., 6 D. R. 9.....	947	Supr. C. 241.....	116
Bergdoll's Est., 11 D. R. 699...	792	Bleyler's Est., 1 Berke Co. 85...	530
Bergdoll's Est. (No. 2), 11 D. R.		Blight v. Blight, 61 Pa. 420....	796
701	417	Blight v. Wright, 1 Phila. 549...	828
Berrybill's Ap., 85 Pa. 245.....	949	Bloodhart's Est., 2 C. C. 476....	139
Berry (Dr's) Will, 3 Levins, 427.	676	Bloodgood's Est., 6 C. C. 545....	364-364
Berry's Est., 8 D. R. 50.....	414	Bloom's Ap., 106 Pa. 498	417
Berryman's Est., 17 Phila. 462...	88	Blume v. Hartman, 115 Pa. 32...	611
Berryman's Est., 19 Phila. 108..	216	Blumer's Case, 56 Pa. 371.....	954

Board of Charities, Etc. v. Lockhard, 198 Pa. 572.....	926	Boyer's Est., 174 Pa. 16.....	796
Boas v. Updegrove, 5 Pa. 519....	79	Boyer v. Chauncy, 12 Supr. C. 526.	950
Bockius' Est., 10 C. C. 183.....	946	Boyle v. Boyle, 152 Pa. 108.....	801
Bode's Est., 14 D. R. 440.....	862	Brabson's Est., 16 D. R. 669....	576
Bodder's Est., 13 D. R. 470.....	162	Brachbill's Est., 23 Lanc. L. R. 369	530
Boehm v. Kress, 179 Pa. 886.....	548	Bracken's Est., 15 D. R. 71.....	432
Boger's Ap., 10 Pa. 440.....	21	Bracken's Est., 138 Pa. 104.....	408, 558, 791
Boehrig's Est., 17 D. R. 46.....	676, 690	Bradford's Ap., 29 Pa. 513.....	892
Bohlen's Est., 75 Pa. 804.....	937	Bradford's Will, 1 Parsons, 153..	549
Bohrer's Est., 7 D. R. 307.....	635, 819	Bradford v. Kent, 43 Pa. 474....	645
Boileau's Est., 18 D. R. 320.....	642	Bradish v. McClellan, 100 Pa. 607	565, 582
Boileau's Est., 201 Pa. 493.....	647	Bradley's Est., 9 Phila. 327.....	16, 63
Boies' Est., 177 Pa. 190.....	664, 905, 914, 916	Bradley's Est., 15 Phila. 586.....	91
Bomberger's Est., 21 Lanc. L. R. 153	687	Bradley's Est., 5 C. C. 572.....	691
Bomberger v. Raymond, 12 C. O. 460	180, 629	Bradley's Est., 17 Phila. 474....	665
Bone's Ap., 27 Pa. 492.....	255-259	Bradley's Est., 166 Pa. 300.....	682
Boniface v. Scott, 3 S. & R. 351..	108	Bradley v. Bradley, 4 Wharton, 173	850
Boning's Est., 217 Pa. 306.....	510, 955-957	Bradley v. Comber, 19 D. R. 130	496, 615
Bonneville's Pet., 16 D. R. 125....	226	Bradley v. Pierce, 180 Pa. 262....	615
Bonsall's Ap., 1 Rawle, 266.....	249	Bradshaw's Ap., 3 Grant, 109....	19
Bonwill's Est., 10 D. R. 98.....	801	Brady's Ap., 66 Pa. 277.....	190
Book v. Book, 104 Pa. 240.....	530, 531	Braman's Ap., 89 Pa. 78.....	432, 479
Bopp's Est., 18 York, 161.....	303	Bramberry's Est., 156 Pa. 628....	358
Borle v. Crissman, 82 Pa. 125.46,	176	Brandt's Est., 11 Lanc. L. R. 321..	17
Borden's Est., 13 D. R. 1.....	656	Branin's Est., 5 D. R. 464.....	929-932
Borland's Est., 51 Pitts. L. J. 227.	688	Bransby v. Grantham, Plowden, 525	635
Borland v. Nichols, 12 Pa. 38.....	648	Brauning's Est., 15 D. R. 836....	603
Bortner's Est., 43 Supr. C. 429....	663	Bredin v. Gilliland, 67 Pa. 34....	702-704
Boshart v. Evans, 5 Wharton, 551.	735	Breen's Est., 11 D. R. 745.....	321
Bosler's Est., 161 Pa. 457.....	942	Breese's Est., 15 Luz. L. R. 71....	642
Bosler v. Kuhn, 8 W. & S. 185....	296	Breiter's Est., 21 Lanc. L. R. 101.	868
Boudinot v. Bradford, 2 Yeates, 170	555	Breneman's Ap., 121 Pa. 641.....	249
Boulden v. Penna. R. Co., 205 Pa. 264	629	Brennan's Est., 65 Pa. 16.....	93
Bousquet's Est., 206 Pa. 534.....	495	Brennan's Est., 14 D. R. 807....	942, 949
Bouvier's Est., 12 D. R. 149.....	915, 930	Brennan's Est., 220 Pa. 232..162,	649
Bowers v. Bowers, 227 Pa. 395....	876	Brenneman's Est., 27 C. C. 478....	22
Bowers v. Reem, 26 Lanc. L. R. 213	642	Brenneman's Est., 27 C. C. 478....	502, 847
Bowker's Est., 12 Phila. 161..137,	855	Brenneman's Est., 14 York, 14....	447
Bowlby v. Thunder, 105 Pa. 173	584, 753	Brenneman's Est., 17 Supr. C. 75	408, 791
Bowman's Ap., 62 Pa. 166.....	45, 61, 179, 620-622	Brenneman's Ap., 40 Pa. 115.....	461
Bowman's Ap., 3 Watts, 369.....	840	Brewster's Ap., 12 Atl. 470.....	698
Bowen's Ac., 2 Clark, 147.....	90, 867	Brick's Est., 20 W. N. C. 499....	694
Bowen's Est., 14 D. R. 157.....	802	Brick's Est., 7 D. R. 396.....	736
Bowen v. Goranplo, 73 Pa. 857....	555	Bricker's Est., 22 Supr. C. 12....	368
Bower's Est., 12 D. R. 59.....	951-953	Bridesburg Land Co.'s Pet., 7 Phila. 436	276
Bower's Est., 12 D. R. 206.....	919	Briggs v. Davis, 81* Pa. 470..914-	916
Bower's Est., 1 Berks Co. 238....	574	Bright's Ap., 100 Pa. 603.....	690
Bowman's Ap., 84 Pa. 19.....	743	Bright's Est., 212 Pa. 363.....	535, 564
Bowman's Est., 6 D. R. 763.....	602	Bright v. Esterly, 199 Pa. 188....	756
Bowman v. Hoke, 80 Supr. C. 633.	584	Brink v. Brady, 224 Pa. 116.....	604
Bowman v. Knorr (No. 1), 206 Pa. 270	488, 646	Brinker v. Brinker, 7 Pa. 53.....	2, 14, 189
Boyd's Ap., 88 Pa. 246.....	81	Brinton's Est., 10 Pa. 408.....	394
Boyd's Est., 18 Phila. 112.....	241	Brinton's Est., 29 C. C. 107.....	869
Boyd's Est., 17 D. R. 393.....	801	Brinton v. Martin, 197 Pa. 615....	757
Boyd's Est., 199 Pa. 487.....	665, 720, 805, 915	Brittain's Est., 28 Supr. C. 144....	395
Boyd v. Boyd, 66 Pa. 288.....	610, 611	Broadrick v. Broadrick, 25 Supr. C. 225	121, 433
Boyd v. Comth., 86 Pa. 355.....	934	Broadtop, Etc., Co. v. Riddlesburg, Etc., Co., 65 Pa. 435.....	466
Boyd v. Conshohocken Mills, 149 Pa. 363	119	Brock v. Penna. Steel Co., 203 Pa. 249	278
Boyd v. Weber, 193 Pa. 651.....	755	Broe v. Boyle, 108 Pa. 76.....	557
Boyer's Est., 5 Watts, 50.....	420	Brolasky's Ap., 3 Penny. 323....	699
Boyer's Est., 18 Phila. 218.....	24, 222	Brooke's Ap., 102 Pa. 150.....	16
Boyer's Est., 8 C. C. 423.....	335	Brooke's Ap., 102 Pa. 150.....	222
Boyer's Est., 166 Pa. 630.....	608	Brooke's Ap., 109 Pa. 188.....	912
Boyer's Est., 17 D. R. 417.....	930		
Boyer's Est., 23 York, 103.....	869		

Brooks' Est., 140 Pa. 84.....	296	Burden's Est., 11 Phila. 180....	580
Brooke's Est., 214 Pa. 46....	280, 958	Burdick's Est., 6 Lack. Jur. 861	
Brooks v. Litchfield, 12 Northam.		.....	287, 252, 480
48	620	Burgess v. Burgess, 100 Pa. 813..	115
Brooke's Est., 36 Supr. C. 832..	446	Burford v. Burford, 29 Pa. 221..	540
Brooke's Est., 36 Supr. C. 834..	939	Burk's Est., 15 D. R. 206.....	111
Broomall's Est., 27 Supr. C. 475..	223	Burk v. Gleason, 46 Pa. 297.....	48
Brophy's Est., 3 W. N. C. 806...	91	Burke's Est., 3 D. R. 884.....	245-280
Bross's Est., 155 Pa. 619.....	112, 120	Burke's Est., 84 W. N. C. 859....	107
Brotsman's Ap., 119 Pa. 645....	705	Burkhart's Est., 1 Mona. 474....	277
Brotsman's Est., 138 Pa. 478....		Burkhart's Est., 25 Supr. C. 514..	202
.....	698, 705	Burkholder's Ap., 105 Pa. 81....	407
Brown's Ap., 12 Pa. 833.....	20, 908	Burnett's Est., 219 Pa. 599....	467
Brown's Ap., 27 Pa. 63.....	816	Burns' Est., 11 D. R. 863.....	495
Brown's Ap., 68 Pa. 53.....	169	Burns' Will, 11 Phila. 85.....	550
Brown's Ap., 84 Pa. 457.....	816	Burns v. Burns, 4 S. & R. 295..	581
Brown's Ap., 89 Pa. 139.....	23, 159	Burns v. Cooper, 81 Pa. 426....	166
Brown's Ap., 112 Pa. 18.....	240	Burr's Est., 14 D. R. 298.....	798
Brown's Est., 4 D. R. 587.....	531	Burr v. Sim, 4 Wharton, 150....	850
Brown's Est., 6 D. R. 163.....	866	Burson's Ap., 22 Pa. 164.....	922
Brown's Est., 15 C. O. 289.....	510, 629	Burt v. Herron, 66 Pa. 400.....	
Brown's Est., 20 Lanc. L. R. 244..	825	.....	680, 704, 711, 753
Brown's Est., 54 Pitts. L. J. 101		Barton's Est., 3 D. R. 755.....	131
.....	668, 669, 797	Burton's Est., 4 D. R. 106.....	279
Brown's Est., 36 C. O. 13.....	467	Busser v. Walter, 14 York, 178 ..	660
Brown's Est., 166 Pa. 249.....		Butler's Est., 228 Pa. 252.....	540
.....	211, 214, 868	Butler's Will, 37 Pitts. L. J. 122.	729
Brown's Est., 190 Pa. 464.....	507, 698	Butts' Est., 20 Lanc. L. R. 41.187.	819
Brown's Est., 208 Pa. 161.....	201	Butts v. Armor, 164 Pa. 79	614
Brown's Est. (No. 2), 210 Pa.		Buttermore's Ap., 28 W. N. C. 14..	273
499	426	Butterweck's Est., 4 D. R. 563.427.	719
Brown v. Carey, 149 Pa. 134....	119	Buts v. Buts, 2 Pennay. 270.....	799
Brown v. Thompson, 156 Pa. 297..	250	Byer's Est., 27 Lanc. L. R. 278..	642
Brown v. Williamson, 86 Pa. 836..	292	Byer's Est., 186 Pa. 404.....	802, 907
Brownfield v. Brownfield, 12 Pa.		Byers v. Hay, 9 D. R. 502.....	185
136; 20 Pa. 55.....	732		
Brownfield's Est., 193 Pa. 151....	732		
Brownfield's Est., 14 D. R. 518..	811		
Brubaker v. Huber, 2 D. R. 703..	926		
Bruch's Est., 195 Pa. 194.....			
.....	741, 744, 915		
Bruckman's Est., 195 Pa. 863	663, 729		
Brumbach v. Johnson, 187 Pa.			
602	118		
Bruner's Ap., 57 Pa. 46.....	507		
Bruner's Est., 14 D. R. 124.....	757-759		
Bruner's Est., 27 Lanc. L. R. 37..	MAN		
Bruner v. Dobbins, 26 Lanc. L. R.			
25	758		
Bruner v. Finley, 187 Pa. 389....	945		
Branot's Est., 49 Pitts. L. J. 180.	MM		
Bryan's Ap., 101 Pa. 389.....	741		
Bryant's Est., 180 Pa. 192.....	114		
Bryce's Est., 194 Pa. 135.....	789		
Buchanan v. Duncan, 40 Pa. 82..	655		
Buchanan v. Pierie, 205 Pa. 123..	606		
Buchanan v. Shaffer, 2 Yeates,			
874	665		
Bucher's Est., 18 York, 81.....	882		
Buck's Est., 10 D. R. 381.....	22		
Buck v. Buck, 195 Pa. 373.....	400		
Buckingham's Est., 12 Phila. 105.	950		
Bucknor's Ap., 18 W. N. C. 116..	138		
Bucknor's Est., 136 Pa. 23.....	484		
Buechle's Est., 3 D. R. 16; 5 D.			
R. 127	MM		
Buehler's Ap., 100 Pa. 385.....	661		
Bulata's Est., 8 Phila. 190.....	270, 844		
Bujac's Ap., 76 Pa. 27.....	915		
Bull's Ap., 24 Pa. 286.....	896		
Bull's Est., 12 D. R. 898.....	600		
Bull v. Towson, 4 W. & S. 557..	384		
Bunn's Est., 1 Kulp, 230	497		
Bunting's Est., 23 W. N. C. 160..	855		
Burd's Est., 71 Pa. 402.....	692		
Burd v. McGregor, 2 Grant, 858			
.....	895, 479		

C

Cable's Ap., 91 Pa. 827.....	701-703
Cable v. Cable, 146 Pa. 451.....	530
Cadmus v. Jackson, 52 Pa. 295..	
.....	186, 188
Cadbury v. Duval, 10 Pa. 265....	827
Cadwalader's Ap., 64 Pa. 293....	945
Cage v. Russell, 2 Ventria, 852...	740
Cahill's Est., 180 Pa. 131.....	609
Cake's Est., 157 Pa. 457.....	429
Cake's Ap., 110 Pa. 65.....	115
Cake v. Cake, 162 Pa. 584.....	116
Caldwell's Est., 38 Pitts. L. J.	
398	629
Caldwell v. Anderson, 104 Pa. 199.	611
Caldwell v. Snyder, 178 Pa. 420..	
.....	809, 817
Callahan's Est., 44 Pitts. L. J.	
414	249
Callahan's Est., 5 Lack. L. N. 105	
.....	129, 769
Cameron v. Coy, 165 Pa. 290....	163
Cameron's Est., 3 D. R. 101	607
Camp v. Clark, 81* Pa. 225....	549
Campbell's Est., 58 Pitts. L. J.	
167	631
Campbell's Est., 17 Montg. 89....	114
Campbell's Est., 39 Supr. C. 148..	526
Campbell's Est., 202 Pa. 459....	722
Campbell v. Jamison, 8 Pa. 498..	683
Campbell v. McLain, 51 Pa. 200 ..	945
Canavan v. Paya, 34 Supr. C. 91..	896
Candor's Ap., 6 W. & S. 513....	113
Cannon's Est., 10 Montg. 179 ..	212
Cantini v. Tillman, 54 Fed. R. 969.	890
Caputa's Est., 57 Pitts. L. J. 584.	890
Capwell's Est., 26 C. O. 899....	646
Cardwell's Est., 10 C. O. 818....	600
Carey's Ap., 75 Pa. 201.....	579
Carey's Est., 5 Kulp, 171.....	215

Carey's Est., 14 D. R. 891.....	534, 708, 802
Carey's Est., 15 D. R. 527.....	110
Carey's Est., 16 D. R. 204.....	528
Carey v. Bertie, 2 Vernon, 342.....	861
Carl's Ap., 106 Pa. 635...659, 570, 571	
Carlisle's Ap., 9 Watts, 381.....	457
Carlisle's Est., 3 D. R. 158.....	570
Carlisle v. Giffen, 57 Pitts. L. J. 412	
Carman's Est., 5 O. O. 16.....	755
Carnahan's Est., 30 Pitts. L. J. 31.	111
Carnahan v. Brown, 60 Pa. 23.....	649
Carnell's Est., 26 Montg. 89.....	738
Carother's Est., 41 Supr. C. 126.....	648
Carpenter's Est., 16 Phila. 290.....	642
Carpenter's Est., 17 D. R. 170.....	106
	827, 957
Carpenter's Est., 170 Pa. 203.....	977
Carpenter v. Cameron, 7 Watts, 51	
Carpenter v. Ulmer, 29 W. N. O. 551	
Carpenter v. U. S. Life Ins. Co., 161 Pa. 9.....	618
Carr's Est., 4 O. O. 128.....	112
Carr's Est., 13 O. O. 643.....	120
Carr's Est., 88 Pitts. L. J. 843.....	258
Carr's Est., 3 D. R. 740.....	798
Carr's Est., 17 D. R. 297.....	343
Carr's Est., 24 Supr. C. 869.....	508
Carrier's Ap., 79 Pa. 230.....	250
Carroll's Est., 219 Pa. 440.....	989
Carroll v. Burns, 103 Pa. 386.....	951
Carroll v. Tufts, 9 D. R. 144.....	683
Carskadon v. M'Ghee, 7 W. & S. 140	
Carson's Ap., 59 Pa. 493.....	662
Carson's Ap., 99 Pa. 325.....	174
Carson v. Fuhs, 181 Pa. 256.....	281
	655, 749, 921
Carson v. New, Etc., Co., 104 Pa. 575	
Carstensen's Est., 196 Pa. 325.....	653
Carter's Ap., 10 Pa. 144.....	742
Carter's Est., 2 D. R. 578.....	19
Carter's Est., 217 Pa. 542.....	564
Carter's Est., 225 Pa. 355.....	667, 727
Carter v. McMichael, 10 S. & E. 429	
Carter v. Trueman, 7 Pa. 815...179, 480	
Casa's Est., 7 D. R. 678.....	817
Cascaden's Est., 8 Phila. 582.....	753
Caseby's Est., 28 Supr. C. 646.....	480
Casely's Est., 12 D. R. 46.....	819
Casey's Est., 12 D. R. 15.....	650
Cass Est., 30 O. O. 660.....	950
Cassady's Est., 13 Phila. 383.310, 709	
Cassidy's Est., 224 Pa. 199.....	947
Cassidy v. Knapp, 167 Pa. 305.....	576
Cassel's Ap., 180 Pa. 252.....	929
Cassell v. Cooke, 8 S. & R. 268.....	709
Cassey v. Smith, 38 Pa. 225.....	670
Castner's Ap., 88 Pa. 478.....	14
Catterson's Ap., 100 Pa. 9.....	878
Cauffman v. Long, 82 Pa. 72.....	740
Caughey v. Bridenbaugh, 208 Pa. 414	
Caughey v. Harrar, 21 Lanc. L. R. 353	
Caven v. Agnew, 186 Pa. 314.....	666
Cawley's Est., 136 Pa. 628...531-536	
Cawley's Est., 162 Pa. 520.....	721
Cella's Est., 17 Supr. C. 428.....	49
City of Williamsport v. Comth., 84 Pa. 487	
Chahoon's Est., 12 D. R. 229.....	608
Chamber's Est., 3 W. N. O. 188.....	611
	818
	611
	531-536
	616
	345
	84
	855
	648
	622
Chambers v. Baugh, 26 Pa. 105... 509	
Chambersburg, Etc., Ap., 76 Pa. 203	
Chandler's Ap., 100 Pa. 262.....	350
Chandler v. Lamborne, 2 Clark, 124	
Charles v. Huber, 78 Pa. 448...555, 557	
Charlton's Ap., 34 Pa. 473.....	508
Charlton's Ap., 88 Pa. 476.....	
Charlton's Est., 12 Phila. 102.....	480
Chase's Est., 4 Lack. Jur. 365.....	557
Chase v. Brown, 22 O. C. 598.....	231
Chase v. Irvine, 87 Pa. 286.....	402
Chase v. Hodges, 2 Pa. 48.....	297
Chase v. Miller, 41 Pa. 403.....	943
Chess' Ap., 4 Pa. 52.....	244
Chestnut St., Etc., Bank v. Fidelity, Etc., Co., 186 Pa. 333.....	830
Chew's Ap., 37 Pa. 23.....	176
Chew's Ap., 44 Pa. 247.....	578
Chew's Est., 2 Parsons, 153...66, 558	
Chew v. Chew, 28 Pa. 17.....	187
Chew v. Nicklin, 45 Pa. 84...822-823	
Chidester's Est., 227 Pa. 560.....	581
	660
Children's Hospital's Ap., 10 W. N. O. 318.....	954
Chorpenning's Ap., 32 Pa. 315.....	558
Christman's Est., 11 D. R. 363.....	823
Christy's Ap., 110 Pa. 538.....	822-823
	603, 604
Christy v. Christy, 162 Pa. 485.....	577
	255
	426
	377
	485
	666, 725, 792
Christy v. Sill, 95 Pa. 380.....	913
Church's Ap., 103 Pa. 263.....	954
Church v. Gray, 198 Pa. 321.....	573
Church v. Ruland, 64 Pa. 432.....	912
Church v. Winton, 196 Pa. 107	
	150, 945
Claghorn's Est., 181 Pa. 600.....	425
Clark's Est., 7 O. O. 308.....	138
Clark's Est., 10 Supr. C. 423.....	157
Clark's Est., 52 Pitts. L. J. 112.....	572
Clark's Est., 134 Pa. 140.....	310, 317
Clark's Est., 89 Supr. C. 445...253, 267	
Clark's Est., 89 Supr. C. 445.....	869
Clark v. Miller, 89 Pa. 242.....	945
Clark v. Morrison, 25 Pa. 453.....	585
Clark v. Scott, 67 Pa. 446.....	719
Clarke's Ap., 79 Pa. 376.....	654, 656
Clarke's Est., 82 Pa. 528.....	660, 796
Clarke's Est., 28 O. C. 270.....	203
Clarke v. Parker, 19 Vesey, 1.....	740
Clauser's Est., 84 Pa. 51.....	446, 953
Clime's Est., 22 Lanc. L. R. 373.....	604
Clingan v. Mitcheltres, 31 Pa. 25.....	534
Clinton's Est., 8 D. R. 661.....	866
Clinton's Est., 9 D. R. 455...451, 695	
Olemens v. Hecksher, 185 Pa. 476	
	755, 944
Clement's Est., 160 Pa. 391...423, 644	
Clemson v. Pusey, 9 S. & R. 204.....	619
Clendaniel's Est., 13 Phila. 248.....	892
Clermontel's Est., 12 Phila. 139.....	942
Clermontel's Est., 17 D. R. 25.....	958
Clery's Ap., 35 Pa. 54.....	664, 702
Clevenstine's Ap., 15 Pa. 495.....	843
Clever's Est., 40 Pitts. L. J. 358.....	319
Cobaugh's Ap., 24 Pa. 143.....	137
Cobleigh's Est., 23 Supr. C. 271.....	169
Cobb v. Biddle, 14 Pa. 445.....	
	176, 296, 822-823
Cobb v. Burns, 61 Pa. 278.....	
	96, 187, 190, 893-894
Cobleigh's Est., 23 Supr. C. 271.....	16
Cochran's Est., 28 C. C. 33...213-214	
Cochran v. Young, 104 Pa. 333.....	
	557, 558, 913

Cochrane's Est., 202 Pa. 415....	937	Comth. v. Pauline Home, 141 Pa.	575
Cockin's Ap., 111 Pa. 26.....	754	Comth. v. Pool, 6 Watts, 32.....	127
Coggin's Appeal, 124 Pa. 10....	742	Comth. v. Powell, 16 W. N. C. 297.	470
Cohen's Ap., 2 Watts, 175.....	68, 76	Comth. v. Powell, 51 Pa. 438....	48
Cohen's Est., 9 Kulp, 116.....	882	Comth. v. Pray, 125 Pa. 542....	223
Colburn's Est., 12 D. R. 45.....	945	Comth. v. R. Co., 182 Pa. 591....	496
Colehower's Est., 12 Phila. 78...	929	Comth. v. Randall, 225 Pa. 197....	199
Coleman's Ap., 163 Pa. 384.....	561	Comth. v. Raser, 62 Pa. 436....	224
Coleman's Est., 4 D. R. 105.....	598	Comth. v. Reed, 59 Pa. 425.....	229
Coleman's Est., 159 Pa. 231....	199	Comth. v. Risdon, 8 Phila. 23....	70
Coleman's Est., 185 Pa. 437....	611	Comth. v. Rodgers, 6 Supr. C. 284.	368
Coleman v. Eberley, 76 Pa. 197...	668	Comth. v. Rogers, 53 Pa. 470....	68, 70
Coleman v. Rowland, 1 Pitts. 122		Comth. v. Royer, 161 Pa. 851....	856
..... 892-895		Comth. v. Ruhl, 199 Pa. 40.....	508
Collins' Est., 10 D. R. 249.....	650	Comth. v. Sisters of Mercy, 23	
Collins' Est., 11 D. R. 455.....	219	Montg. 9	229
Colwell's Est., 18 Phila. 88.....	91	Comth. v. Smith, 4 Phila. 51.....	934
Columbian Bank's Est., 147 Pa.		Comth. v. Snyder, 62 Pa. 153....	418
422	917	Comth. v. Stone, 56 Pitts. L. J.	
Colvin's Est., 27 C. O. 518.....	167	379	605
Combs' Ap., 105 Pa. 155.....	541	Comth. v. Strohecker, 9 Watts, 479.	179
Combs v. Jolly, 2 Gr. Ch. R. 625...	541	Comth. v. Stubb, 11 Pa. 156....	481
Comly's Est., 136 Pa. 153.....	720	Comth. v. Thomas, 163 Pa. 446....	589
Comly's Est., 185 Pa. 208.....	121, 526	Comth. v. Waleiser, 2 Leg. Chron.	
Commonwealth's Ap., 127 Pa. 435.	199	305	211
Commonwealth's Ap., 128 Pa. 603.	202	Comth. v. Wood, 14 D. R. 509...	179
Comth. v. Allen, 16 D. R. 615....	589	Compher v. Compher, 25 Pa. 34...	48
Comth. v. Am., Etc., Co., 16 Supr.		Compton v. Mitton, 7 Halstead, 70-	
C. 570	223	75	542
Comth. v. Am., Etc., Co., 212 Pa.		Conard's Ap., 33 Pa. 47.....	705-706
855	223	Conlan v. Conlan, 20 Supr. C. 45.	532
Comth. v. Anderson, 1 Ashmead,		Conley's Est., 197 Pa. 291.....	574, 680, 798
55	211	Conlon's Est., 49 Pitts. L. J. 424.	947
Comth. v. Bryan, 8 S. & R. 128...	383	Connolly's Est., 50 Pitts. L. J.	
Comth. v. Bunn, 71 Pa. 405.....	589	188	668
Comth. v. Cashman, 32 Supr. C.		Connolly's Est., 198 Pa. 187....	795, 796
459	342-344	Connor's Est., 31 C. O. 278....	213
Comth. v. Cochran, 146 Pa. 223...	182	Connors v. Gibbons, 228 Pa. 617...	877
Comth. v. Cox, 36 Pa. 442.....	223	Conrow's Ap., 3 Penny. 356....	295
Comth. v. Orompton, 187 Pa. 138		Conway's Est., 10 D. R. 509....	570, 576
..... 489, 508		Conway's Est., 181 Pa. 156....	718
Comth. v. Dechart, 4 Kulp, 218...	224	Cook's Est., 16 Phila. 322.....	612
Comth. v. Dugan, 18 O. C. 88....	237	Cook's Est., 32 W. N. C. 281....	112
Comth. v. Farnham's Admr., 5		Cook's Est., 10 C. O. 465.....	294
Kulp, 425	29	Cook's Will, 5 Clark, 1.....	582
Comth. v. Ferguson, 137 Pa. 595...	199	Cook v. Petty, 108 Pa. 138....	702
Comth. v. Gilkeson, 5 Clark, 32...	211	Cooke v. Doran, 215 Pa. 393....	496, 653
Comth. v. Gilkeson, 24 C. C. 289...	199	Cooney's Est., 18 D. R. 301....	956
Comth., Etc., Co. v. Gray, 150 Pa.		Cooper's Est., 1 D. R. 804.....	941
255	606	Cooper's Est., 20 Phila. 178....	948
Comth. v. Gregg, 1 Dauphin Co.		Cooper's Est., 10 C. O. 605....	728
203	495	Cooper's Est., 13 D. R. 127....	682
Comth. v. Hackett, 102 Pa. 505...		Cooper's Est., 16 York, 78.....	601
..... 660, 729		Cooper's Est., 147 Pa. 322....	408, 791
Comth. v. Harding, 87 Pa. 343....	15	Cooper's Est., 150 Pa. 576....	905
Comth. v. Hart, 8 W. N. C. 156....	211	Cooper's Est., 206 Pa. 628....	429, 828
Comth. v. Hart, 14 Phila. 352....	214	Cooper v. Eyrich, 6 Supr. C. 200...	452
Comth. v. Hilgert, 55 Pa. 236....	145	Cooper v. Eyrich, 41 W. N. C. 376.	639
Comth. v. Hoobaugh, 5 D. R. 502.	224	Cooper v. Pogue, 92 Pa. 254....	792-793
Comth. v. Judges, 4 Pa. 301.....	14	Cooper v. Scott, 62 Pa. 139....	252, 743
Comth. v. Judges, 10 Pa. 37.....	63	Coover's Ap., 74 Pa. 143.....	649, 650, 918
Comth. v. Julius, 173 Pa. 322....	228	Cope's Est., 191 Pa. 1.....	479
Comth. v. Kean, 19 Supr. C. 576		Copenheffer's Ap., 3 Penny. 243...	253
..... 179, 508		Corbett's Est., 10 D. R. 59....	146, 170
Comth. v. Klemesen, 23 C. O. 207.	229	Cornell v. Green, 10 S. & R. 14...	623
Comth. v. Kresger, 78 Pa. 477...	356	Corr's Est., 12 D. R. 788.....	576
Comth. v. Lee, 6 S. & R. 255....	211	Corr's Est., 29 C. C. 276.....	297
Comth. v. McAllister, 28 Pa. 480...	939	Corr's Est., 202 Pa. 391.....	577
Comth. v. McDonald, 170 Pa. 221		Corson's Est., 137 Pa. 160.....	119, 431, 820
..... 449, 502, 508, 934		Corwin's Ap., 126 Pa. 326....	215, 220
Comth. v. McGovern, 4 Supr. C.		Castello's Est., 16 D. R. 188....	669
598	145	Cote v. Von Bonnhorst, 41 Pa. 243	
Comth. v. Magee, 24 Supr. C. 829.	145	..... 756-758	
Comth. v. Mateer, 16 S. & R. 416		Cotton's Est., 21 C. O. 451.....	943
..... 620-622			
Comth. v. Miller, 195 Pa. 230...			
..... 85, 625-626			

Darrak's Est., 6 D. R. 178.....	160	Derr's Est., 203 Pa. 98.....	913, 941
Davies v. Morris, 17 Pa. 205.....	559	Derr v. Ackerman, 182 Pa. 591..	189
Davey's Est., 9 O. O. 125.....	181	Derr v. Greenawalt, 76 Pa. 339..	555
Davis' Ap., 34 Pa. 256.....	48	Deesebata v. Berquier, 1 Blinney,	
Davis' Ap., 33 Pa. 346.....	702, 843	836	566
Davis' Est., 12 Phila. 128.....	74	Deahong's Est., 6 Del. Co. 519..	317
Davis' Est., 13 Phila. 407.....	322	Deahong's Est., 9 Del. Co. 339..	312
Davis' Est., 14 Phila. 256.....	520	De Silver's Est., 211 Pa. 459..	575-577
Davis' Est., 6 D. R. 45..	670-671, 904	De Silver's Est., 142 Pa. 74....	478
Davis' Est., 12 D. R. 356.....	311	De Silver's Est., 14 D. R. 65....	680
Davis' Est., 49 Pitta. L. J. 155..	383	Dettenmaier's Est., 18 Supr. C.	
Davis' Est., 17 D. R. 570.....	427	170	113
Davis v. Fenner, 80 Supr. C. 389..	656	Detweiler's Ap., 44 Pa. 343.....	52
Dawson's Est., 11 D. R. 247.....	472	Detwiler v. Cox, 75 Pa. 200.....	662
Dean's Ap., 37 Pa. 24.....	138	Daniel's Est., 19 D. R. 378.....	649
Dean's Est., 11 D. R. 84.....	131, 429	Devine's Est., 10 D. R. 273....	677
Dean v. Nagley, 41 Pa. 312.....	610	Devine's Est., 199 Pa. 250.....	
Dean v. Winton, 150 Pa. 227..	665, 786	.....	726, 789, 801
De Arman's Est., 32 Pitta. L. J.		Devlin's Est., 18 D. R. 47.....	627
182	17	Devlin's Est., 19 D. R. 431.....	954
De Armit v. Milnor, 20 Supr. C.		Devlin v. Comth., 13 W. N. C.	
369	245	299	27
Deaven's Est., 140 Pa. 242....	546, 585	Devlin v. Comth., 101 Pa. 273..	552
Deaven's Est., 32 Supr. C. 205..		Dewald v. Berkhaiser, 19 Supr. C.	
.....	525, 933	570	395-396, 711, 918
De Bourbon's Est., 211 Pa. 523...	301	Dewart's Ap., 70 Pa. 403.....	709
Dech's Est., 7 York, 43.....	318	Dewey's Est., 33 C. O. 307..	844, 929
Deckard's Est., 25 C. O. 187....	847	Dice's Est., 49 Pitta. L. J. 242..	927
Decker v. Huntingdon, Etc., 120		Dick's Est., 183 Pa. 647.....	394
Pa. 272	927	Dickerman v. Eddinger, 168 Pa.	
De Coursey's Est., 211 Pa. 92....	38	240	701
De Coursey v. Johnston, 134 Pa.		Dickerson's Est., 115 Pa. 198...	
328	119	.....	532, 904, 907
Deemer's Est., 18 O. C. 496.....	329	Dickerson's Ap., 115 Pa. 210 ...	904
Deering's Est., 15 Phila. 599.....	268	Dickinson's Est., 148 Pa. 142...	
Deering v. Wisler, 21 C. O. 156..	181	.....	8, 368, 373, 484
Duffenbaugh v. Hess, 35 O. O. 7..	653	Dickinson's Est., 209 Pa. 59....	
Duginther's Ap., 33 Pa. 337....	129	.....	733, 801-802
De Haven's Ap., 75 Pa. 337....	602	Dickinson v. Beyer, 37 Pa. 274 ..	355
De Haven's Est., 1 Clark, 336..	462	Dickinson v. Dickinson, 61 Pa. 401	
De Haven's Est., 13 W. N. C. 179.	510	.....	543, 613
De Haven's Est., 7 Dauphin Co.		Dickson's Est., 11 Phila. 96....	383
219	701-706	Dickson's Est., 9 D. R. 431.....	649
De Haven's Est., 24 Lanc. L. R.		Dickson v. McGraw, 151 Pa. 98..	
97	14	.....	119, 120
De Haven's Est., 207 Pa. 147-		Diehl's Ap., 33 Pa. 406.....	153, 161
152	565	Diehl's Est., 11 Supr. C. 293....	530
De Haven's Est., 25 Supr. C. 507		Diehl's Est., 29 C. C. 288.....	472
.....	445-446	Diehl v. Emig, 65 Pa. 320.....	119
De Haven's Est., 215 Pa. 549...		Diehl v. Rodgers, 189 Pa. 316...	540
.....	445-446	Diemer's Est., 2 D. R. 543.....	726
De Haven's Est., 41 Supr. C. 382		Diese v. Fackler, 58 Pa. 109....	180
.....	525, 548	Dignal's Est., 50 Pitta. L. J. 311.	656
De Haven v. Willama, 30 Pa. 480.	377	Diller v. Groff, 11 Lanc. L. R. 73.	654
Deierier's Est., 10 Kulp, 525....	496	Dilworth v. Schuylkill, Etc., Co.,	
Delbert's Ap., 33 Pa. 468..	16, 18, 639	37 Pitta. L. J. (N. S.) 393....	746
Del Busto's Est., 6 C. C. 289....	204	Dilworth v. Schuylkill, Etc., Co.,	
Dellinger's Ap., 71 Pa. 425....	119	219 Pa. 527.....	802-803
Demmy's Ap., 43 Pa. 155.....		Dilworth's Ap., 103 Pa. 92.....	944
.....	137, 167, 247	Dimm's Ap., 90 Pa. 367.....	479
Deni v. R. Co., 181 Pa. 525.....	496	Dinah Duncan's Est., 3 Sm. L.	
Denis' Est., 169 Pa. 493.....	699	164	579
Denis' Est., 201 Pa. 516.....	914	Dingman v. Amaluk, 77 Pa. 114 ..	150
Denlinger's Est., 28 Lanc. L. R.		D'Inwillers v. Abbott, 12 Phila.	
329	114	462	377
Denlinger's Est., 12 D. R. 592..	932	Directors v. Nyce, 161 Pa. 32....	642
Denlinger's Est., 170 Pa. 104...	725	Dixson's Est., 14 Phila. 310....	383
Denning's Est., 4 C. O. 179.....	333	Dixey v. Laning, 49 Pa. 148.....	4
Dennison v. Goshring, 6 Pa. 403.	401	Dixon's Ap., 55 Pa. 424.	557, 582
Dent's Ap., 22 Pa. 514.....	631	Dobbin's Est., 221 Pa. 249.....	
Derbyshire's Est., 11 D. R. 315..	917	.....	662-664, 670
De Renne's Est., 15 Phila. 566..	579	Dobbin's Est. (No. 2), 221 Pa.	
Dermond's Est., 10 Del. Co. 508.	320	259	565, 583
De Roux v. Girard's Ex., 112 Fed.		Dockerty's Est., 3 Lack. L. N.	
R. 89	567	157	608
De Roy v. Richards, 8 Supr. C.		Dodge's Ap., 106 Pa. 216.....	720
119	930	Dodson's Est., 6 C. C. 617.....	345

TABLE OF CASES.

Eisenbrown v. Burns, 80 Supr. C. 46.....	827-828	Eyster's Ap., 16 Pa. 372.	214, 21
Eisenmann's Est., 12 D. R. 822.	21, 868	F	
Eisiminger v. Eisiminger, 129 Pa. 564.....	671	Fabel's Est., 12 D. R. 829	
Elbert's Est., 8 C. C. 611.....	138, 429	Fague's Est., 19 Supr. C. 61	
Eldred's Est., 9 D. R. 420.....	790	Fahey's Est., 10 D. R. 89	
Elliot's Ap., 60 Pa. 161.....	128	Fahnestock's Est., 147 Pa.	
Elliot's Est., 5 D. R. 455.....	451	.....	66
Ellmaker's Est., 26 Lanc. L. R. 81.....	683	Fahnestock v. Fahnestock, 1 56.....	
Ellwanger v. Moore, 206 Pa. 234.	895	Fahnestock's Est., 22 Lanc. 381.....	
Elmer v. Hall, 148 Pa. 845.....	629	Fahnestock's Est., 22 Supr.	
Elmslie's Est., 11 D. R. 246.....	683	Fair's Est., 34 Supr. C. 26	
Else v. Osborn, 1 Peere Williams, 388.....	545	Fairchild v. Fairchild, 9 Atl	
Elton's Est., 15 D. R. 91.....	956	Fairfax's Ap., 103 Pa. 166.	
Emanuel's Est., 13 Supr. C. 43.....	248, 446	Falconer's Est., 1 D. R. 67	
Emerick's Est., 11 Phila. 74.....	389	Falk's Est., 22 Lanc. L. R.	
Emerick's Est., 6 O. C. 641.....	17	Falk's Est., 6 Supr. C. 192	
Emerick v. Emerick, 219 Pa. 187.	757	Fallon's Est., 214 Pa. 584.	
Emig's Est., 18 York, 157.....		Fallon's Est., 9 Del. Co. 52	
.....	86, 92, 509	Farley's Est., 12 Luz. L. R.	
Emig's Est., 23 York, 138.....	828	Farmers' Etc., Co. v. Graybi Pa. 17.....	
Engle's Est., 12 Montg. 71.....	664	Farnum's Est., 191 Pa. 75..	
Engle's Est., 22 Lanc. L. R. 261.	429	Farrell's Est., 8 W. N. C. 2	
Engle's Est., 166 Pa. 280.....	698	Farrell's Est., 44 Supr. C.	
Engle's Est., 167 Pa. 463.....	744	Farrar v. Denning, 11 Supr.	
Engle's Est., 180 Pa. 215.....	792	.....	8, 14, 502
Englert v. Englert, 198 Pa. 326.....	608-609, 618	Farver's Est., 11 Dauphin Co.	
Equitable Trust Co. v. Bowen, 201 Pa. 534.....	120	Fattosina, in re, 33 Misc. (C Sur.) 18.....	
Erb's Est., 14 D. R. 286.....	83, 932	Faulstich's Est., 154 Pa. 188	
Eroh's Est., 1 Kulp, 81.....	847	Fay's Est., 213 Pa. 428.....	
Ervin's Est., 7 D. R. 486.....	680	Fechter's Est., 51 Pitts. L. J	
Erwin's Est., 4 D. R. 219.....	605	Feeley's Pet., 7 Lack. Jur. 8	
Eshbach's Est., 197 Pa. 153.....		Fehl's Est., 13 Supr. C. 601	
.....	758, 904-907, 914	Fell's Est., 14 Phila. 248..	20.
Eshelman's Ap., 74 Pa. 42.....	119	Fell's Est., 6 Supr. C. 192..	
Eshelman's Case, 5 Lanc. Bar, No. 14.....	342	Fellow's Ap., 93 Pa. 470..	
Eshelman's Est., 74 Pa. 42.....	481	Fellow's Est., 6 Luz. L. R. 2	
Eshelman's Est., 191 Pa. 68..	772-776	Fellows v. Loomis, 204 Pa. 2	
Eshelman's Est., 25 Lanc. L. R. 311.....	442	Felton's Est., 7 D. R. 262	
Eshelman v. Hoke, 2 Yeates, 509.	579	.....	23,
Eshelman v. Witmer, 2 Watts, 263.	362	Fenn's Ac., 2 Pearson, 485..	
Espy's Est., 207 Pa. 459.....	664, 691, 702	Fenstermacher's Est., 25 Lanc R. 151.....	
Esterly's Ap., 109 Pa. 222.....	426	Ferguson's Est., 138 Pa. 208	
Etter v. Greenawalt, 98 Pa. 422.	788	Ferguson's Est., 204 Pa. 253.	
Evans' Ap., 58 Pa. 238.....	539, 582	Ferguson's Est., 31 Supr. C.	
Evans' Est., 150 Pa. 212.....	650-651	Ferguson's Est., 223 Pa. 580	
Evans' Est., 150 Pa. 528.....	842, 871	Ferguson v. Yard, 164 Pa. 58	
Evans' Est., 155 Pa. 646.....	448, 720	Fernsler v. Moyer, 8 W. & S.	
Evans' Est., 1 D. R. 453.....	17, 211	Ferree v. Comth., 8 S. & R. 81	
Evans' Est., 7 Supr. C. 146.....	17, 251	Ferris' Est., 7 D. R. 425.....	
Evans' Est., 12 D. R. 694.....	559	Ferry's Ap., 102 Pa. 207.....	
Evans' Est., 21 Lane. L. R. 50.....	951	Fesmire's Est., 134 Pa. 67..	
Evans' Est., 23 Lanc. L. R. 52.....	445	Fesmire v. Shannon, 143 Pa. 20	
Evans' Est., 11 Kulp, 212.....	665	Fessenden's Est., 170 Pa. 631.	
Evans v. Chew, 71 Pa. 47.....	628	Fest's Est., 13 D. R. 193.....	
Evans v. Evans, 9 Pa. 190.....	652	Fetherman's Est., 181 Pa. 849.	
Evans v. Evans, 4 Clark, 478.....	812	Fetrow's Est., 58 Pa. 424.....	
Evans v. Mylert, 19 Pa. 402.....	182	Fetterhoff's Est., 228 Pa. 535	
Evans v. Ross, 107 Pa. 231.....	355	Fettig's Est., 5 Kulp, 152.....	
Evans v. Smith, 166 Pa. 625.....	753	Feuerstein v. Bartels, 221 Pa. 4	
Everitt's Est., 195 Pa. 450.....	725	Ficthorn v. Ficthorn, 1 Berks 193.....	
Everman's Ap., 67 Pa. 835.....	137, 188	Fiddler's Est., 14 D. R. 359..	
Ewing's Est., 18 Lanc. L. R. 73	107, 116	Fidelity, Etc., Co.'s Ap., 108 492.....	
Eyerman v. Detwiller, 186 Pa. 285.	339	Fidelity, Etc., Co.'s Ap., 115 157.....	
Eyre's Ap., 106 Pa. 184.....	80, 705		

Fidelity, Etc., Co.'s Ap., 121 Pa. 1.....	584	Formad's Est., 3 D. R. 18.....	49
Fidelity Trust Co. v. Bobloski, 228 Pa. 63.....	733-742	Forney's Est., 161 Pa. 209.....	915
Fidelity, Etc., Co. v. Gazzam, 161 Pa. 536.....		Forney v. Ebersole, 18 Lanc. L. R. 207.....	121
Fidelity, Etc., Co. v. Sampson, 209 Pa. 214.....	180	Forquer's Est., 216 Pa. 331.....	535, 585
Fidler v. Lash, 125 Pa. 87.....	827	Forrester v. Torrence, 64 Pa. 29.....	118
Field's Est., 14 Phila. 304.....	858	Forster's Est., 55 Pitts. L. J. 198.....	230, 660, 678
Field's Est., 16 D. R. 585.....	721	Forsythe's Est., 47 Pitts. L. J. 73.....	585
Fieser's Est., 15 Supr. C. 447.....	446	Fosselman v. Elder, 98 Pa. 159.....	533, 718
Filer's Est., 7 Lack. L. N. 318.....	216, 861	Foster's Ap., 74 Pa. 391.....	161
Finch's Est., 43 Pitts. L. J. 142.....	624	Foster's Ap., 87 Pa. 67.....	546
Finegan's Est., 14 D. R. 297.....	787	Foster's Est., 142 Pa. 62.....	608
Finger's Est., 21 Lanc. L. R. 182.....	220	Foster's Est., 55 Pitts. L. J. 65.....	684
Fink's Ap., 101 Pa. 74.....	219	Foster v. Comth., 85 Pa. 148.....	28
Fink v. Miller, 19 Supr. C. 556.....	163	Foster v. Foster, 1 Addams' R. 462.....	545
Finley's Est., 196 Pa. 140.....	40, 403	Fouche's Est., 147 Pa. 395.....	534
Finley's Est., 10 D. R. 272.....	830	Foulke's Est., 52 Pa. 201.....	668, 745
Finnen's Est., 196 Pa. 72.....	199	Fountain v. Ravenel, 17 Howard (U. S.), 386.....	832
Finney's Ap., 87 Pa. 323.....	821	Foust's Est., 6 Luz. L. R. 92.....	113
Finney's Ap., 113 Pa. 11.....	51, 664-665	Fow's Est., 3 D. R. 316.....	128
Fish's Ap., 7 Atl. 222.....	222	Fow's Est., 147 Pa. 264.....	604
Fisher's Est., 7 D. R. 116.....	432	Fowler's Ap., 125 Pa. 388.....	295
Fisher v. Harris, 10 Pa. 457.....	195	Fowler v. Fuller, 8 W. N. C. 146.....	141
Fisher v. Wister, 154 Pa. 65.....	665, 905, 914	Fowler v. Smith, 153 Pa. 639.....	118
Fitch's Est., 8 Lack. L. N. 150.....	889	Fox's Ap., 99 Pa. 382.....	661
Fitzgerald's Est., 11 D. R. 628.....	929	Fox's Ap., 11 Atl. 228.....	426
Fitzpatrick's Est., 9 D. R. 88.....	24	Fox's Est., 14 D. R. 78.....	679
Fitzpatrick's Est., 12 D. R. 780.....	868	Fox's Est., 16 D. R. 849.....	757, 793
Fitzsimmons' Ap., 40 Pa. 422.....	135, 148	Fox's Est., 30 Supr. C. 393.....	797
Fitzsimmons v. Lindsay, 205 Pa. 79		Fox v. Evans, 3 Yeates, 506.....	556
Fitzwater's Ap., 94 Pa. 141.....	665, 747	Fox v. Fox, 88 Pa. 19.....	585
Flade's Est., 16 Phila. 227.....	238	Frack v. Gerber, 167 Pa. 316.....	120
Flanagan v. Nash, 185 Pa. 41.....	120, 538	France's Est., 75 Pa. 220.....	107, 662, 792
Flanagan's Est., 50 Pitts. L. J. 289.....	598	Franciscus v. Reigart, 4 Watts, 98.....	296
Flannery's Will, 24 Pa. 502.....	540, 561	Frankenfield's Ap., 103 Pa. 589.....	297
Fleck's Est., 28 Supr. C. 466.....	727	Frankenfield v. Gruver, 7 Pa. 448.....	474
Fleming's Ap., 67 Pa. 18.....	88	Franklin's Ap., 163 Pa. 1.....	449
Fleming's Est., 10 D. R. 259.....	441, 526, 677	Franklin v. Franklin, 22 Supr. C. 463.....	913
Fleming's Est., 25 C. C. 269.....	45	Fransen's Will, 26 Pa. 202.....	584-585
Fleming's Est. (No. 4), 15 D. R. 233.....	704	Frantz v. Race, 205 Pa. 150.....	914
Fleming's Est., 184 Pa. 80.....	739, 788	Frazier's Est., 8 C. C. 306.....	539
Fleming's Est., 217 Pa. 610.....	524, 656, 955	Freas' Est., 10 D. R. 333.....	539, 558
Fleming v. Rouch, 2 Pearson, 204.....	841	Freas' Est., 19 D. R. 735.....	830, 945
Flemming v. Flemming, 204 Pa. 648.....	788	Freas v. Yost, 23 Montg. 85.....	660
Fletcher's Ap., 125 Pa. 352.....	403, 527	Frederick's Ap., 52 Pa. 338.....	531
Fletcher v. Hoblitzell, 209 Pa. 337.....	773	Fredericks v. Kerr, 219 Pa. 365.....	827
Flick v. Forest Oil Co., 188 Pa. 817.....	801	Freeman's Ap., 68 Pa. 151.....	579, 625, 630
Flickwir's Est., 136 Pa. 374.....	694-696	Freeman's Est., 16 D. R. 873.....	407
Flood v. Ryan, 220 Pa. 450.....	571-577	Freeman's Est., 17 D. R. 472.....	805
Flynn's Est., 21 Supr. C. 126.....	942	Freeman's Est., 18 D. R. 194.....	850
Fogg v. Carroll, 18 C. O. 434.....	679	Freeman's Est., 181 Pa. 405.....	276, 278, 280
Foley's Est., 50 Pitts. L. J. 417.....	613	Freeman's Est., 220 Pa. 343.....	661, 800
Follmer's Ap., 37 Pa. 121.....	407	Freeman's Est., 35 Supr. C. 185.....	745, 776, 780
Follweiler's Ap., 102 Pa. 581.....	668	Freiler v. Freiler, 1 C. C. 263.....	174
Follweiler v. Lutz, 112 Pa. 107.....	567	French v. Comth., 78 Pa. 339.....	15, 36
Folmar's Ap., 68 Pa. 482.....	558	Freno's Est., 11 Phila. 42.....	134
Foltz's Ap., 55 Pa. 428.....	253, 266	Frew's Est., 57 Pitts. L. J. 501.....	733
Foltz's Est., 19 Lanc. L. R. 183.....	417, 777	Frew v. Clark, 80 Pa. 170.....	529, 555, 610
Forcey's Ap., 106 Pa. 508.....	915	Frey's Est., 23 York, 141.....	955
Ford's Est., 8 Phila. 196.....	93	Frey's Est., 23 Lanc. L. R. 42.....	866
Ford's Est., 11 Phila. 97.....	481	Frey's Est., 223 Pa. 61.....	877
Ford's Est., 7 Lack. Jur. 117.....	137	Fricke's Est., 16 Supr. C. 38.....	826
Forepaugh's Est., 199 Pa. 484.....	690	Frick Coke Co. v. Laughead, 203 Pa. 168.....	162, 465
		Friedman's Est., 7 D. R. 517.....	23
		Friend's Est., 198 Pa. 363.....	611
		Fritz's Est., 14 Phila. 260.....	158

Frost' Ap., 105 Pa. 258. 115, 507, 529
 Frost v. Bush, 195 Pa. 544. 913
 Fry's Election Case, 71 Pa. 302. 578
 Fry's Est., 10 D. R. 493. 431
 Fry's Est., 168 Pa. 80. 671
 Fry's Est., 85 Supr. C. 446. 116
 Fry's Est., 229 Pa. 473. 641
 Frymeyer's Est., 17 Lanc. L. R. 401. 292, 414
 Fuguet's Will, 11 Phila. 73. 535, 557, 582
 Fuhrman's Est., 21 Supr. C. 27. 417
 Fullam v. Rose, 160 Pa. 47. 509
 Fuller's Ap., 98 Pa. 534. 19
 Fuller's Est., 222 Pa. 182. 549, 603
 Fuller's Est., 225 Pa. 626. 663
 Fuller's Est., 41 Supr. C. 417. 526
 Fuller v. Cole, 33 Supr. C. 563. 732
 Fullerton's Est., 146 Pa. 61. 5
 Fullerton's Est., 17 D. R. 1081. 210
 Fulton's Est., 14 Phila. 298. 271
 Fulton's Est., 19 York. 133. 114
 Fulton's Est., 51 Pitts. L. J. 257. 276
 Fulton's Est., 178 Pa. 78. 434, 458
 Fulton's Est., 200 Pa. 545. 414
 Fulton v. Miller, 193 Pa. 60. 373
 Funck's Est., 16 Supr. C. 434. 278
 Funk's Est., 21 Lanc. L. R. 149. 428
 Funk v. Haldeman, 53 Pa. 229. 297
 Funk v. Holahan, 13 D. R. 88. 115
 Furbush's Est., 220 Pa. 166. 94
 Furry's Est., 17 D. R. 608. 126

G

Gable's Ap., 40 Pa. 281. 428, 843
 Gable's Est., 16 D. R. 218. 720
 Gaffney's Est., 146 Pa. 49. 905
 Galboesch's Est., 16 D. R. 259. 137, 429
 Galbraith v. Bowen, 5 D. R. 852. 730
 Galbraith v. Galbraith, 6 Watts. 112. 230, 330
 Galbraith v. Green, 13 S. & R. 85. 645
 Galbraith v. Swisher, 19 Supr. C. 143. 747
 Gallagher's Est., 76 Pa. 296. 619
 Gallagher's Est., 10 D. R. 738. 396, 488
 Gallagher's Est., 218 Pa. 609. 94
 Gallagher v. Gallagher, 16 D. R. 458-669
 Gallen's Est., 26 W. N. C. 308. 45
 Gallen's Est., 8 C. C. 37. 451
 Gallen's Est., 15 Phila. 615. 576
 Gallen's Est., 20 Phila. 18. 430-436
 Galloway's Est., 5 Supr. C. 272. 448, 507, 868
 Gallup's Est., 4 Kulp. 475. 249
 Gamble's Est., 13 Phila. 198. 922
 Gamble's Est., 1 Parsons. 469. 654
 Gamble v. Woods, 57 Pa. 158. 136, 159
 Gandy, Admr., v. Dickson, 166 Pa. 422. 49
 Gangwere's Ap., 36 Pa. 466. 492
 Gangwere's Est., 14 Pa. 417. 690
 Gantz's Est., 19 Lanc. L. R. 390. 303
 Gantz's Est., 10 York. 201. 719
 Gantz v. Tyrrell, 7 Supr. C. 249. 317
 Gardner's Est., 4 Pa. 502. 546
 Gardner's Est., 164 Pa. 420. 641
 Gardner's Est., 228 Pa. 282. 546
 Gardner v. Gardner, 177 Pa. 218. 110
 Garland, ex parte, 10 Vesey, Jr. 685

Garman's Est., 32 Supr. C. 494. 94, 448
 Garman's Est., 211 Pa. 264. 179
 Garrett's Est., 12 D. R. 325. 698
 Garver v. Clouser, 218 Pa. 611. 754
 Gaston's Est., 188 Pa. 374. 534-535, 608
 Gaul's Est., 9 Phila. 333. 18
 Gebble's Est., 9 D. R. 56. 729
 Geddes v. O. & N. Co., 89 Supr. C. 417. 376
 Gehr v. McDowell, 206 Pa. 100. 944
 Geibler's Est., 1 Pearson. 445. 335
 Geise's Est., 1 Foster. 232. 222
 Geist's Est., 16 D. R. 331. 692
 Gelbach's Est., 11 D. R. 183. 946
 Gelbach's Est., 29 Supr. C. 446. 949, 952
 Gemmill v. Butler, 4 Pa. 232. 174
 Gentner's Est., 16 Phila. 618. 92
 Geoffroy v. Riggs, 133 U. S. 258.
 George's Ap., 12 Pa. 260. 4, 399, 400, 403
 Gerber's Est., 196 Pa. 866. 770-772, 804
 Gerhard's Est., 160 Pa. 253. 759
 Gernert v. Albert, 160 Pa. 95. 941-945
 Gernst v. Lynn, 31 Pa. 94. 748
 Gers v. Demarrara, 162 Pa. 580. 114
 Gers v. Weber, 151 Pa. 396. 113-118
 Gfeller v. Lappe, 208 Pa. 48. 547
 Gfeller v. Lappe, 211 Pa. 462. 547
 Ghormley v. Smith, 139 Pa. 584. 924
 Gibbs' Est., 17 D. R. 88. 310
 Gibbons' Ap., 104 Pa. 597. 14
 Gibbons' Est., 15 D. R. 447. 434
 Gibbons' Est., 17 D. R. 627. 669, 796-797
 Gibbons' Est., 224 Pa. 38. 730
 Gibbons v. O'Connor, 220 Pa. 395. 792, 940
 Gibson's Ap., 25 Pa. 191. 703
 Gibson's Ap., 108 Pa. 244. 478
 Gibson's Est., 9 Lack. Jur. 265. 258
 Gibson's Est., 5 Supr. C. 57. 48
 Gibson's Est., 228 Pa. 409. 526, 876
 Gideon's Est., 2 W. N. C. 855. 624
 Giffin's Est., 30 Pitts. L. J. 60. 328
 Giffin's Est., 138 Pa. 827. 757
 Gilbert's Ap., 85 Pa. 347. 701
 Gilbert's Est., 19 D. R. 460. 920
 Gilbert's Est., 227 Pa. 648. 51
 Gilchrist's Est., 9 D. R. 349. 677, 693
 Gilchrist v. Empfield, 194 Pa. 897. 753
 Gilfillen's Est., 170 Pa. 185. 220
 Gilkeson v. Thompson, 210 Pa. 255. 497
 Gillan v. Dixon, 65 Pa. 895. 474
 Gillen's Est., 16 York. 77. 113
 Gillespie's Est., 10 Watts. 800. 149, 159
 Gillespie's Est., 5 D. R. 65. 585
 Gillespie's Est. (No. 3), 14 D. R. 870. 870
 Gilliland v. Bredin, 63 Pa. 393. 785
 Gilliland's Est., 6 D. R. 138. 425
 Gillingham's Est., 220 Pa. 353. 789
 Gilmer's Est., 15 D. R. 59. 949
 Gilmer's Est., 17 D. R. 59. 781
 Gilmer's Est., 154 Pa. 528. 585, 668, 723
 Gilmore v. Rodgers, 41 Pa. 120. 4, 276
 Gilson's Est., 18 W. N. C. 570. 45
 Gilson's Est., 4 Lanc. L. R. 27. 640
 Ginder v. Farnum, 10 Pa. 98. 585
 Gingrich's Est., 26 Supr. C. 266. 732-738
 Girard's Ap., 4 Penny. 347. 574

Girard's Will, 2 Howard (U. S.), 127.....	574	Graham's Est., 14 W. N. C. 31.....	281
Girard, Etc., Co. v. Ashburner, 18 Phila. 643.....	565	Graham's Est., 14 D. R. 5.....	870
Girard, Etc., Co. v. Bedford, Etc. Co., 20 Supr. C. 304.....	952	Graham's Est., 15 D. R. 258.....	879
Gish's Ap., 31 Pa. 277.....	109	Graham's Est., 27 Lanc. L. R. 230.....	866
Gissel's Est., 5 Kulp, 208.....	238	Graham's Est., 218 Pa. 344.....	957
Githen's Est., 9 D. R. 465.....	827	Graham's Est., 225 Pa. 314.....	603-604
Githen's Est., 10 D. R. 875.....	486	Graham v. Abbott, 208 Pa. 98.....	666
Gitts' Est., 15 York, 108; 203 Pa. 263.....	743	Graham v. Heldrick, 204 Pa. 238.....	732
Gitts' Est., 203 Pa. 263.....	692	Grant v. Leslie, 3 Phillimore, 116.....	618
Givin v. Green, 10 Phila. 99.....	548	Gratz v. Bayard, 11 S. & R. 41.....	635
Gladings' Est., 13 D. R. 814.....	742	Grave's Est., 134 Pa. 877.....	51
Glandings' Est., 15 D. R. 985.....	413	Gravenstein's Ap., 2 Penny. 61.....	432
Glandings' Est., No. 2, 16 D. R. 546.....	693	Gray's Ap., 57 Pa. 46.....	848
Glaser's Est., 13 D. R. 198.....	931	Gray's Ap., 96 Pa. 243.....	215
Glass v. Glass, 6 C. C. 408.....	465	Gray's Est., 18 Phila. 132.....	613
Glassburner's Est., 40 Supr. C. 143.....	253, 267	Gray's Est., 1 Kulp, 449.....	126
Glassen's Est., 16 Phila. 219.....	557	Gray's Est., 147 Pa. 67.....	574, 680-685, 686, 727
Glatfelter's Est., 18 York, 81.....	759	Greble's Est., 16 Supr. C. 42.....	80, 953
Glentworth's Est., 221 Pa. 329.....	116, 816-817, 432	Green's Ap., 59 Pa. 235.....	399
Glesenkamp's Est., 51 Pitts. L. J. 155.....	868	Green's Est., 1 Del. Co. 521.....	277
Glessner v. Patterson, 164 Pa. 224.....	427	Green's Est., 7 Phila. 502.....	62
Goddard's Est., 198 Pa. 454.....	279, 281, 804	Green's Est., 140 Pa. 258.....	668
Godshalk's Est., 20 Montg. 118.....	526	Green's Est., 227 Pa. 188.....	683
Godshalk v. Seitz, 18 Montg. 125, 152.....	895	Green v. Mills, 103 Pa. 22.....	894
Godwin's Est., 22 Supr. C. 469.....	699	Greenawalt's Ap., 87 Pa. 95.....	276
Goe's Est., 146 Pa. 431.....	925	Greenawalt's Est., 27 Lanc. L. R. 433.....	877
Goenner's Est., 18 Phila. 203.....	220	Greenough v. Greenough, 11 Pa. 497.....	539-540
Gold's Est., 183 Pa. 495.....	794	Greenough v. Small, 137 Pa. 132.....	165-167
Gold v. Scott, 5 Supr. C. 262.....	118	Greentree's Est., 12 Phila. 10.....	64
Goldsmith's Est., 13 Phila. 389.....	282	Gregg's Ap., 20 Pa. 148.....	342-344, 351
Good's Est., 11 Lanc. L. R. 17.....	113	Gregg's Est., 213 Pa. 260.....	570-571
Good's Est., 10 D. R. 598.....	726	Gregg v. Keenan, 9 D. R. 262.....	686
Good's Est., 11 Dauphin Co. 379.....	507	Gregory's Est., 11 Phila. 126.....	105
Good's Est., 85 Supr. C. 440.....	86	Grelner's Ap., 103 Pa. 89.....	481, 645-646
Good v. Fichthorn, 144 Pa. 287.....	801	Gress's Ap., 14 Pa. 463.....	255, 384
Good v. Good, 19 Lanc. L. R. 174.....	16	Gressle's Est., 29 C. O. 97.....	870
Goodbread's Est., 9 D. R. 710.....	408	Grice's Est., 11 Phila. 107.....	135-139
Goodman's Ap., 199 Pa. 1.....	773	Griest's Est., 171 Pa. 412.....	376
Goodman's Est., 6 C. O. 254.....	103	Grier's Ap., 25 Pa. 352.....	75, 483
Goodnight v. Morningstar, 1 Yeates, 317.....	460	Grier's Ap., 101 Pa. 412.....	244
Goodwill v. Heim, 212 Pa. 595.....	876	Grier v. Huston, 8 S. & R. 402.....	125
Goodwin's Est., 22 Supr. C. 469.....	417	Grier v. McAlarney, 148 Pa. 587.....	127
Goodwin v. Colwell, 213 Pa. 614.....	18, 616, 880	Grieve's Est., 165 Pa. 126.....	43
Gordon's Ap., 93 Pa. 361.....	24, 155, 894	Griffin's Est., 1 D. R. 816.....	649
Gordon's Est., 9 Phila. 850.....	24	Griffin's Est., 9 D. R. 248.....	599, 811
Gorgas' Est., 166 Pa. 269.....	663-664, 686	Griffin v. Bower, 21 C. C. 188.....	173
Gormley's Est., 154 Pa. 378.....	843	Griffith v. Ogle, 1 Binney, 172.....	176
Gorton's Est., 15 D. R. 550.....	271	Griffith's Est., 147 Pa. 274.....	940
Gottshall v. Knipe, 11 Montg. 159.....	180	Griffiths v. Chew, 8 S. & R. 17.....	619
Goudy v. Wagner, 22 Montg. 21.....	18	Grim's Ap., 109 Pa. 391.....	292-295, 435
Gould's Est., 11 Kulp, 45.....	408	Grim's Est., 13 Northam. 61.....	869
Gouldley's Est., 201 Pa. 491.....	941	Grim's Est., 20 York, 147; 38 Supr. C. 587.....	656
Gourley v. Kinley, 66 Pa. 270.....	388, 855	Grim's Est., 147 Pa. 190.....	435, 479
Gowen's Ap., 106 Pa. 288.....	295, 716, 845	Grim v. Carr, 31 Pa. 533.....	176
Grabill's Est. (No. 2), 19 Lanc. L. R. 189.....	715	Grimes v. Penna. R. Co., 189 Pa. 619.....	629
Grabill v. Barr, 5 Pa. 441.....	540, 609	Grimes v. Shirk, 169 Pa. 74.....	752-753
Gracie's Est., 53 Pitts. L. J. 300.....	668	Grimm's Est., 181 Pa. 283.....	128
Graff's Est., 191 Pa. 28.....	479	Groetzinger's Est., 10 Northam. 327.....	279
Graff's Est., 16 D. R. 518.....	571	Groff's Ap., 45 Pa. 879.....	383
Graff v. Callahan, 158 Pa. 880.....	120	Groff's Est., 38 Supr. C. 140.....	527
Graham's Ap., 61 Pa. 43.....	96, 602	Groff v. Groff, 209 Pa. 603.....	426
		Groff v. Trust Co., 38 Supr. C. 567.....	524
		Groome's Est., 7 C. C. 519.....	105
		Groome v. Belt, 171 Pa. 74.....	211, 254

Gross' Est., 6 York, 143..320-327, 335	Hancock's Est., 1 Kulp, 85..... 345
Gross' Est., 6 C. C. 478..... 120	Hand's Est., 4 C. C. 446..... 547
Gross' Est., 26 O. C. 219..... 306	Hand's Est., 11 D. R. 146 435
Gross' Est., 20 York, 172..... 669	Handley's Est., 208 Pa. 388.... 731
Gross' Est., 14 D. R. 137....398, 772	Handley's Est., 312 Pa. 11.....
Gross' Est., 36 Supr. C. 54..... 869	..... 665-666, 679
Gross v. Strominger, 178 Pa. 64.. 733	Handy's Est., 9 D. R. 475..... 506
Grossman v. Thunder, 212 Pa. 274. 112	Handy's Est., 182 Pa. 68..... 916
Grothe's Est., 229 Pa. 186..... 663	Hanna v. Clark, 204 Pa. 145.... 949
Grove's Ap., 103 Pa. 562..... 356	Hannon v. Fliedner, 216 Pa. 470. 803
Grover's Est., 12 Luz. L. R. 224 ..	Hano's Est., 8 D. R. 353... 435, 933
..... 333, 368-369	Saml. Hano Co. v. Hano, 224 Pa.
Grover v. Boon, 124 Pa. 399..181-183	312 369
Grow's Est., 14 D. R. 325..... 363	Harberger's Ap., 98 Pa. 29..... 625
Grubb's Ap., 58 Pa. 55..... 470	Hardaker's Est., 304 Pa. 161 ... 800
Grubb's Ap., 62 Pa. 23..... 376	Hardy v. Scanlon, 1 Milan, 87... 597
Grubb's Est., 10 D. R. 443..466-467	Harley's Est., 21 Montg. Co. 97. 632
Grubb's Est., 174 Pa. 137..... 535	Harman's Est., 135 Pa. 441..679, 740
Guest's Est., 4 Kulp, 17 167	Harmon v. Rumberger, 18 D. R.
Guido's Est., 10 Kulp, 150..316, 351	486 575
Gulliver v. Poynts, 3 Wilson, 141. 674	Harmony Lodge's Ap., 127 Pa.
Gumaer's Est., 19 Supr. C. 621..	269 608
..... 700, 738	Harner v. Hasbrouck, 41 Pa. 169. 479
Gunn v. Windle, 15 D. R. 324.... 826	Harper's Est., 196 Pa. 137..... 700
Guthrie's Ap., 37 Pa. 9.....457, 757	Harrington v. Stivason, 210 Pa. 10. 341
Guthrie v. Kerr, 55 Pa. 303..395, 561	Harris v. Harria, 205 Pa. 460.914-919
Gwynne's Est., 50 Pitts. L. J. 303. 114	Harrison's Ap., 100 Pa. 458..... 603
Gwynne v. Muddock, 14 Vesey,	Harrison's Est., 15 D. R. 117... 443
488 720	Harrison's Est., 196 Pa. 576....
Gyger's Ap., 62 Pa. 73..... 576	..... 530-533, 679
	Harrison's Est., 202 Pa. 381.....
	..... 565, 682, 716, 721
	Harrison's Est., 217 Pa. 307.... 951
	Harrison's Est., 31 Supr. C. 485. 427
	Harrison's Est., 227 Pa. 184.... 920
	Harrison v. Farrell, 32 Supr. C.
	141 639
	Harschaw v. Harschaw, 184 Pa. 401. 676
	Hart's Est., 9 D. R. 274..... 863
	Hart's Est., 10 D. R. 421...415, 442
	Hart's Est., 12 D. R. 47 626
	Hart's Est., No. 3, 303 Pa. 492..
	..... 408, 933, 941-947
	Hart v. Stoyer, 164 Pa. 523 ...
	..... 640-665, 666
	Hartman's Ap., 21 Pa. 488..... 344
	Hartman's Ap., 90 Pa. 203..... 947
	Hartman's Est., 11 Supr. C. 35.. 744
	Hartman's Est., 12 Supr. C. 69.. 634
	Hartman v. Hartman, 25 Montg.
	Co. 58 376
	Hartmyer's Est., 25 Lanc. L. R.
	14 539
	Harton's Est. (No. 1), 313 Pa.
	499 634
	Hartz's Est., 20 Lanc. L. R. 25.. 434
	Hartzell's Est., 178 Pa. 366..... 703
	Hartzell's Est., 186 Pa. 364..... 737
	Harvey's Est., 26 O. C. 500..... 415
	Harvey's Est., 11 D. R. 83...442, 510
	Harvey's Est., 181 Pa. 307...608-609
	Haskell's Est., 212 Pa. 469..... 789
	Hausinger v. Hausinger, 20 O. C.
	485 424
	Hastings v. Engle, 217 Pa. 419.. 757
	Hauer's Est., 16 Supr. C. 357 ..
	..... 695, 726
	Haworth's Ap., 105 Pa. 362..... 703
	Hayes' Ap., 39 Pa. 256.....462, 477
	Hayes' Est., 7 Supr. C. 160.... 613
	Hayes' Est., 23 Supr. C. 570.... 657
	Hay's Ap., 52 Pa. 449..... 355
	Hays' Est., 201 Pa. 391..... 923
	Hays v. Hardin, 6 Pa. 409..... 526
	Hays v. Leonard, 155 Pa....474-921
	Hazard's Est., 19 D. R. 671 ... 601
	Headley v. Renner, 129 Pa. 542. 535

H

Hans' Est., 16 D. R. 251..... 427
Hans' Est., 3 C. C. 345..... 445
Habecker's Est., 43 Supr. C. 85.. 663
Haberman's Ap., 101 Pa. 329... 507
Hackett v. Milnor, 156 Pa. 1..
..... 734, 825
Hager's Est., 17 D. R. 1015..721, 774
Hagy's Est., 191 Pa. 26..... 479
Hahn v. Bealor, 132 Pa. 243.... 657
Hahn v. Hutchinson, 159 Pa. 183. 926
Hahne v. Meyer, 178 Pa. 151..753-754
Haines' Est., 2 D. R. 104..... 463
Haines v. Eshelman, 25 Supr. C.
381 366
Haines v. Hall, 209 Pa. 104.... 932
Hale's Est., 9 D. R. 339..... 940
Hall's Ap., 113 Pa. 42..... 508
Hall's Est. (No. 1), 10 Northam.
93 599
Hall's Est. (No. 2), 10 Northam.
97 605-606
Hall v. Hurford, 4 Clark, 291.... 712
Haller's Est., 27 Lanc. L. R. 5.. 642
Hallowell's Est., 9 D. R. 90.... 669
Haly's Est., 18 O. C. 124..... 716
Hambleton v. Yocum, 105 Pa. 304. 614
Hamilton's Est., 51 Pa. 58..... 364
Hamilton's Est., 74 Pa. 69...535, 571
Hamilton's Est., 4 D. R. 231.... 498
Hamilton v. J. C. Mercet Home,
228 Pa. 410.....573, 576
Hamilton v. Porter, 63 Pa. 332.. 395
Hammer's Est., 156 Pa. 632..673, 687
Hammett's Ap., 33 Pa. 392...395-396
Hammond's Est., 197 Pa. 119...
..... 701-705, 739
Hanbest's Est., 12 Phila. 31.... 413
Hanbest's Est., 11 D. R. 418.... 349
Hanbest's Est., 12 D. R. 114... 932
Hanbest's Est., 15 D. R. 234.... 825
Hanbest's Est., 21 Supr. C. 427;
11 D. R. 418; 12 D. R. 114.. 362
Hanbest v. Grayson, 206 Pa. 59. 534
Hancock's Ap., 112 Pa. 532..... 663

Heagy's Est., 4 Supr. C. 493.....	680	Hinkle's Est., 18 Phila. 100.....	388
Heathcote's Est., 209 Pa. 522.....		Hinkle v. Landis, 131 Pa. 573....	522
.....	691, 702	Hirsch's Est., 41 Supr. C. 367....	526
Heck's Est., 170 Pa. 232.....	801	Hirsch's Est., 15 D. R. 431.....	431
Hockman v. Kipp, 228 Pa. 436....		Hirsch's Est., 26 Lanc. L. R. 75...	641
.....	408, 412	Histor. Soc. v. Kelker, 226 Pa. 16...	572
Heffner's Est., 134 Pa. 436.....	423	Hoch's Est., 154 Pa. 417, 462, 665,	727
Hegarty's Ap., 75 Pa. 503.....	559	Hodnett's Est., 154 Pa. 485.....	577
Heier's Est., 13 D. R. 414.....	604	Hoff's Ap., 24 Pa. 200.....	645
Heilbrun's Est., 9 C. C. 350.....	610	Hoff's Est., 7 D. R. 93, 408, 649,	866
Heilig v. Heilig, 28 Supr. C. 396;		Hoffman's Est., 9 D. R. 206.....	389
215 Pa. 256.....	530	Hoffman's Est., 14 D. R. 279....	648
Heinemann's Ap., 92 Pa. 95.....	650	Hoffman's Est., 10 Supr. C. 113....	449
Heise v. Heise, 31 Pa. 246.....	538	Hoffman's Est., 19 Supr. C. 70....	616
Heister's Est., 26 C. C. 49.....	872	Hoffman's Est., 32 Supr. C. 646....	425
Heister v. Yerger, 166 Pa. 445....	753	Hoffman's Est., 37 Supr. C. 548....	524
Helb's Est., 16 D. R. 986.....	414	Hoffman's Est., 209 Pa. 357.....	609
Helferty's Est., 18 D. R. 324.....	604	Hofus v. Hofus, 92 Pa. 305.....	669
Heller's Est., 16 D. R. 306.....		Hoffner's Est., 161 Pa. 331.....	571
.....	448, 563, 784	Hogan's Est., 12 D. R. 47.....	664
Hellerman's Ap., 115 Pa. 120.....	667	Hogg's Est., 206 Pa. 415.....	330
Hemingway's Est., 195 Pa. 291....	608	Hogue v. Hogue, 161 Pa. 643....	771
Hemphill's Est., 180 Pa. 95.....	905	Hohein v. Hohein, 25 Lanc. L. R.	
Henderson's Est., 228 Pa. 405....	847	105.....	614
Hendricks v. Senior, 25 C. C. 220		Hoke's Est., 11 York, 162.....	640
.....	728, 754	Holbrook's Est., 3 C. C. 265....	645
Henry's Est., 20 C. C. 415.....	690	Holbrook's Est., 20 W. N. C. 79....	354
Henson's Est., 12 D. R. 326.....		Holbrook's Est., 213 Pa. 93.....	
.....	821, 827, 944	.....	741, 786-787
Henszey v. Gross, 185 Pa. 353....	465	Holland's Est., 5 Schuylkill, 63....	604
Henszey v. Parker, 185 Pa. 355....	465	Hollenback v. Clapp, 103 Pa. 60....	637
Heppenstall's Est., 144 Pa. 259....	648	Holliday v. Hively, 198 Pa. 335....	921
Herbeln's Est., 2 Chester Co. 449.	471	Holliday v. Ward, 19 Pa. 485, 560-561	
Hermann's Est., 220 Pa. 52, 668, 698		Holman's Ap., 106 Pa. 502, 845, 371	
Herr v. Groff, 17 D. R. 478.....	784	Holmes' Est., 15 D. R. 774, 584, 827	
Herron's Est., 57 Pitta. L. J. 259		Holmes' Est., 19 D. R. 121.....	955
.....	630, 829	Holmes v. Fulton, 193 Pa. 270....	772
Hershey's Est., 23 Lanc. L. R. 87		Holmes v. Woods, 168 Pa. 530.....	
.....	417, 721	.....	371, 772
Herster v. Herster, 116 Pa. 612....	611	Holts' Est., 11 D. R. 731.....	939
Herster v. Herster, 122 Pa. 239		Homel v. Bacon, 126 Pa. 176.....	719
.....	610, 618-614	Homeyard's Est., 13 D. R. 259, 509-510	
Herrstine's Est., 29 C. C. 481....	432	Hood's Est., 21 Pa. 106.....	561
Hertler's Est., 192 Pa. 581.....	883	Hood v. Penna., Etc., 221 Pa. 474	
Hess' Ap., 43 Pa. 78.....	547	.....	662, 779
Hess' Est., 9 D. R. 19.....	426	Hook's Est., 207 Pa. 203.....	
Hess' Est., 22 Lanc. L. R. 872....	942	.....	607, 610, 790
Hess' Est., 27 Supr. C. 498.....		Hoopes' Est., 10 W. N. C. 223....	506
.....	897, 408, 791	Hoopes' Est., 174 Pa. 373.....	611
Heston's Est., 13 D. R. 760.....	608	Hoopes' Est., 185 Pa. 167.....	558
Heyer's Ap., 84 Pa. 183.....	430	Hoopes' Est., 185 Pa. 167.....	
Hicks' Est., 19 D. R. 410.....	875	.....	558, 597, 600-601, 684
Hickman's Est., 40 Supr. C. 282....	641	Hoover's Est., 9 Dauphin Co. 358	
Hickock v. Still, 168 Pa. 155, 825,	937	.....	585, 682
Hiestand v. Meyer, 150 Pa. 501....	666	Hoover's Est., 12 Dauphin Co. 302.	876
Hiestor v. Hiestor, 228 Pa. 102....	794	Hoover's Est., 15 Montg. 200.....	677
Hiestor v. Yerger, 166 Pa. 445....	755	Hoover v. Landis, 76 Pa. 354....	651
High's Ap., 21 Pa. 285.....	482	Hoover v. Mummert, 16 D. R. 852.	472
High's Est., 136 Pa. 222.....	431, 669	Hoover v. Potter, 42 Supr. C. 21.	483
Hildebrand's Est., 14 D. R. 729.	946	Hoover v. Strauss, 215 Pa. 130....	757
Hildebrandt's Est., 26 Lanc. L. R.		Hopkins v. Glunt, 111 Pa. 287....	753
60.....	743	Horam's Est., 59 Pa. 152.....	333
Hildebrant v. Hildebrant, 42 Supr.		Horne v. Mengel, 30 Supr. C. 67.	948
C. 190.....	744, 771	Horn's Est., 223 Pa. 415.....	648
Hildeburn's Est., 4 D. R. 40.....	571-579	Horne's Est., 10 D. R. 226.....	341
Hileman v. Bauslaugh, 13 Pa. 344.	457	Horner's Est., 10 D. R. 729.....	428
Hilker's Est., 5 C. C. 142.....	467	Horning's Est., 43 Pitta. L. J. 827.	582
Hill's Est., 19 Lanc. L. R. 179....	889	Horts's Est., 26 Supr. C. 489.....	527
Hill's Ests., 23 Lanc. L. R. 30....		Hostetter's Est., 8 York, 127.....	434
.....	626, 870	Houseman's Est., 11 D. R. 87.....	870
Hill v. Hill, 17 D. R. 746.....	743, 797	Houston's Est., 12 D. R. 121.....	575
Hill v. Giles, 201 Pa. 215, 749, 756-757		Howard's Est., 8 D. R. 125.....	822
Hillbush's Ap., 89 Pa. 490.....	344	Howe's Ap., 126 Pa. 233, 662, 728-729	
Himelspark's Est., 8 D. R. 183....	339	Howe's Est., 8 D. R. 267.....	364
Hindman's Ap., 85 Pa. 466, 567, 579		Hoysradt v. Tioneata Gas Co., 194	
Hindman v. Van Dyke, 153 Pa.		Pa. 251.....	561, 944
243.....	609, 611	Hoyt's Est., 10 Kulp, 166.....	609

Hoxie v. Chamberlain, 228 Pa. 81	
Huber's Ap., 80 Pa. 348.....	730, 743
Huber v. Hamilton, 211 Pa. 289.	661
Hubert's Est., 181 Pa. 551.....	802
Hubley's Ap., 19 Pa. 138.....	692
Huey's Est., 17 D. R. 1030.....	383
Hughes' Ap., 57 Pa. 179.....	678, 689
Hughes' Est., 24 Lanc. L. R. 40....	482
Hughes' Est., 18 Supr. C. 249....	452
Hughes' Est., 225 Pa. 79.....	396
Hughes-Hallett v. Hughes-Hallett,	683
152 Pa. 590.....	928
Hulton's Ap., 104 Pa. 359.....	917, 957
Hummel's Est., 161 Pa. 215.....	660
Hunt's Ap., 101 Pa. 590.....	466
Hunt's Est., 133 Pa. 260.....	482
Hunt's Est., 105 Pa. 128.....	535, 683
Hunter's Est., 10 D. R. 120.....	828
Hunter's Est., 11 D. R. 761.....	722
Hunter v. Anderson, 152 Pa. 386	936
Hunter v. Hunter, 229 Pa. 349....	917, 957
Hutchins' Est., 19 D. R. 76.....	660
	877

I

Iddings v. Iddings, 7 S. & R. 111.	588
Ibrie's Est., 162 Pa. 369.....	662
Ike's Est., 200 Pa. 202.....	893
Ingersoll's Est., 3 D. R. 399.....	713
Ingersoll's Est., 167 Pa. 536.....	942
Irvine's Est., 206 Pa. 1.....	547, 572
Irvine's Est., 31 Supr. C. 614.....	743
Irvine's Est. (No. 2), 209 Pa. 325	
	389, 507, 825, 871
Irwin's Est., 133 Pa. 1.....	428
Irwin's Est., 17 Lanc. L. R. 409....	657
Irwin's Est., 22 Lanc. L. R. 393....	417
Irwin v. Covode, 24 Pa. 162.....	465
Irwin v. Hanthorn, 1 Supr. C. 149.	605
Ivin's Ap., 106 Pa. 176.....	662, 719

J

Jack's Est., 17 D. R. 127.....	940
Jack v. R. Co., 43 Supr. C. 337....	876
Jack v. Shoenberger, 22 Pa. 416.	549
Jackman v. Delafield, 85 Pa. 381..	623
Jackson's Est., 179 Pa. 77.....	
	662-664, 786, 801
Jackson's Est., 209 Pa. 520.....	745, 773
Jackson's Est., 15 Supr. C. 238....	794
Jackson v. Tozer, 154 Pa. 223.....	614
Jacob's Est., 140 Pa. 268.....	663
Jacob's Est., 17 D. R. 369.....	612
Jacoby's Est., 45 Pitts. L. J. 17....	564
Jacoby's Est., 54 Pitts. L. J. 237;	
34 Supr. C. 355.....	436, 507
Jacoby's Est., 190 Pa. 382.....	580-533
Jacoby's Est., 201 Pa. 442.....	389
Jacoby's Est., 204 Pa. 188.....	
	664, 697-698, 916
Jacoby's Est., 219 Pa. 554.....	727
James' Est., 3 D. R. 373.....	868
James' Est., 20 Phila. 43.....	619
Jamieson's Est., 34 O. C. 417.....	743
Jeanes' Est., 228 Pa. 537.....	572
Jeffries' Est., 18 Supr. C. 439....	535
Jennings' Est., 10 D. R. 90.....	871
Jennings' Est., 16 D. R. 252.....	432
Jennings' Est., 38 Supr. C. 522....	
	524-525
Jeremy's Est., 178 Pa. 477.....	801
Jervis v. Ferris, 23 C. O. 142....	698
Johns' Est., 1 Lanc. L. R. 291....	447
Johnson's Ap., 88 Pa. 346.....	466, 470

Johnson's Ap., 114 Pa. 132.....	399
Johnson's Est., 20 Phila. 170....	845
Johnson's Est., 159 Pa. 630.....	810
Johnson's Est., 170 Pa. 177.....	877
Johnson's Est., 201 Pa. 513.....	686
Johnson's Est., 29 Supr. C. 255....	478
Johnson v. Blair, 126 Pa. 426....	598
Johnson v. Fritz, 44 Pa. 449.....	356, 655
Johnson v. Gaul, 228 Pa. 75.....	919
Johnson v. Haines, 4 Dallas, 64....	456
Johnston's Est., 185 Pa. 179.....	
	770, 804
Johnston's Est., 222 Pa. 514.....	525
Johnston v. Furnier, 69 Pa. 449....	407
Louise Jones' Ap., 99 Pa. 124.....	
	365, 394, 403, 507
Jones' Est., 6 D. R. 783.....	686
Jones' Est., 15 D. R. 30.....	432
Jones' Est., 24 York, 25.....	828
Jones' Est., 199 Pa. 143.....	927
Jones' Est., 211 Pa. 364.....	
	579, 585, 660, 681
Jones v. Cable, 114 Pa. 586.....	773
Jones v. Jones, 201 Pa. 548.....	755
Jones v. Strong, 142 Pa. 496.....	666
Jordan's Est., 161 Pa. 393.....	572
Jourdan v. Dean, 175 Pa. 618.....	923
Journeay v. Gibson, 56 Pa. 57....	478
Joyce's Est., 16 Phila. 269.....	686
Justice's Est., 15 D. R. 342.....	528
Justice's Est. (No. 2), 15 D. R.	
843	844

K

Kane's Est., 185 Pa. 544.....	463, 663-664
Kane's Est., 206 Pa. 204.....	608, 611
Kann's Est., 69 Pa. 219.....	368
Kase's Est., 10 D. R. 497.....	598
Kates' Est., 148 Pa. 471.....	893
Kaufman's Ap., 112 Pa. 649.....	640
Kaufman v. Burger, 195 Pa. 274....	802
Kaufman v. O'Conner, 198 Pa. 213.	611
Kearney's Est., 148 Pa. 218.....	608
Kearns v. Kearns, 107 Pa. 575....	705
Keates' Est., 16 Phila. 257.....	678
Keating v. McAdoo, 180 Pa. 5.801,	921
Keabler v. Shute, 133 Pa. 283....	613-614
Keene's Est., 221 Pa. 201.....	
	662-666, 725
Keil's Est., 215 Pa. 464.....	549
Keim's Est., 125 Pa. 480.....	669
Keiper's Ap., 124 Pa. 193.....	686
Keisel's Est., 24 Montg. 34.....	345
Keisel's Est., 17 D. R. 476.....	666
Keisler's Est., 12 D. R. 232.....	558, 562
Keisler's Est., 213 Pa. 9.....	610
Keith's Est., 19 Phila. 73.....	427
Keller v. Lamb, 10 Kulp, 246; 202	
Pa. 412	654
Kellerman's Est., 18 Supr. C. 530.	685
Kelley's Est., 17 D. R. 456.....	666
Kelley v. Kelley, 182 Pa. 131.....	668
Kelly's Est., 3 D. R. 635.....	485, 731
Kelly's Est., 9 D. R. 387.....	570
Kelly's Est., 193 Pa. 45.....	916
Kelly's Est., 17 D. R. 456.....	571
Kelly's Est., 27 Supr. C. 320.....	507, 510
Kelly v. R. Co., 226 Pa. 540.....	743
Kelly v. Shillingsburg, 2 Supr. C.	
576	940
Kelsey's Ap., 113 Pa. 119.....	
	372, 654, 912
Kemp's Est., 2 Woodward, 428....	473
Kemp v. Reinhard, 228 Pa. 143....	
	749, 754-756, 763
Kempel's Est., 27 Lanc. L. R. 5....	642

Lloyd's Est., 186 Pa. 451; 174 Pa.	184	669, 683
Locher's Est., 219 Pa. 42; 24 Lanc.	L. R. 17	432
Locher's Est., 19 D. R. 666		870
Lodge's Est., 11 D. R. 364		947
Loesser's Est., 167 Pa. 498		604-609
Logan's Est., 1 O. C. 76		629
Logan's Est., 195 Pa. 282		611, 617
Logan v. Richardson, 1 Pa. 372		480
Logan v. Watt, 5 S. & R. 212		559
Long's Ap., 77 Pa. 151		343
Long's Ap., 86 Pa. 196		529
Long's Est., 204 Pa. 60		929
Long's Est., 225 Pa. 39		745, 770
Long's Est., 27 Lanc. L. R. 182		642
Long's Est., 39 Supr. C. 323; 228	Pa. 594	682, 743
Long v. Hill, 29 Supr. C. 606		662-664, 793
Long v. Labor, 8 Pa. 229		685
Long v. Zook, 18 Pa. 400		529
Longenecker's Est., 226 Pa. 1		946
Louck's Est., 17 York, 160		647, 697
Louck's Est., 203 Pa. 278		777
Lovett v. Lovett, 10 Phila. 537		761
Lovett v. Mathews, 24 Pa. 330		660
Lowen's Estates, 35 Pitts. L. J. 181		546
Lowry's Ap., 114 Pa. 219		912
Loy v. Kennedy, 1 W. & S. 396		551
Lucas' Ap., 53 Pa. 404		353, 365
Lucas' Est., 56 Pitts. L. J. 185		663
Lucas' Est., 35 O. C. 305		534
Luccareni's Est., 14 D. R. 296		662
Luckenbach's Est., 170 Pa. 586		705
Luckenbach v. Luckenbach, 175 Pa.	484	705, 825
Ludlam's Est., 18 Pa. 188		676
Luebbs's Est., 179 Pa. 447		570
Lupher's Est., 26 O. C. 172		417
Lutton's Est., 17 Supr. C. 342		527
Lutz's Est., 9 O. C. 294		580
Luzerne, Etc., Assn. v. Savings	Bank, 142 Pa. 121	376
Lyle v. Richards, 9 S. & R. 322		457
Lynch's Est., 17 D. R. 374		451
Lynch's Est., 220 Pa. 14		465
Lynch v. Lynch, 132 Pa. 423		477, 574, 680
Lyon's Est., 3 D. R. 739		650

McAleer's Est., 4 D. R. 360..... 603
McAlpin's Est., 211 Pa. 26..... 762
McAndrews' Est., 306 Pa. 366, 345, 697
McArthur's Est., 26 Pitts. L. J. 57. 562
McAuley's Est., 184 Pa. 124.... 912
McAvey's Est., 8 D. R. 233..... 874
McBride's Ap., 72 Pa. 480.... 481, 479
McBride's Est., 81 Pa. 303..... 656
McBride's Est., 152 Pa. 192..... 662
McBride v. Smyth, 54 Pa. 245.... 920
McCafferty v. Duerr, 207 Pa. 261
..... 755, 762
McCahan's Est., 221 Pa. 188.... 787
McCall's Ap., 56 Pa. 363..... 930-939
McCall v. McCall, 181 Pa. 412, 774-775
McCalla's Est., 16 Supr. C. 202... 792
McCallum's Est., 211 Pa. 205 .
..... 726, 952
McCandless' Ap., 98 Pa. 489... 848-845
McCandless' Est., 61 Pa. 9..... 428
McCann's Est., 16 Phila. 270..... 544
McCann v. Barclay, 204 Pa. 214...
..... 751-754

McCann v. McCann, 197 Pa. 452...	754	McHenry's Est., 15 D. R. 302...	
McCarter's Ap., 78 Pa. 401.....	601	948, 952	
McCaull's Est., 12 D. R. 769....	424	McInnes' Est., 11 D. R. 149.....	956
McCay v. Clayton, 119 Pa. 183...		McIntosh's Est., 158 Pa. 528....	
545, 558		650, 679, 753, 785, 905,	914
McClain v. Provident, Etc., Soc., 17		McKee's Est., 15 D. R. 524.....	792
Supr. C. 509.....	713	McKee's Est., 17 C. C. 548.....	669
McClean's Est., 11 D. R. 103.....	498	McKendry v. Shannon, 201 Pa. 331.	820
McClelland's Est., 8 D. R. 759...		McKenna v. McMichael, 189 Pa.	
422, 441		440	580
McClelland's Est., 17 D. R. 26....	664	McKeown's Est., 10 D. R. 332....	
McClerman's Est., 11 D. R. 163...		561, 580, 597	
651, 947		McKibben's Est., 7 D. R. 511....	429
McClintock's Ap., 29 Pa. 360.....	428	McKibbin's Est., 21 Supr. C. 578	
McCloskey's Est., 15 D. R. 428...	931	679, 789	
McCloskey v. McCloskey, 205 Pa.		McKown's Est. (No. 2), 198 Pa.	770
491.....	912	102	
McClure's Est., 221 Pa. 556.....	745	McMahon's Est., 132 Pa. 175, 427,	688
McCollum's Est., 211 Pa. 205....	664	McMann's Est., 212 Pa. 267.....	878
McComb's Est., 49 Pitts. L. J.		McManus' Est., 3 D. R. 183.....	623
218.....	650	McMasters v. Shellito, 14 Supr. C.	
McConnell's Est., 5 Supr. C. 120		303	662, 758
462, 468		McMichan's Est., 220 Pa. 187....	427
MacConnell v. Lindsay, 181 Pa.		McMillan's Ap., 52 Pa. 435.....	856
436 (476).....	921	McMurray's Ap., 101 Pa. 421....	428
MacConnell v. Wright, 150 Pa.		McMurray's Est., 101 Pa. 421....	896
275.....	921	McNamara's Est., 18 D. R. 46...	670
McConomy's Est., 170 Pa. 140....		McNeel's Est., 68 Pa. 412.....	403
788, 934		McNeile's Est., 217 Pa. 179, 335,	338
McCorkle's Est., 184 Pa. 626....	871	McNitt's Est., 229 Pa. 71.....	603, 611
McCormick's Ap., 104 Pa. 146....	480	McNutt's Est., 15 D. R. 429....	429
McCormick v. McCormick, 194 Pa.		McPherran's Est., 212 Pa. 425...	433
107.....	618	McPherran's Est. (No. 2), 212 Pa.	
McCort's Ap., 98 Pa. 33.....	558	432	424
McCown's Est., 221 Pa. 324.....	507, 940	McPherson v. Cunliff, 11 S. & R.	
McCoy's Est., 17 Phila. 482.....	844	422	506
McCoy's Est., 23 Supr. C. 282....	843	McTamany's Est., 44 Supr. C. 484.	641
McCracken v. Graham, 14 Pa. 209.	892	Macaulay's Est., 224 Pa. 1.....	603, 604
McCrea's Est., 180 Pa. 81.....	720, 774	Mack's Ap., 68 Pa. 231.....	530-531
McCreary v. Bomberger, 151 Pa.		Mackin's Est., 14 Phila. 328....	597
323.....	826	Maffet's Est., 6 Kulp, 452.....	647
McCredy's Ap., 64 Pa. 428.....	843	Maffit v. Clark, 6 W. & S. 262...	464
McCrorry's Est., 27 C. C. 335....	548	Magee's Est., 5 C. C. 58.....	861
McCuen's Est., 18 D. R. 222....	610	Magooohan's Ap., 117 Pa. 238...	535
McCulloch's Ap., 113 Pa. 247....	584	Mahan's Est., 52 Pitts. L. J. 5...	568
McCullough's Est., 14 D. R. 7....	509	Main v. Ryder, 84 Pa. 217.....	
McCullough v. Johnetta Coal Co.,		539, 606, 610	
210 Pa. 222.....	756	Major's Ap., 126 Pa. 109.....	790
McCullough v. Young, 1 Binney,		Malone v. Mounts, 17 D. R. 884...	737
63.....	629	Malunney's Est., 208 Pa. 21.....	548, 604
McCully's Est., 12 Supr. C. 78....	472	Man's Est., 160 Pa. 609.....	779
McDermott's Est., 19 D. R. 385...	641	Manifold's Ap., 126 Pa. 508....	679
McDonald's Est., 14 Phila. 253...	549	Mann v. Mullin, 84 Pa. 297.....	659
McDonald's Est., 130 Pa. 480....		Manners v. Phila. Library Co., 93	
561, 610		Pa. 165	571
McDowell's Est., 8 D. R. 371....	714	Manning's Est., 23 Lanc. L. R. 409.	408
McDowell's Est., 17 Montg. 43...		Manning v. Bader, 224 Pa. 575...	763
416, 446		Manasfield's Est., 19 Supr. C. 26...	939, 949
McDowell's Est., 194 Pa. 624....	722	Manasfield's Est., 206 Pa. 64....	955
McDowell v. Addams, 45 Pa. 430.	473	Manasfield v. McFarland, 202 Pa.	
McEnroe v. McEnroe, 201 Pa. 477		173	629
609, 611		Markman's Est., 16 D. R. 55.....	664
McEwen's Est., 18 D. R. 534, 670,	669	Marsden's Ap., 102 Pa. 199.....	648
McGarry's Est., 9 D. R. 172....	645	Marsden's Est., 166 Pa. 213....	956
McGarry's Est., 12 D. R. 371....	677	Marsh v. Platt, 221 Pa. 431, 758,	940
McGlensy's Est., 37 Supr. C. 514.	683	Marshall's Est., 188 Pa. 260....	825
McGlinchy's Est., 11 D. R. 257...	426	Marshall's Will, 41 Pitts. L. J.	
McGovern's Est., 190 Pa. 375....	663	241	558
McGovran's Est., 185 Pa. 208...	608	Marshall v. De Haven, 209 Pa.	
McGowan v. Bailey, 179 Pa. 470.	462	187	616
McGrann's Est., 12 D. R. 219....	432	Marshall v. Marshall, 11 Pa. 430.	584
McGreevy v. Kulp, 126 Pa. 97....	389	Martin's Est., 1 Chester Co. 512.	335
McGregor v. Davidson, 14 Supr. C.		Martin's Est., 8 C. C. 212.....	473
230.....	749, 753-754	Martin's Est., 7 D. R. 408.....	526
McGrew's Ap., 14 S. & R. 396....	861	Martin's Est., 16 D. R. 521.....	725
McGrew v. Hart, 11 Atl. 617....	657		

Martin's Est., 160 Pa. 82.....	795, 914	Middleton's Est., 212 Pa. 119...	748
Martin's Est., 184 Pa. 221.....	526	Middleton's Est., 17 D. R. 894...	946
Martin's Est., 185 Pa. 51.....	745	Mikesell v. Mikesell, 40 Supr. C.	
Martin v. Greenwood, 27 Supr. C.		892	876
245	479	Miles' Est., 4 Kulp, 152.....	514
Martin v. Martin, 214 Pa. 389....	940	Miles v. Smith, 27 C. O. 218.....	464
Martin v. Ryder, 16 D. R. 770....	784	Miles v. Treanor, 194 Pa. 480....	608
Mason's Ap., 41 Pa. 74.....	330	Miller's Ap., 40 Pa. 57.....	481
Mason's Est., 12 D. R. 717.....	932	Miller's Ap., 40 Pa. 387.....	462
Mason's Est., 29 C. C. 240.....	717	Miller's Ap., 113 Pa. 459.....	668
Mason v. Ammon, 117 Pa. 127....	752	Miller's Est., 159 Pa. 562.....	341
Mason v. Slocum, 25 C. O. 620....	762	Miller's Est., 159 Pa. 575.....	525, 599
Massacer's Est., 4 Kulp, 13.....	833	Miller's Est., 159 Pa. 562.....	558, 599
Masseth's Est., 213 Pa. 136.....		Miller's Est., 9 D. R. 510.....	868
548, 607, 612, 662		Miller's Est., 11 D. R. 714.....	715, 845
Massey's Est., 19 Lanc. L. R. 342.	682	Miller's Est., 12 D. R. 719.....	949
Masson's Est., 198 Pa. 636.....	548	Miller's Est., 18 D. R. 216.....	641
Masters v. Negley, 152 Pa. 304....	652	Miller's Est., 179 Pa. 645.....	
Masterson v. Berndt, 207 Pa. 284		608-608, 610-612	
608-609, 615		Miller's Est., 188 Pa. 214.....	428
Mather's Est., 17 D. R. 127, 457		Miller's Est., 216 Pa. 247.....	558, 618
940-948		Miller's Est., 17 York, 165.....	570, 576
Mathews v. Biddell, 8 Supr. C. 112		Miller's Est., 23 York, 136.....	876
558, 597, 615		Miller's Est., 12 Dauphin Co. 112.	828
Matthews v. Warner, 4 Vesey, Jr.,		Miller's Est., 26 Supr. C. 443....	665
186	540	Miller's Est., 26 Supr. C. 458....	726
Mattocks v. Brown, 103 Pa. 16....	531	Miller's Est., 34 Supr. C. 885....	426
Mauk's Est., 19 Supr. C. 838.....	482	Miller's Est., 222 Pa. 834.....	869
Maurer's Ap., 86 Pa. 380.....	922	Miller v. Fulton, 206 Pa. 595....	434
Maurer v. Kerper, 102 Pa. 444....	397	Miller v. Graham, 40 Supr. C. 807.	730
Maury's Est., 4 D. R. 752.....	480	Miller v. Hulme, 126 Pa. 277....	
Maxwell v. McClintock, 10 Pa.		451, 501, 694	
227	422	Miller v. Miller, 187 Pa. 572....	611
May's Est., 11 D. R. 178.....	463	Miller v. Oestrich, 157 Pa. 264....	
Mays' Est., 25 Supr. C. 267.....	417	607, 611	
May v. Espenshade, 1 Pearson,		Miller v. Thompson, 175 Pa. 618.	923
139	473	Milligan's Ap., 82 Pa. 389.....	340, 399
Mayer's Est., 10 W. N. C. 261....	861	Milliken's Est., 227 Pa. 502.....	400
Mayer's Est., 17 D. R. 677.....	950	Milne's Ap., 99 Pa. 483.....	403, 433
Mayer v. Walker, 214 Pa. 440....		Milramow's Est., 18 D. R. 392....	917
662-667, 683, 762, 780		Minnich's Est., 206 Pa. 405.....	925
Mazurie's Est., 11 Phila. 143.....	418	Minor v. Minor, 204 Pa. 199.....	400
Meck's Ap., 97 Pa. 313.....	582	Mintz v. Brock, 193 Pa. 294.....	946
Meckel's Ap., 112 Pa. 554.....	408	Mintzer's Est., 163 Pa. 484.....	447
Meek's Est., 161 Pa. 360.....	848	Miskey's Est., 209 Pa. 474.....	907
Megary's Est., 25 Supr. C. 243....		Miskimin's Ap., 114 Pa. 530.....	435
567-568		Missimer's Est., 23 Montg. 49....	602
Megary's Est., 206 Pa. 260.....	529, 531	Mitchell's Est., 2 Watta, 87.....	429
Mehaffey's Est., 139 Pa. 276.....	662	Mitchell's Est., 182 Pa. 530.....	906
Mehard's Est., 5 Supr. C. 336....	725	Mitchell's Est., 17 D. R. 566....	
Meisenhelter's Will, 15 Phila. 651.	568	434, 689, 690	
Meliset's Ap., 17 Pa. 449.....	383	Moninger v. Ritner, 104 Pa. 298..	654
Mellon's Ap., 114 Pa. 564.....	343	Monroe's Est., 9 Kulp, 334.....	428
Mellor v. Reed, 122 Pa. 635.....	861	Monroe v. Monroe, No. 1, 26 Supr.	
Mellor v. Smyth, 220 Pa. 169....	567	C. 47	873
Melot's Est., 2 Berks Co. 271....	656	Montefiore v. Montefiore, 2 Ad-	
Mendinhall's Ap., 124 Pa. 387....	670	dams' R. 354	541
Menohar's Est., 18 Supr. C. 335....	773	Montgomery v. Petrikin, 29 Pa.	
Menold's Est., 14 D. R. 275.....	740	118	463
Mercur's Est., 151 Pa. 49.....	795	Mooney's Est., 27 C. C. 450.....	717
Meredith's Est., 1 Parsons, 438....	623	Mooney's Est., 205 Pa. 418.....	844, 914
Merkel's Ap., 89 Pa. 340.....	481	Moore's Est., 23 C. C. 340.....	636
Merkel's Ap., 109 Pa. 235.....	667	Moore's Est., 22 Lanc. L. R. 322.	685
Merriman v. Munson, 184 Pa. 114.	940	Moore's Est., 9 D. R. 58.....	649
Messner v. Elliott, 184 Pa. 41.....	609-610	Moore's Est., 14 D. R. 401.....	601
Metzger's Est., 222 Pa. 276.....	507, 796	Moore's Est., 15 D. R. 39.....	580
Metzger v. Lehigh, Etc., Co., 220		Moore's Est., 211 Pa. 338.....	432
Pa. 585	941	Moore v. Deyo, 212 Pa. 102.....	574, 680
Metzler's Est., 20 Lanc. L. R. 21.	601	Moorhead's Est., 180 Pa. 119.....	905-914
Meyer's Est., 10 D. R. 445.....	452	Moorhead's Ap., 32 Pa. 297.....	388
Meyer's Est., 18 D. R. 191.....	865	Moran's Est., 13 Supr. C. 251....	
Meyer's Est., 179 Pa. 157.....	348, 366	700-705, 744	
Michell v. Low, 213 Pa. 526.....	546	Moran's Est., 24 Lanc. L. R. 70....	
Michener's Est., 227 Pa. 284.....	376	570, 869	
Mickley's Est., 4 Supr. C. 550....	660	Morgan's Est., 2 D. R. 816.....	432
Middleditch v. Williams, 47 N. J.		Morgan's Est., 12 D. R. 341.....	539, 601
Eq. 585	597		

Morgan's Est., 219 Pa. 855..... 547, 610-612
 Morgan v. Reel, 218 Pa. 81..... 467
 Morris v. Galbraith, 8 Watts, 166. 880
 Morrison's Est., 183 Pa. 155..... 850-854
 Morrison v. Blake, 88 Supr. C. 290..... 954, 958
 Morrison v. Truby, 145 Pa. 540... 768
 Morrow's Est., 15 W. N. C. 240... 882
 Morrow's Ap., 116 Pa. 440..... 585
 Morrow's Est., 204 Pa. 479..... 535, 557, 571
 Morton's Est., 201 Pa. 269..... 654
 Moses' Est., 8 Supr. C. 93..... 682-685, 721
 Mosser v. Leshner, 154 Pa. 84..... 738
 Mount's Est., 7 D. R. 713..... 508
 Mowry's Est., 20 O. C. 76..... 741
 Moyer's Est., 141 Pa. 125..... 507
 Moyer v. Moyer, 13 D. R. 739... 842
 Moyer v. Thomas, 38 Pa. 426... 464
 Mueller's Ap., 190 Pa. 601..... 878
 Mueller's Est., 159 Pa. 590..... 427
 Mulholland's Est., 154 Pa. 491... 446
 Mulholland's Est., 217 Pa. 65... 606
 Mulligan's Est., 157 Pa. 98..... 669
 Mulliken v. Earnshaw, 209 Pa. 226. 778
 Mumma's Est., 2 D. R. 592... 894-895
 Mundy v. Mundy, 2 McCarter, 290. 541
 Munn's Est., 49 Pitts. L. J. 234. 861
 Munson v. Crookston, 219 Pa. 419. 657
 Murdy's Ap., 123 Pa. 464..... 611
 Murphy's Est., 184 Pa. 810..... 576, 878, 907
 Murray's Est., 28 Supr. C. 474... 649
 Murray v. Lowrie, 208 Pa. 1... 921-922
 Mushrush's Est., 23 O. C. 629... 615
 Mushrush v. Mushrush, 7 D. R. 743..... 600
 Mutchmore's Est., 14 D. R. 251... 845
 Myers' Est., 5 D. R. 127..... 546
 Myer's Est., 13 Supr. C. 476... 439
 Myers' Est., 205 Pa. 413..... 956
 Myers v. Bryson, 158 Pa. 246... 939
 Myers v. Leas, 101 Pa. 172... 482
 Myer v. Myer, 187 Pa. 247... 878
 Myers v. Vanderbelt, 84 Pa. 510. 535
 Mylin's Est., 82 Supr. C. 504. 446, 950

N

Nathan's Est., 10 D. R. 205..... 680
 Nathan's Est., 191 Pa. 404 (over-ruled)..... 956
 Nax's Est., 18 D. R. 428... 869, 954
 Naylor's Est., 11 D. R. 414... 445
 Neafie's Est., 199 Pa. 307... 956
 Neal's Est., 16 W. N. C. 441... 497
 Neal's Est., 16 Phila. 880, 859... 616
 Neal's Est., 13 D. R. 699... 915
 Neale's Ap., 104 Pa. 214... 659
 Nebinger's Est., 185 Pa. 399. 664-667
 Neel's Est., 45 Pitts. L. J. 895... 851
 Neel's Est., 88 Pa. 94..... 502, 508
 Neel's Est., 207 Pa. 443-446... 679, 950
 Neely's Est., 155 Pa. 188... 720, 774
 Neff's Ap., 48 Pa. 501... 565, 582
 Neill's Ap., 92 Pa. 193... 470
 Neill's Est., 222 Pa. 142... 584
 Neilson's Est., 147 Pa. 160. 535, 619
 Nes v. Ramsay, 155 Pa. 628... 756
 Neubert's Est., 19 York. 88... 488
 Neumann's Est., 18 D. R. 181... 829
 Neumann's Est., 41 Supr. C. 279. 828
 Nevin's Est., 70 Pa. 410... 402
 Nevin's Est., 192 Pa. 258... 904, 916

Newhard v. Yandt, 182 Pa. 824... 605, 618
 Newhouse's Est., 39 Supr. C. 452. 526
 Newlin's Est., 7 O. C. 648... 611
 Newlin's Est., 209 Pa. 456... 583-584
 Newman's Est., 19 D. R. 189... 649
 Newton's Est., 11 Phila. 100... 433
 Nichol v. Hall, 28 Pitts. L. J. 239. 474
 Nichols' Est., 3 Supr. C. 484... 549
 Nichols' Est., 174 Pa. 405... 557, 600
 Niseman's Est., 131 Pa. 346... 723
 Nissley v. Heisey, 78 Pa. 418... 356, 656
 Nixon v. Frick Coke Co., 27 O. C. 150... 581
 Noble's Est., 178 Pa. 460... 943
 Noble v. Assn., 224 Pa. 298... 876
 Nolde's Est., 27 Supr. C. 418... 870
 Nolen's Est., 19 D. R. 660... 677
 Nonnemacher v. Nonnemacher, 159 Pa. 634... 608, 611
 Noonan v. Pardee, 200 Pa. 474... 913
 Norris' Est., 217 Pa. 548... 662-664, 665, 667
 Nye's Ap., 126 Pa. 341... 854

O

Oakford's Est., 4 O. C. 465... 717
 O'Brien's Est., 22 Supr. C. 475... 525
 Odd Fellows' Sav. Bk.'s Ap., 123 Pa. 356... 497-498
 O'Donnell's Est., 9 Kulp, 123... 389
 O'Donnell's Est., 209 Pa. 63... 576
 Ogden's Est., 9 Kulp, 412... 416
 Okeson's Ap., 2 Grant, 303... 884
 Old's Est., 150 Pa. 529... 448, 508
 Old's Est., 176 Pa. 150... 939
 Olinger v. Shultz, 183 Pa. 469... 913
 Oliver's Est., 184 Pa. 306... 473
 Oliver's Est., 199 Pa. 509... 756
 Olwine's Ap., 4 W. & S. 492... 624
 O'Malley v. Loftus, 220 Pa. 424... 662, 793
 O'Neill v. O'Neill, 227 Pa. 334... 794
 O'Rourke v. Sherwin, 156 Pa. 285. 753
 Opdyke's Ap., 49 Pa. 373... 465, 470
 Opp v. Chess, 204 Pa. 401... 560-561
 Osborne's Est., 149 Pa. 412... 841, 871
 Osmond's Est., 161 Pa. 543... 868
 Otterson v. Gallagher, 88 Pa. 355. 508
 Otterson v. Middleton, 102 Pa. 78. 508
 Ottinger's Est., 4 D. R. 711... 897
 Oviatt's Est., 3 D. R. 620... 514
 Oviatt's Est., 14 O. C. 611... 847
 Owens v. Haines, 199 Pa. 137... 559, 579, 584, 684
 Owens v. Naughton, 28 Supr. C. 639... 913
 Oyster v. Knull, 187 Pa. 448... 756
 Oyster v. Orrie, 191 Pa. 606... 758
 Oyster v. Oyster, 100 Pa. 538... 756

P

Packer v. Owens, 164 Pa. 185... 622
 Packer v. Packer, 179 Pa. 580... 549, 922
 Padelford's Est., 9 D. R. 174... 573
 Padelford's Est., 190 Pa. 85... 585, 670
 Page's Est., 75 Pa. 87... 466, 631
 Page's Est., 3 D. R. 812... 868
 Page's Est., 227 Pa. 288... 682
 Painter v. Henderson, 7 Pa. 48... 338
 Palethorpe's Est., 160 Pa. 316. 377, 867
 Palethorpe's Est., 3 D. R. 760... 416
 Palethorpe v. Palethorpe, 194 Pa. 409... 753

Palm's Est., 18 Supr. C. 296...	705-706, 740	Phila. v. Fox, 64 Pa. 169.....	574
Palmer's Est., 6 C. C. 541.....	603	Phila. v. Girard, 45 Pa. 9-26.....	574-575, 804
Palmer's Est., 219 Pa. 803.....	612	Phila., Etc., Co. v. Isaac, 167 Pa.	270..... 719
Palumbo's Est., 15 D. R. 188.....	861	Phila. v. Linton, 10 D. R. 329.....	491
Panezzi's Est., 40 Supr. C. 282.....	641	Phillips' Est., 1 Kulp, 333.....	420
Pare's Est., 15 D. R. 553.....	580	Phillips' Est., 1 D. R. 311.....	559
Park's Est., 4 C. C. 560.....	685	Phillips' Est., 12 D. R. 690.....	950
Park's Est., 173 Pa. 190.....	796	Phillips' Est., 17 Supr. C. 103....	681, 724
Parker's Ap., 61 Pa. 478.....	526	Phillips' Est., 205 Pa. 504.....	662, 776-778
Parkhurst v. Harrower, 142 Pa.	432..... 756	Phillips v. Allegheny V. R. Co.,	107 Pa. 465..... 424, 509
Parkinson's Est., 1 Del. Co. 349....	868	Pickering's Est., 4 D. R. 263.....	414
Parr v. Bankhart, 22 Pa. 291.....	463-464	Pidcock v. Potter, 68 Pa. 342.....	612
Parry's Est., 188 Pa. 38.....	796	Pile's Est., 10 D. R. 356.....	943
Parson's Ap., 74 Pa. 121.....	482	Pillion's Est., 8 D. R. 383.....	659
Parson's Ap., 82 Pa. 465.....	910	Pinkerton's Est., 193 Pa. 275.....	801
Patrick's Est., 162 Pa. 175.....	665, 958, 957	Piper's Est., 208 Pa. 636.....	895, 452
Patrick v. Smith, 2 Supr. C. 113.....	980	Piper v. Locke, 205 Pa. 616.....	752-757
Patrick v. Smith, 165 Pa. 526.....	907	Piper v. Piper, 7 D. R. 135.....	373
Patterson's Ap., 104 Pa. 869.....	440, 524	Pittman's Est., 182 Pa. 355.....	690
Patterson's Ap., 116 Pa. 8.....	408	Plate's Est., 9 C. C. 644.....	534
Patterson v. English, 71 Pa. 454....	532-534	Plate's Est., 148 Pa. 55.....	539
Patton's Est., 19 Supr. C. 545.....	449, 507-511	Playford's Est., 8 Del. Co. 200....	932
Patton v. Church, 168 Pa. 321.....	793	Playford's Est., 7 Supr. C. 825....	376
Paxson's Est., 13 D. R. 78.....	822	Poh's Est., 12 D. R. 160.....	528
Paxson's Est., 221 Pa. 98.....	547, 572	Pomeroy's Ap., 127 Pa. 492.....	431, 452, 510, 620
Paxson v. Nields, 137 Pa. 885.....	637	Pomeroy's Will, 1 Berks Co. 381....	582
Peale's Est., 17 D. R. 889.....	861	Porter's Ap., 84 Pa. 332.....	668
Pearson's Est., 10 D. R. 189.....	408, 661, 791	Porter's Est., 57 Pitts. L. J. 690..	661
Pearson's Est., 211 Pa. 188.....	671	Portuondo's Est., 10 W. N. C. 174..	497
Peebles' Ap., 15 S. & R. 41.....	639	Portuondo's Est., 185 Pa. 472.....	649
Peirce v. Peirce, 199 Pa. 4.....	822	Portuondo's Est., 191 Pa. 28.....	479
Penn-Gaskell Est. (No. 2), 208	Pa. 346..... 786, 919, 950	Pote's Ap., 106 Pa. 574.....	524
Pennepacker v. Pennepacker, 2	Clark, 114..... 480	Potteiger's Ap., 170 Pa. 531.....	905
Penney's Est., 159 Pa. 846.....	726	Potter's Est., 4 D. R. 329.....	414
Pennock's Est., 20 Pa. 268.....	907	Potts' Est., 23 Lanc. L. R. 255....	680
Penrose's Ap., 102 Pa. 448.....	664	Potts v. Brenneman, 182 Pa. 295....	623
Penrose's Est., 17 C. C. 283.....	800	Potts v. Griesemer, 174 Pa. 516....	753
Penrose v. Penrose, 2 Binney, 440.	834	Potts v. Kline, 174 Pa. 513.....	758, 757
Pensyl's Est., 157 Pa. 465.....	607	Powell's Est., 10 D. R. 46.....	702
Penna. Co. v. Claghorn, 7 D. R.	213..... 480	Powell's Est., 16 D. R. 544.....	427
Penna. R. Co. v. Wolfe, 208 Pa.	269..... 488	Powell's Est., 138 Pa. 322.....	685
Penta's Est., 200 Pa. 2.....	668, 724	Power's Est., 10 W. N. C. 208.....	639
People's Bank's Ap., 93 Pa. 107....	498	Power's Est., 10 D. R. 165.....	866
Pepper's Est., 32 W. N. C. 823....	618	Preston v. Preston, 202 Pa. 515....	913
Pepper's Est., 2 D. R. 533.....	416	Prevost v. Greneaux, 19 Howard,	1..... 887
Pepper's Est., 148 Pa. 5.....	539, 561-564, 565, 580, 610	Price's Ap., 169 Pa. 294.....	660
Pepper's Est., 154 Pa. 331.....	573	Price's Est., 81 Pa. 263.....	447
Pepper's Est., 154 Pa. 340.....	799	Price's Est., 12 D. R. 693.....	388, 431, 528
Pereyra's Ap., 126 Pa. 220.....	376	Price's Est., 18 D. R. 50.....	830
Perot's Ap., 102 Pa. 235.....	461	Price's Est., 18 D. R. 442.....	869
Perrett's Est., 14 Supr. C. 611....	716	Price's Est., 209 Pa. 210.....	956
Perret v. Lepper, 226 Pa. 528.....	641	Price v. Maxwell, 28 Pa. 23.....	571-577
Perrett v. Perrett, 49 Pitts. L. J.	79..... 548	Price v. Price, 156 Pa. 617.....	567, 579, 580
Perret v. Perret, 184 Pa. 131.....	610	Priester's Est., 23 Supr. C. 386....	662-667, 727
Perrine v. Kohr, 20 Supr. C. 36;	205 Pa. 602..... 364, 371	Priestley's Ap., 24 W. N. C. 305..	399
Perry's Est., 4 C. C. 107.....	584	Priestley's Est., 127 Pa. 420.....	868
Peters' Est., 1 Phila. 581.....	383	Pringle v. Marshall, 152 Pa. 603..	703, 738
Peters' Est., 7 D. R. 52.....	664	Pringle v. Pringle, 130 Pa. 565....	424
Peters' Est., 12 Dauphin Co. 222..	875	Pritchett's Est., 9 C. C. 600.....	529
Peterson's Est., 29 C. C. 28.....	395	Provenchere's Ap., 67 Pa. 463....	660
Petrie v. Clark, 11 S. & R. 377....	635	Pruner's Est., 222 Pa. 179.....	677, 687
Petterson's Est., 195 Pa. 78.....	648, 651	Pryer v. Mark, 129 Pa. 529.....	700
Phelps v. Benson, 161 Pa. 418.....	509	Purves' Est., 196 Pa. 438.....	790
		Puterbaugh's Est., 44 Supr. C. 102..	954

Q

Queen's Est., 11 D. R. 801.....	677
Quin's Est., 144 Pa. 144. 652, 918, 920	
Quinn's Est., 9 Del. Co. 582.....	510

R

Raber's Est., 11 Kulp, 197.....	940
Radigan's Est., 13 Supr. C. 181..	401
Raeysling's Est., 13 D. R. 68.....	874
Rahm's Est., 226 Pa. 594.....	918
Raisig v. Graf, 17 Supr. C. 509..	718
Raleigh's Est., 206 Pa. 451.....	
..... 720, 745, 774	
Ralston's Est., 8 D. R. 328.....	509
Ralston's Est., 158 Pa. 645.....	620
Ralston's Est., 172 Pa. 104.....	408
Ralston v. Truesdell, 178 Pa. 429..	764
Rambo's Est., 15 Montg. 25.....	389
Ramsey's Est., 2 D. R. 425.....	557
Ramsey v. Ramsey, 226 Pa. 249..	328
Ranck's Ap., 113 Pa. 98.....	465
Randall v. Dunlap, 218 Pa. 210..	584
Rank v. Rank, 120 Pa. 191.....	655
Rastatter's Est., 15 Supr. C. 549	
..... 374	
413, 415, 430, 450, 507-509, 694	
Rathbun's Est., 3 Lehigh Co. 57..	510
Rawle's Ap., 106 Pa. 193.....	662
Rawle's Ap., 119 Pa. 100.....	377
Reagan v. Curran, 226 Pa. 265. 661-668	
Reamer's Est., 53 Pitts. L. J. 135..	571
Redding v. Rice, 171 Pa. 801.....	
..... 661, 738, 759, 762	
Reed's Ap., 71 Pa. 378.....	567
Reed's Ap., 118 Pa. 215.....	744
Reed's Est., 82 Pa. 428.....	416, 686
Reed's Est., 10 D. R. 162.....	778
Reed's Est., 4 Montg. 173.....	448
Reed's Est., 87 C. O. 205.....	328
Reed v. Hollibaugh, 8 C. O. 20..	350
Reed v. Reed, 30 Supr. C. 229..	579
Reed v. Woodward, 11 Phila. 541..	535
Reeder v. Rodgers, 161 Pa. 851..	371
Reel's Pet., 32 C. C. 200.....	826
Reel v. Elder, 62 Pa. 308.....	354
Rees' Est., 166 Pa. 498.....	472
Rees v. Stille, 38 Pa. 138.....	548
Reese's Ap., 116 Pa. 272.....	388
Reeser's Est., 4 C. O. 417.....	498
Reeve's Est., 12 Luz. L. R. 187..	
..... 868-869	
Regan's Est., 219 Pa. 176.....	830
Reichard's Ap., 116 Pa. 232.....	686
Reichenbach v. Ruddach, 127 Pa.	
564.....	609
Reid v. Clendenning, 193 Pa. 496	
..... 364, 904, 945	
Reiff's Ap., 60 Pa. 361-365.....	715
Reiff's Est., 10 D. R. 450.....	955
Reiff's Est., 16 Supr. C. 80.....	534
Reiff v. Mack, 160 Pa. 265.....	922
Reilly's Est., 200 Pa. 288.....	
..... 773, 779, 790	
Reimer's Est., 159 Pa. 212.....	729, 797
Reimer v. Reimer, 192 Pa. 571..	753
Reinbold's Est., 11 Northam. 377..	641
Remmert v. R. Co., 2 Berks Co.	
226.....	876
Republic Iron Works v. Burgwin,	
139 Pa. 439.....	412
Reutter v. McCall, 192 Pa. 77.....	753
Revell's Est., 12 D. R. 138.....	524
Rex v. Inhabitants of Netherreal, 4	
Durnf. & East. 258.....	545
Rex v. Raines, Lord Raymond, 368.	634
Rex v. Rex, 3 S. & R. 533.....	334
Reynolds' Est., 11 D. R. 387.....	682
Reynolds' Est., 18 D. R. 604.....	408
Reynolds' Est., 175 Pa. 257.....	800
Reynolds' Est., 195 Pa. 225.....	429
Rhoads' Ap., 89 Pa. 186.....	394
Rhoads' Ap., 119 Pa. 468.....	737
Rhoades' Est., 13 D. R. 287.....	428
Rhorne v. Morris, 31 Supr. C. 254	
..... 561, 605	
Rice's Est., 173 Pa. 298.....	548, 597
Richards v. Bantz, 212 Pa. 93.....	801
Richards v. Citizens' Gas Co., 130	
Pa. 37.....	348
Richmond's Est., 206 Pa. 219. 608, 612	
Rick's Ap., 105 Pa. 528.....	531
Riddle's Ap., 37 Pa. 177.....	344-347
Riddle's Est., 19 Pa. 431.....	401
Riddle's Est., 17 Phila. 520.....	413
Ridgway's Est., 18 D. R. 137.....	745
Riemensberger's Est., 29 Supr. C.	
596.....	525
Riley's Est., 18 D. R. 431.....	954
Rilling's Est., 50 Pitts. L. J. 77..	678
Risk's Ap., 110 Pa. 171.....	690
Risser v. Rasser, 15 Lanc. L. R.	
158.....	746
Rist's Est., 192 Pa. 24.....	948
Rittenhouse's Est., 8 D. R. 700..	416
Ritter's Est., 148 Pa. 577.....	904
Ritter's Est., 10 Supr. C. 852.....	837
Ritter's Est., 190 Pa. 102.....	744, 770
Ritter v. Knerr, 214 Pa. 279.....	745
Roat's Est., 30 Supr. C. 521.....	665, 670
Robb's Ap., 41 Pa. 45.....	431
Robb's Est., 13 Phila. 239.....	631
Robb v. Mann, 11 Pa. 300.....	637
Robb v. Robb, 173 Pa. 620.....	732
Robbins' Est., 199 Pa. 500.....	
..... 746, 770, 782	
Robeno v. Mariatt, 136 Pa. 35. 584, 824	
Roberts' Ap., 39 Pa. 417.....	464
Roberts' Ap., 126 Pa. 102.....	425
Roberts' Est., 8 D. R. 303.....	942
Roberts' Est., 17 D. R. 453.....	561
Roberts' Est., 163 Pa. 408.....	788
Roberts v. Clement, 202 Pa. 198..	
..... 403, 417, 430, 450-451, 507, 694	
Robinson's Ap., 62 Pa. 213.....	350-351
Robinson's Est., 149 Pa. 418.....	664
Robinson's Est., 24 C. O. 588.....	676
Robinson's Est., 15 D. R. 92.....	
..... 427, 710, 843	
Robinson's Est., 35 Supr. C. 192	
..... 697, 704	
Robinson's Est., 222 Pa. 113.....	482
Robinson v. Buck, 71 Pa. 386.....	655
Robinson v. Robinson, 203 Pa. 400	
..... 549, 609, 610, 613	
Robinson v. Zollinger, 9 Watts,	
169.....	537
Robinson v. Miller, 158 Pa. 177..	
..... 843, 371	
Roche v. Wegge, 202 Pa. 169.....	613
Rockhill's Est., 13 D. R. 411.....	925
Rockhill's Est., 29 Supr. C. 28..	914
Rockhill's Est., 208 Pa. 510.....	611
Roger's Est., 57 Pitts. L. J. 29..	555
Mary Rogers' Est., 131 Pa. 382..	461
Rogers' Est., 179 Pa. 602.....	802
Rogers' Est., 185 Pa. 428.....	825
Rogers' Est., 218 Pa. 431.....	805
Rohrbach v. Sanders, 212 Pa. 636..	793
Root's Est., 187 Pa. 118.....	723
Rorabaugh's Est., 229 Pa. 377..	507

Rose's Est., 228 Pa. 454.....	604	Schneider's Est., 11 Kulp, 201...	862
Rosengarten v. Ashton, 228 Pa. 889		Scholl's Est., 17 D. R. 471.....	692
..... 688, 743		Schooley v. Crawford, 9 Lack. Jur.	
Ross v. Barclay, 18 Pa. 179.....	624	..... 295	549
Rost's Est., 14 Lane. L. R. 78...	861	Schoyer v. Kay, 217 Pa. 82... 661,	793
Roth's Est., 150 Pa. 261.....	447	Schuldt's Est., 199 Pa. 58.....	779
Rouse, Etc. v. McKean, Etc., 169		Schuldt v. Herbina, 8 Supr. C. 65	
Pa. 116.....	654	..... 758, 792	
Rouser's Est., 8 Supr. C. 188.....	573	Schultz's Ap., 80 Pa. 896.....	571
Rowan's Ap., 25 Pa. 292.....	532	Schwartz's Est., 168 Pa. 204....	825
Rowan's Est., 182 Pa. 299.....	466, 649	Schweitzer's Est., 228 Pa. 281. 603-	604
Rowe's Est., 11 Kulp, 86.....	889	Schwilke's Ap., 100 Pa. 628.....	597
Rowson's Est., 175 Pa. 150.....	607	Scott's Ap., 112 Pa. 427.....	899
Royer's Est., 6 Supr. C. 401.....	607	Scott's Est., 137 Pa. 454.....	874
Royer's Est., 217 Pa. 626.....	426	Scott's Est., 147 Pa. 89.....	538-534
Ruddy's Est., 8 Lack. Jur. 12.....	677	Scott's Est., 168 Pa. 165.....	
Ruddy's Est., 87 Supr. C. 538. 502,	626	..... 461, 665, 726-727	
Rudy v. Ulrich, 69 Pa. 177.....		Scott's Est., 202 Pa. 389.....	947
..... 558, 580, 610		Scott's Est., 215 Pa. 853.....	510
Rufe's Est., 29 O. C. 617.....	423	Scott's Est., 228 Pa. 526.....	952
Runyan's Ap., 27 Pa. 121.....	640	Scott's Est., 87 Supr. C. 842.....	
Rupp's Ap., 100 Pa. 581.....	431	..... 721, 774-779	
Rupp v. Eberly, 79 Pa. 141.....	668	Scott's Est., 19 D. R. 643.....	828
Russell's Case, 5 Coke, 27.....	618	Scott v. McNeal, 154 U. S. 34....	851
Russell v. Kennedy, 66 Pa. 248...		Scott v. Murray, 218 Pa. 186....	793
..... 661, 805		Scott v. Scott, 70 Pa. 244.....	530
Ruston v. Ruston, 2 Yeates, 65....	645	Scully's Est., 10 D. R. 731.....	861
Rutt's Est., 200 Pa. 549.....	568	Sechler v. Eshelman, 222 Pa. 85...	
Rutt's Est., 35 Supr. C. 522.....	701	..... 757, 808	
S			
Sackett v. Twining, 18 Pa. 199....	850	Seeds v. Burk, 181 Pa. 281... 823,	826
Safe Deposit, Etc., Co. v. Lange,		Seely v. Seely, 44 Pa. 434.....	755
207 Pa. 527.....	608	Seibert's Ap., 18 W. N. O. 276....	573
Safe, Etc., Co. v. Wood, 201 Pa.		Seider v. Seider, 5 Wharton, 208...	645
420.....	770	Seiders v. Giles, 141 Pa. 93.....	858
Sager v. Galloway, 113 Pa. 500....	770	Seiler's Est., 14 Supr. C. 504....	
Sager v. Lindsey, 118 Pa. 25.....	509	..... 598, 607, 611	
St. Margaret, Etc. v. Penna. Co.,		Seip's Est., 163 Pa. 428.....	408
Etc., 158 Pa. 441.....	918	Seip's Est., 11 Northam. 138....	757
St. Paul's, Etc. v. Gray, 198 Pa.		Seip v. Drach, 14 Pa. 852.....	637
821.....	573	Seitzinger's Est., 170 Pa. 500....	
Sampson's Ap., 4 W. & S. 86.....	830	Seller's Est., 82 Pa. 153.....	640
Sampson's Est., 18 Phila. 81. 68...	435	Semple's Est., 189 Pa. 885.....	640
Samson's Est., 22 Supr. C. 98.....		Serfoos v. Serfoos, 190 Pa. 484. 758-	754
..... 874, 428, 921		Sovern's Est., 211 Pa. 68.....	824
Sanders' Est., 18 Montg. 117.....	863	Seybert v. Hibbert, 5 Supr. C. 587...	662
Sanders' Est., 41 Supr. C. 77.....	889	Shadle's Est. (No. 2), 80 Supr. C.	
Sanders v. Mamolen, 218 Pa. 859...	801	160.....	446
Sandoe's Ap., 65 Pa. 814.....	650	Shaeffer v. Eichart, 10 O. C. 860...	562
Sands v. McKee, 179 Pa. 886.....	801	Shaffer's Ap., 46 Pa. 131.....	883, 507
Sankey's Ap., 55 Pa. 491.....	835	Shakespeare, Adm. v. Fidelity, Etc.,	
Sapper's Est., 57 Pitts. L. J. 805...	641	Co., 97 Pa. 178.....	628
Sauer v. Mollinger, 138 Pa. 838...	701	Shallcross' Est., 200 Pa. 122....	781
Saunders v. Samarreg, 205 Pa.		Shaller v. Brand, 6 Binney, 435....	556
632.....	538, 580	Shalters v. Ladd, 141 Pa. 849....	
Sax's Est., 19 D. R. 118.....	828-829	..... 457, 655, 670	
Sayre v. Helme, 61 Pa. 299.....	629	Shaner v. Wilson, 207 Pa. 550....	
Scarlett's Est., 89 Supr. C. 284....	834	..... 663, 800	
Scattergood v. Kirk, 192 Pa. 268;		Shapley v. Diehl, 203 Pa. 566....	754
195 Pa. 195.....	547, 611	Sharp's Est., 155 Pa. 289.....	670
Schad's Ap., 88 Pa. 111.....	530	Sharp's Est., 7 Supr. C. 372.....	701
Schaeffer's Ap., 119 Pa. 640.....		Sharp v. Wightman, 205 Pa. 285....	679
..... 415, 450, 507		Sharpless' Est., 134 Pa. 250... 548,	602
Schaefer's Est., 16 D. R. 537.....	426	Sharpless' Est., 151 Pa. 214.....	919
Schall's Ap., 40 Pa. 170.....	854	Sharpless' Est., 209 Pa. 409... 801,	882
Schall's Est., 17 D. R. 471.....	696	Sharpless' Est., 214 Pa. 335.....	725
Schell v. Deperven, 198 Pa. 600....	878	Shartel's Ap., 64 Pa. 25.....	407
Schellinger's Est., 16 Phila. 376...	851	Shaver v. McCarthy, 110 Pa. 839...	
Scherr's Est., 19 W. N. O. 64....	866	..... 557, 606, 613	
Schleicher's Est., 201 Pa. 612....		Shaw's Est., 15 Phila. 602.....	430
..... 573, 907		Sheard's Est., 5 Schuylkill Co. 181...	603
Schlemmer's Est., 12 D. R. 137....	866	Shedder's Est., 210 Pa. 82.....	729
Schmid's Est., 182 Pa. 267.....	655	Sheeley v. Neidhammer, 182 Pa.	
Schmidt's Est., 183 Pa. 641.....	664	163.....	749, 757
Schmidt's Est., 185 Pa. 579.....	801	Sheets' Est., 52 Pa. 257.....	753, 929
Schmitt's Est., 11 D. R. 399.....	949	Sheets' Est., 215 Pa. 164.....	528, 931
		Sheetz's Ap., 82 Pa. 213.....	666
		Shelley's Case, 1 Coke, 93a.....	748

Shenk v. Shenk, 150 Pa. 521.....	784	Smith v. Piper, 229 Pa. 343.....	755
Shepard's Est., 170 Pa. 323.....	558, 598, 615	Smith v. Townsend, 82 Pa. 434....	762
Sheridan's Est., 10 Kulp, 157....	889	Smith v. Wildman, 178 Pa. 245....	509
Sheridan v. Sheridan, 136 Pa. 14..	918	Smythe's Est., 11 D. R. 441.....	866
Shermer's Ap., 44 Pa. 396.....	558	Snively's Est., 129 Pa. 250.....	345
Sherwood's Est., 206 Pa. 465.....	558	Snodgrass' Ap., 96 Pa. 420.....	377
..... 432, 523-524, 528		Snyder's Ap., 54 Pa. 67.....	376
Shields v. McAuley, 205 Pa. 45....	921	Snyder's Est., 180 Pa. 70.....	774
Shillito v. Shillito, 160 Pa. 167..	789	Snyder's Est., 29 C. C. 10.....	417
Shindel's Ap., 57 Pa. 43.....	507	Snyder's Est., 17 D. R. 270.....	958
Shipler's Ap., 8 Penny, 272.....	582	Snyder's Est., 14 Supr. C. 509....	702
Shoenberger's Est., 139 Pa. 132....	558	Snyder's Est., 18 Supr. C. 462....	403
Shonk v. Brown, 61 Pa. 320, 458, 478		Snyder's Est., 217 Pa. 71.....	677-679
Shortlidge's Est., 214 Pa. 620....	398	Snyder v. Bull, 17 Pa. 54.....	540
Shoup v. Delong, 190 Pa. 331.....	753	Society of the Cincinnati's Ap.,	
Showers' Est., 211 Pa. 297, 792, 925		154 Pa. 621.....	943
Shreiner's Est., 8 Lanc. L. R. 287..	462	Souder's Est., 169 Pa. 239.....	
Shreiner v. Shreiner, 178 Pa. 57....		..... 425, 677, 787, 878	
..... 608, 615		South, Etc., Co. v. McGrew, 219 Pa.	
Shroyer v. Smith, 204 Pa. 810.....	790	606.....	612
Shubart's Est., 154 Pa. 230, 660-664		Sower's Est., 16 D. R. 224.....	649, 870
Shuman's Est., 12 Northam. 198....	876	Spayd's Est., 15 D. R. 592.....	434
Shumato v. McGarity, 88 Pa. 38....	508	Speise's Est., 21 Lanc. L. R. 185	
Siddall's Est., 180 Pa. 127.....	776	..... 423, 447, 869	
Siegwarth's Est., 38 Supr. C. 622		Spencer's Est., 37 Supr. C. 67....	681
..... 743, 924		Spencer's Est., 227 Pa. 469, 829, 877	
Sigel's Est. (No. 1), 213 Pa. 14....	670	Sponsler's Ap., 107 Pa. 95.....	676, 679
Silkman's Est., 12 Luz. L. R. 349..	382	Spring's Est., 216 Pa. 529.....	940, 958
Silkman's Pet., 5 Lack. Jur. 299....	626	Springer's Ap., 29 Pa. 208.....	433, 481
Silknitter's Ap., 45 Pa. 365.....	904	Springer's Ap., 111 Pa. 228, 701, 732	
Silvius' Est., 18 Lanc. L. R. 92....	383	Stahl's Est., 26 Lanc. L. R. 61....	434
Sim's Est., 130 Pa. 451, 716, 844, 919		Stahl's Est., 25 Supr. C. 402, 436, 743	
Simcox's Est., 56 Pitts. L. J. 78....	533	Stallman's Ap., 88 Pa. 200.....	576
Simcox's Est., 15 C. C. 386.....	615	Stambaugh's Est., 135 Pa. 585....	925
Simmons' Est., 17 D. R. 629.....	682	Stark's Est., 22 C. C. 25.....	706
Simon's Est., 155 Pa. 215.....	955	Stark's Est., 9 Kulp, 525.....	343
Simon's Est., 9 D. R. 59.....	869	Stark v. Byers, 213 Pa. 101.....	701
Simon v. Kessler, 12 D. R. 781....	374	Stark v. Stark, 55 Pa. 62.....	477
Simonds' Est., 201 Pa. 413.....	928	Starr's Est., 8 Supr. C. 212.....	867
Alex. Simpson, Jr.'s Ap., 109 Pa.		Starr's Est., 190 Pa. 162.....	699
383.....	418	States v. Bank, 203 Pa. 69.....	913
Simpson v. Reed, 205 Pa. 53, 756-757		Stayman v. Paxson, 221 Pa. 446....	756
Simrell's Est., 154 Pa. 604.....	555	Steckel's Ap., 64 Pa. 493.....	472- 32
Sinclair's Ap., 116 Pa. 316.....	430	Steel's Ap., 86 Pa. 222.....	866
Singerly's Est., 16 D. R. 391.....	936	Steinman's Est., 5 D. R. 846....	509
Sinkler's Est., 10 D. R. 399, 938-941		Steinmetz's Est., 194 Pa. 611....	
Sinn's Est., 18 D. R. 887.....	680	..... 721, 781, 914, 922	
Sipe's Est., 30 Supr. C. 145, 665, 726		Stelwagon's Est., 17 D. R. 609....	434
Sipe's Est., 38 Supr. C. 582.....	726	Stephenson's Est., 6 C. C. 628....	546
Sixpenny Sav. Fund Soc., 12 D.		Stephenson's Est., 30 Supr. C. 97	
R. 418.....	485	Stetler's Est., 17 D. R. 593.....	667, 800
Slater v. Slater, 209 Pa. 194.....	610	Stetson v. Rosenberger, 196 Pa.	
Slemmon's Est., 173 Pa. 156, 907, 931		534.....	408, 791
Sloan's Ap., 168 Pa. 422.....	571, 699	Stevens' Est., 164 Pa. 209.....	667, 785
Smeltzer v. Goslee, 172 Pa. 298....	925	Stevens' Est., 200 Pa. 318.....	577, 943
Smith's Ap., 103 Pa. 559.....	677	Stevenson v. Fox, 125 Pa. 568....	763
Smith's Est., 9 C. C. 333.....	539	Stevenson v. Long, 23 C. C. 391....	429
Smith's Est., 7 D. R. 754.....	659, 948	Stevenson v. Scott, 188 Pa. 234....	736
Smith's Est., 10 D. R. 92.....	468	Stewart's Ap., 56 Pa. 241.....	334, 338
Smith's Est., 18 D. R. 1024.....	576	Stewart's Ap., 86 Pa. 149.....	415
Smith's Est., 144 Pa. 428.....	905	Stewart's Ap., 110 Pa. 410.....	
Smith's Est., 152 Pa. 102.....	371	..... 389, 640, 650	
Smith's Est., 177 Pa. 17.....	616	Stewart's Est., 147 Pa. 383, 463, 478	
Smith's Est., 189 Pa. 587.....	774, 777	Stewart's Est., 149 Pa. 111.....	546
Smith's Est., 27 Supr. C. 494.....	907	Stewart's Est., 212 Pa. 327.....	870
Smith's Est., 226 Pa. 804.....	725, 773	Stewart's Est., 38 Supr. C. 177....	642
Smith v. Blachley, 188 Pa. 550....		Stewart v. Allegheny Natl. Bank,	
..... 402, 918		101 Pa. 342.....	343
Smith v. Blachley, 198 Pa. 173....	913	Stewart v. Neeley, 139 Pa. 309....	782
Smith v. Beales, 33 Supr. C. 570....		Stigers v. Dinmore, 193 Pa. 483	
..... 535-540, 541, 556		..... 753-755	
Smith v. Coffman, 224 Pa. 411.....	763	Stiles v. Easton Natl. Bank, 33	
Smith v. Derr, 34 Pa. 126.....	472	Supr. C. 57.....	743, 958
Smith v. Lindsey, 37 Supr. C. 171		Still's Est., 12 C. C. 379.....	624
..... 653, 757, 803		Stine's Est., 16 Supr. C. 12.....	686
Smith v. Metzger, 32 Supr. C. 596		Stinson's Est., 228 Pa. 475, 538, 594	
..... 729, 731-732			

TABLE OF CASES.

Stitzel's Est., 221 Pa. 227.....	423	Thomas' Ap., 124	
Stobert v. Smith, 189 Pa. 240....	557	Thomas v. Carter,	
Stoever's Ap., 3 W. & S. 154.....	420	Thomas v. Folwell,	
Stokely's Est., 19 Pa. 482.....	561	Thomason's Est.,	
Stoner's Est., 8 York, 26.....	363	Thomman's Est., 16	
Stoner v. Wunderlich, 198 Pa. 158.	762	Thompson's Ap., 10	
Stong's Est., 160 Pa. 13.....	878	Thompson's Est., 9	
Stoolfoos v. Jenkins, 8 S. & R.		Thompson's Est., 8	
167.....	652-658	Thompson's Est., 8	
Stouch v. Ziegler, 196 Pa. 426....		Thompson v. Lloyd	
	753, 762	Thompson v. Kyne	
Stough's Est., 10 D. R. 547.....	452	Thompson v. Stitt,	
Stout's Est., 16 D. R. 74.....	689	Thomson's Est., 11	
Stout v. Young, 217 Pa. 427.....	558	Thornley's Est., 25	
Strickler's Est., 28 Supr. O. 455.	950	Thran v. Hersog, 1	
Striewig's Est., 169 Pa. 61.....	726	Throckmorton v.	
Strouse v. Becker, 88 Pa. 190.....	370	Supr. O. 214....	
Strouse v. Lawrence, 160 Pa. 421.	397	Tibby's Est., 207	
Sturgeon v. Frick Coke Co., 196		Tidball's Est., 29	
Pa. 155.....	473	Tiernan v. Binns,	
Sturgeon v. Husted, 196 Pa. 148		Tigue's Est., 11 K	
	463, 473	Tilow v. Tilow, 5	
Sturgeon v. Stevens, 186 Pa. 350.	581	Todd's Est., 33 Su	
Sturgis' Est., 205 Pa. 435.....	664	Todd v. Armstrong,	
Sullivan's Est., 130 Pa. 842.....	534, 608	Tome's Ap., 50 Pa.	
Sullivan v. Kieffer, 122 Pa. 135....	651	Tomlinson's Est., 11	
Sullivan v. Straus, 161 Pa. 145....		Toomey's Est., 150	
	667, 725	Topham's Est., 12	
Summerville's Est., 129 Pa. 631....	872	Torrence v. Reuther	
Sunday's Est., 167 Pa. 30.....	531-535	Totten's Ap., 46 Pa	
Sunday v. Miller, 15 York, 177.	669	Townsend's Ap., 106	
Sunderland's Est., 203 Pa. 160....	789	Tozer v. Jackson,	
Susman's Est., 45 Pitts. L. J. 101.	470	154 Pa. 223....	
Sutter's Est., 5 O. C. 591.....	451	Tracy's Est., 15 Mo	
Swalls v. White, 149 Pa. 261.....	608	Trainer v. McGarritt	
Swan v. Covert, 138 Pa. 806.....	823	57.....	
Swasey v. Jacques, 144 Mass. 135.	463	Transue's Est., 141	
Sweeney's Est., 15 D. R. 191.....	434, 510	Tressler's Est., 228	
Swelgart's Est., 26 Lanc. L. R. 53.	701	Trickett's Est., 8 D.	
Switzer's Est., 142 Pa. 541.....	547	Trim's Est., 168 Pa	
Swift v. Duffield, 5 S. & R. 40....	618	Trimble's Est., 10	
Swinehart's Est., 21 Lanc. L. R.		Tripp's Est., 202 Pa	
258.....	898, 527	Tripp v. Gifford, 15	
Swire's Est., 225 Pa. 188.....	538	Trost v. Dingler, 1	
Swope v. Donnelly, 190 Pa. 417....			
T			
Taggart's Case, 1 Ashmead, 321....	604	Tripp v. Gifford, 15	
Tallman's Est., 148 Pa. 286.....	608	Trost v. Dingler, 1	
Tanner's Est., 218 Pa. 361.....	945		
Tarr v. Robinson, 158 Pa. 60.....	789	Trotter's Est., 15 I	
Tasker's Est. (No. 2), 15 D. R.		Trout v. Rominger,	
168.....	640	Troxell's Est., 13 I	
Tasker's Est. (No. 3), 15 D. R.		Troxell's Est., 15 I	
174.....	431	Tucker's Est., 209	
Tasker's Est., 205 Pa. 455.....	608	Tuit v. Smith, 137	
Tasker's Est., 215 Pa. 267.....	821	Pa. 341.....	
Tate v. Hilbert, 2 Vesey, Jr. 120.	532	Turner's Est., 7 Kul	
Tawney v. Long, 76 Pa. 106.....	610	Turner's Est., 27 C	
Taylor's Ap., 119 Pa. 297.....	349, 850	Turner's Est., 187 F	
Taylor's Est., 7 D. R. 305.....	485	Turner v. Hauser, 1	
Taylor's Est., 16 D. R. 95.....	363, 528	Turner v. Patridge, 8	
Taylor's Est., 57 Pitts. L. J. 897..	648	Turner v. Scott, 51	
Taylor's Est., 175 Pa. 60.....	690	Twell's Est., 11 D.	
Taylor v. Comth, 103 Pa. 96.....	589, 598	Tyson's Est., 191 P	
Taylor v. Hammal, 201 Pa. 546....	913		
Taylor v. Mitchell, 57 Pa. 209.....	549	Tyson's Est., 223 Pa	
Taylor v. Trich, 165 Pa. 586.....	608	Tyson v. Rittenhouse,	
Teale's Est., 158 Pa. 219.....	571		
Teed's Est., 225 Pa. 633.....	539		
Teller's Est., 215 Pa. 263.....	784, 844		
Thackara v. Mintzer, 100 Pa. 151.	926		
Thelluson v. Woodford, 4 Vesey,			
Jr., 322.....	639, 803-804		
Thewlis v. Fenton, 224 Pa. 25.....			
	907, 945		
		Umbstetter's Est., 57	
		604	
		Umstead's Est., 21 M	
		Umstead's Est., 81 M	

Union Tr. Co.'s Ap., 203 Pa. 293...	448
Union Trust Co. v. Hopkins, 25	
Lanc. L. R. 885.....	666, 782
Updegraff v. McCormick, 199 Pa.	
590.....	781
Urian's Est., 80 W. N. C. 308...	654
Usher v. West Jersey R. Co., 126	
Pa. 206.....	629

V

Vanartsdalen v. Vanartsdalen, 14	
Pa. 384.....	537
Vance's Est., 141 Pa. 201.....	650
Vance's Est., 209 Pa. 561.....	
665, 726, 781	
Van Dyke's Ap., 60 Pa. 481.....	435
Van Dusen's Ap., 102 Pa. 224...	526
Vankirk's Est., 49 Pitts. L. J. 146.	436
Van Leer v. Van Leer, 221 Pa.	
195.....	668
Varner's Ap., 87 Pa. 422.....	664
Vastine's Est., 190 Pa. 443, 401,	952
Vaux's Ap., 13 W. N. C. 171.....	745
Vensel's Ap., 77 Pa. 71.....	835
Vernon's Est., 10 Del. Co. 356...	416
Vernon v. Kirk, 80 Pa. 218, 538,	548
Vidal v. Girard (Girard's Will), 2	
Howard, 127.....	574
Vilsack's Est., 207 Pa. 611.....	757
Vilsack's Est., 226 Pa. 379.....	876
Viosca's Est., 197 Pa. 280... 561,	630
Vogdes' Est., 16 D. R. 377... 452,	665
Vogel's Est., 44 Pitts. L. J. 80...	536
Vogelsong's Est., 196 Pa. 194...	607
Vowinckle v. Patterson, 114 Pa.	
21.....	754

W

Waddell's Est., 196 Pa. 294....	825
Wade's Est., 22 Lanc. L. R. 258...	
398, 951	
Wade's Est., 19 D. R. 197.....	829
Waesch's Est., 166 Pa. 498.....	472
Wagener's Est., 190 Pa. 513; 191	
Pa. 566.....	716, 947
Wagoner's Est., 174 Pa. 558...	581
Wagner's Est., 16 D. R. 184....	742
Wahl's Est., 20 Phila. 82.....	829
Wainwright's Ap., 89 Pa. 220...	
608, 610	
Wale's Est., 11 Phila. 156.....	648
Walker's Est., 22 Montg. Co. 17.	372
Walker's Est., 116 Pa. 419.....	829
Walker's Est., 219 Pa. 181.....	745
Walker v. Dunshee, 88 Pa. 430...	464
Walker v. Hall, 34 Pa. 483.....	583
Wall v. Wall, 123 Pa. 545... 557,	560
Wall's Est., 25 Lanc. L. R. 227...	
641, 821	
Wallace's Est., 206 Pa. 105... 932,	956
Wallace v. Denig, 152 Pa. 251, 662,	763
Wallise v. Wallise, 55 Pa. 542...	583
Walls v. Walls, 182 Pa. 226....	
565, 660, 788	
Waln's Est., 228 Pa. 259, 742-744,	770
Walsh's Ap., 122 Pa. 177.....	533
Walsh's Est., 18 D. R. 214.....	953
Walter's Ap., 95 Pa. 305.....	398
Walter's Est., 197 Pa. 555.....	
701-708, 728	
Walters' Est., 19 D. R. 298.....	879
Walters v. Steele, 210 Pa. 219...	701
Walton's Est., 194 Pa. 528.....	
547, 565, 608	

Walworth v. Abel, 52 Pa. 370....	407
Wambold's Est., 17 D. R. 330...	682
Wanner v. Snyder, 177 Pa. 308...	924
Ward v. Turner, 2 Vesey, 481-432.	532
Warfield v. Fox, 53 Pa. 382.....	558
Warn v. Brown, 102 Pa. 847.....	754
Warner's Est., 130 Pa. 359... 414,	447
Warner's Est., 210 Pa. 431.....	482
Warrington's Est., 7 D. R. 712...	630
Washburn's Est., 187 Pa. 162...	
741, 378	
Washington's Est., 16 D. R. 561;	
220 Pa. 204, 504.....	432, 940
Waters v. Margerum, 60 Pa. 39...	624
Watson's Ap., 125 Pa. 340... 716,	844
Watson's Est., 139 Pa. 461.....	466
Watson v. Martin, 228 Pa. 248...	
663-669	
Watson v. Smith, 210 Pa. 190....	664
Watts' Est., 168 Pa. 831, 822-828,	829
Watts' Est., 202 Pa. 481.....	662
Weaver's Est., 9 C. C. 648.....	611
Weaver's Est., 39 Supr. C. 419...	678
Webb's Est., 14 D. R. 768.....	416
Webb's Est., 18 D. R. 179.....	641
Weber's Est., 14 D. R. 126.....	948
Weber's Est., 25 Montg. 113....	574
Weed's Est., 163 Pa. 595.....	950
Wehrle's Est., 205 Pa. 62.....	878
Weiler's Est., 189 Pa. 66... 705,	740
Weimer v. Karch, 158 Pa. 385, 395,	894
Weinbrenner's Est., 173 Pa. 440.	804
Weir's Est., 13 W. N. C. 513....	474
Weiser's Est. (No. 2), 24 York,	
21.....	951
Weiser v. Ziegler, 192 Pa. 394...	792
Wellman's Est., 9 D. R. 47.....	570
Weller v. Weller, 213 Pa. 265...	658
Welles' Est., 161 Pa. 218... 465,	631
Wells' Est., 7 O. C. 354.....	558
Wells v. Bunnell, 160 Pa. 460, 646,	657
Wells v. Tucker, 8 Binney, 371...	582
Wells v. Williams, 1 Lutwyche, 34.	618
Wentz's Ap., 7 Pa. 151.....	338
Wentz's Ap., 126 Pa. 541.....	370
Wenzel's Est., 12 D. R. 63.....	682
Weschler's Est., 212 Pa. 508....	788
West's Est., 214 Pa. 35.....	720
West v. Vernon, 215 Pa. 545....	803
Westhafer v. Koons, 144 Pa. 26...	772
Wetherill's Est., 214 Pa. 150... 667,	776
Wettach v. Horn, 201 Pa. 201...	
558, 681-684	
Wetzel's Est., 25 Lanc. L. R. 225	
640, 821	
Weyand v. Weller, 39 Pa. 443...	504
Weyant's Est., 11 D. R. 177.....	651
Whelan's Ap., 70 Pa. 410... 400-404	
Whelan's Est., 175 Pa. 23.....	670
Whitchote v. Lyle, 28 Pa. 73...	483
Whitt's Est., 19 D. R. 550.....	648
Whitaker's Est., 175 Pa. 139...	463
Whitaker's Est., 219 Pa. 646....	525
White's Est., 1 D. R. 508.....	451
White's Est., 5 D. R. 108.....	463
White's Est., 26 Lanc. L. R. 13...	428
White's Est., 163 Pa. 388... 394,	786
White's Est., 174 Pa. 642.....	786
White's Est., 188 Pa. 633.....	657
White's Est., 23 Supr. C. 552....	646
White's Est., 33 Supr. C. 533, 603,	610
White v. White, 5 Rawle, 61... 320-323	
Whitcar's Est., 147 Pa. 368...	941
Whiteman's Est., 13 Phila. 249...	363
Whiteside's Est., 4 O. C. 216...	556
Whiteside's Est., 8 D. R. 274...	446

Whitshade v. Whiteside, 20 Pa. 473	Wood's Est., 7 D. R. 484.....485, 695
Whitshade v. Whiteside, 35 Supr. C. 481	Wood's Est., 209 Pa. 16,547, 572, 669
Wickersham's Ap., 75 Pa. 384.....589	Wood v. Schoen, 218 Pa. 423.....772
Widdowson's Est., 189 Pa. 388.....598	Woodbarn's Est., 151 Pa. 586.....918
Wilford's Ap., 13 Pa. 281.....595	Woodrow's Est., 144 Pa. 198, 502, 847
Wilbert's Est., 166 Pa. 113, 918, 922	Woods v. Irwin, 141 Pa. 278.....445
Willey's Ap., 105 Pa. 121.....407	Woodward's Est., 27 W. N. O. 407, 389
Wilkes's Est., 187 Pa. 32.....568	Woodward's Will, 1 W. N. O. 177.....585
Wilkinson's Est., 192 Pa. 117.....426	Woelpper's Ap., 126 Pa. 562.....776
Wilkinson v. Bist, 124 Pa. 250.....327	Wolfe v. Shelley, 1 Ooke, 93.....750
Willard's Est., 68 Pa. 327.....583, 669	Wolfer's Est., 192 Pa. 63.....654
Willert v. Sandford, 1 Vesey, 187.....568	Woltemate's Ap., 86 Pa. 219.....470
Williams' Est., 8 D. R. 125.....417	Wonsatler v. Wonsatler, 23 Supr. C. 321.....789
Williams v. Brice, 201 Pa. 595.....728	Worth's Est., 39 Supr. C. 565.....574
Williams v. Neff, 52 Pa. 326.....686	Wright's Est., 155 Pa. 64.....790
Williams v. Short, 155 Pa. 480.....581	Wright's Est., 9 O. C. 235.....604
Williams v. Toser, 185 Pa. 802.....938	Wright's Est., 202 D. R. 321.....928
Williams v. White, 35 Pa. 514.....854	Wright's Est., 12 D. R. 895.....608
Williamson's Ap., 94 Pa. 281.....434	Wright v. Vickers, 81 Pa. 122.....370
Willard v. Willard, 56 Pa. 119.....348	Wuller's Est., 14 D. R. 89.....608
Willing's Est., 212 Pa. 136.....523	
Willie's Est., 51 Pitts. L. J. 248.....467	
Willcock's Est., 165 Pa. 522.....434	
Wilson's Ap., 99 Pa. 545.....605, 611	
Wilson's Ap., 115 Pa. 95.....878	
Wilson's Will, 12 D. R. 649.....582-585	
Wilson v. Anderson, 186 Pa. 531.....580-531	
Wilson v. Bryn Mawr Tr. Co., 24 Montg. 302.....827	
Wilson v. Denig, 166 Pa. 29.....763	
Wilson v. Gaston, 93 Pa. 207.....558-560	
Wilson v. Hellman, 219 Pa. 237.....757, 808	
Wilson v. Mitchell, 101 Pa. 495.....611-612, 614	
Wilson v. Ott, 160 Pa. 433.....584	
Wilson v. Smith, 11 D. R. 665.....713	
Wilson v. Van Leer, 103 Pa. 600.....529	
Wilson v. Wilson, 142 Pa. 247.....954	
Willstach's Est., 18 D. R. 738.....897	
Willt's Est., 13 D. R. 483.....865	
Willbank's Est., 18 D. R. 515.....601	
Wimmar's Ap., 1 Wharton, 96.....918	
Wineland's Ap., 118 Pa. 37.....534-538, 539	
Winfield v. Trust Co., 57 Pitts. L. J. 145.....642	
Wingett's Est., 199 Pa. 427.....611	
Wingett's Ap., 122 Pa. 486.....445	
Wingett v. Bell, 14 Supr. C. 558.....704	
Winkle v. Meany, 30 Supr. C. 339, 821	
Winship v. Bass, 12 Mass. 199.....619	
Winters' Est., 23 Lanc. L. R. 307.....946	
Winters' Est., 26 Supr. C. 643.....789	
Winthrop Co. v. Clinton, 196 Pa. 472.....924	
Winton's Ap., 111 Pa. 387.....431-432	
Wise's Est., 188 Pa. 258.....700	
Wise v. Martin, 42 Supr. C. 448.....642	
Wistar's Ap., 80 Pa. 484.....407	
Wistar's Ap., 115 Pa. 241.....377	
Wistar's Ap., 125 Pa. 526.....952	
Wistar v. Scott, 105 Pa. 200.....722	
Witchey v. Noyes, 17 D. R. 612.....190	
Withers' Ap., 16 Pa. 151.....894	
Witman's Ap., 28 Pa. 376.....884	
Witmer v. Delone, 225 Pa. 450.....780	
Woddrop v. Weed, 154 Pa. 807.....938, 943	
Wood's Ap., 18 Pa. 478.....468	
Wood's Est., 7 D. R. 484.....485, 695	
Wood's Est., 209 Pa. 16,547, 572, 669	
Wood v. Schoen, 218 Pa. 423.....772	
Woodbarn's Est., 151 Pa. 586.....918	
Woodrow's Est., 144 Pa. 198, 502, 847	
Woods v. Irwin, 141 Pa. 278.....445	
Woodward's Est., 27 W. N. O. 407, 389	
Woodward's Will, 1 W. N. O. 177.....585	
Woelpper's Ap., 126 Pa. 562.....776	
Wolfe v. Shelley, 1 Ooke, 93.....750	
Wolfer's Est., 192 Pa. 63.....654	
Woltemate's Ap., 86 Pa. 219.....470	
Wonsatler v. Wonsatler, 23 Supr. C. 321.....789	
Worth's Est., 39 Supr. C. 565.....574	
Wright's Est., 155 Pa. 64.....790	
Wright's Est., 9 O. C. 235.....604	
Wright's Est., 202 D. R. 321.....928	
Wright's Est., 12 D. R. 895.....608	
Wright v. Vickers, 81 Pa. 122.....370	
Wuller's Est., 14 D. R. 89.....608	
	X
Xander v. Easton Trust Co., 217 Pa. 485.....758, 940	
	Y
Yardley v. Outhbertson, 108 Pa. 395.....605, 611	
Yarnall's Will, 4 Rawle, 46.....567	
Yeager's Ap., 84 Pa. 173.....400	
Yeager's Est., 18 D. R. 980.....642	
Yerkes' Ap., 99 Pa. 401.....615	
Yerkes v. Richards, 170 Pa. 346.....938	
Yetter's Est., 160 Pa. 506.....435, 795	
Yetter v. Brisse, 190 Pa. 346.....795	
Yocum v. Oom. Natl. Bank, 195 Pa. 411.....397	
Yoder's Ap., 45 Pa. 394.....868	
York's Ap., 110 Pa. 69.....918	
York v. Weber, 195 Pa. 140.....729	
Yorke's Est., 185 Pa. 61.....610-611, 613	
Yost's Est., 28 Supr. C. 188.....482	
Yost v. McKee, 179 Pa. 381.....801	
Youndt v. Youndt, 3 Grant, 140.....546	
Young's Ap., 99 Pa. 74.....402	
Young's Ap., 108 Pa. 17.....650	
Young's Est., 7 O. C. 287.....423	
Young's Est., 8 O. C. 4.....396	
Young's Est., 3 D. R. 282.....507	
Young's Est., 16 D. R. 656.....745	
Young's Est., 202 Pa. 431.....647, 820	
Young's Est., 204 Pa. 32.....446-448	
Young v. Fager, 200 Pa. 829.....558, 582	
Young v. St. Mark's, Etc., 200 Pa. 832.....576	
Young v. Weed, 154 Pa. 816.....943	
Yundt's Ap., 18 Pa. 575.....507	
	Z
Zehring's Est., 3 Supr. C. 248.....854	
Zeigler's Ap., 85 Pa. 173.....854	
Zeigler v. Storey, 220 Pa. 471.....562	
Zigler's Est., 25 O. C. 64.....920	
Zimmerman's Est., 23 Supr. C. 180.....661-665	
Zug's Est., 57 Pitts. L. J. 176.....564, 670	

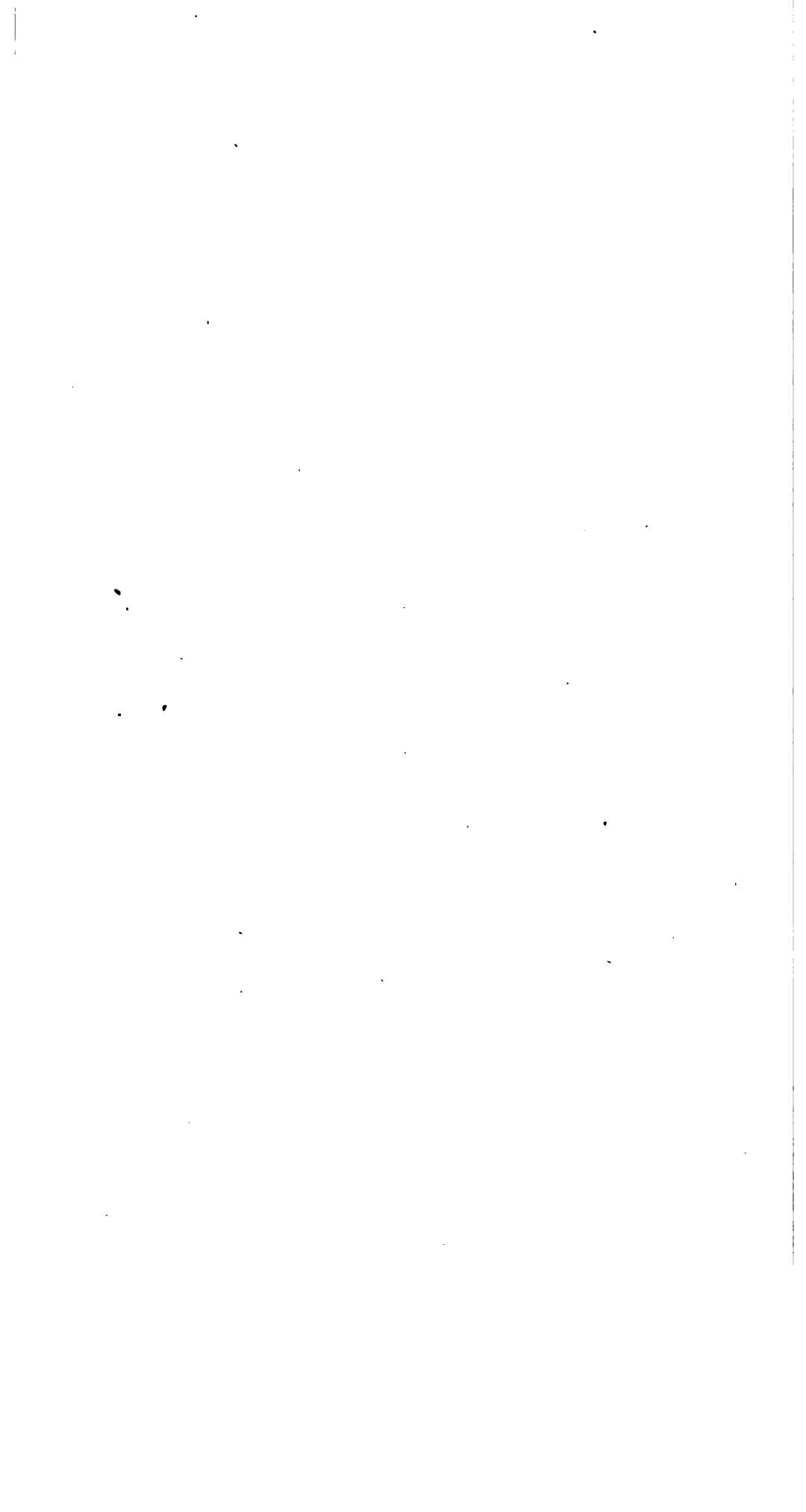


TABLE OF STATUTES

ENGLISH STATUTES

	PAGE	PAR.
13th Edward I, ch. 15, Rob.		
Dig. 317.....	212	
32d Henry VIII, ch. 32.....Amendment	319	n44
32d Henry VIII.....Wills	540	22
32d Henry VIII, ch. 37, § 1,		
Rob. Dig. 254.....	127	
12th Charles II, ch. 24.....Guardians	861	6
17th Charles II, ch. 8, Rob.		
Dig. 377.....Jeofails	176	5
29th Charles II, § 23, ch. 3..Nuncupative will.....	566	1
9th George II, ch. 36.....Mortmain	577	12
38th George III, § 6 ch. 87....Age to make a will.....	618	2
39th and 4th George III, ch.		
' 98	292	27
1693 Duke of York's Law.....	1	1

PENNSYLVANIA STATUTES

1700	Sept. 29, 1 Sm. L. 309.....	Emancipation of female...	212	2
1701	Oct. 28.....	Decedents' Estates.....	2	1
1713	Mar. 27, 1713.....	Record of wills.....	2	1
1787	Sept. 29, § 8, 2 Sm. L. 425....	Escheat	488	12
	Sept. 29, § 11, 2 Sm. L. 425....	Estate escheated.....	488	13
1791	April 6, § 5, 3 Sm. L. 20.....	Notice of bequests.....	37	30
1800	Mar. 12, § 1, 3 Sm. L. 433....	Executor's powers.....	624	12
	Mar. 12, § 2, 3 Sm. L. 433....	Executor's powers.....	624	13
	Mar. 12, § 2, 3 Sm. L. 433....	Renunciation	620	6
1804	April 2, § 4 Sm. L. 183.....	Terms of sale.....	362	100
1807	April 7, § 6, 4 Sm. L. 398....	Widow's dower.....	354	83
	April 7, § 6, 4 Sm. L. 398....	Dower	360	95
	April 7, § 7, 4 Sm. L. 398....	Partition	349	72
	April 8, § 8, 4 Sm. L. 398....	Partition	335	47
	April 7, § 9, 4 Sm. L. 398....	Partition	342	61
1808	Mar. 26.....	Notice of partition....	348, 349	
1812	Mar. 31, § 5 Sm. L. 395.....	Survivorship	726	16
1814	Feb. 7, § 1, 6 Sm. L. 102....	Administrator C. T. A....	624	14
1829	April 3, § 2, P. L. 122.....	Revival of judgment against an executor.....	642	14
1832	Mar. 15, § 4, P. L. 135.....	Register	27	2
	Mar. 15, § 5, P. L. 135.....	Register	27	3
	Mar. 15, § 6, P. L. 135.....	Register	27	5
	Mar. 15, § 6, P. L. 135.....	Letters outside the State..	628	21
	Mar. 15, § 7, P. L. 135.....	Production of will.....	549	6
	Mar. 15, § 8, P. L. 135.....	Witnesses to will.....	550	9
	Mar. 15, § 9, P. L. 135.....	Commissions	551	11
	Mar. 15, § 9, P. L. 135.....	Commissions	37	31
	Mar. 15, § 11, P. L. 249.....	Nuncupative will.....	567	3

			PAGE	PAGE
1832	Mar. 15,	12, P. L. 135.....	Foreign wills.....	560 30
	Mar. 15,	14, P. L. 135.....	Oath of administrator.....	36
	Mar. 15,	15, P. L. 135.....	Inventory	44 3
	Mar. 15,	16, P. L. 135.....	Bond of nonresident execu- tor	625 16
	Mar. 15,	17, P. L. 135.....	Record of will.....	559 29
	Mar. 15,	18, P. L. 135.....	Letters <i>c. t. a.</i>	622 11
	Mar. 15,	19, P. L. 135.....	Admin. <i>d. b. n.</i>	626 17
	Mar. 15,	20, P. L. 135.....	Vacancy	28 9
	Mar. 15,	21, P. L. 135.....	Limitation	28 8
	Mar. 15,	22, P. L. 135.....	Letters	29 13
	Mar. 15,	23, P. L. 135.....	Administration during mi- nority	32 18
	Mar. 15,	24, P. L. 135.....	Administrator's bond.....	32 20
	Mar. 15,	26, P. L. 135.....	Appraisalment	46 10
	Mar. 15,	27, P. L. 135.....	Void letters	32 19
	Mar. 15,	28, P. L. 135.....	Exceptions to bond.....	34 22
	Mar. 15,	29, P. L. 135.....	Accounts	37 32
	Mar. 15,	30, P. L. 135.....	Notice of accounts.....	38 33
	Mar. 15,	§§ 31, 40, 41, P. L. 135	Register's court.....	4 5
	Mar. 15,	32, P. L. 135.....	Certifying copies.....	37 29
	Mar. 15,	36, P. L. 135.....	State tax	29 11
	Mar. 15,	43, P. L. 135.....	Forms	79 21
	Mar. 15,	44, P. L. 135.....	Bonds of administration... ..	35 25
	Mar. 29,	2, P. L. 190.....	Record	4 6
	Mar. 29,	2, P. L. 190.....	Partition	374 123
	Mar. 29,	4, P. L. 190.....	Collection of owelty.....	347 68
	Mar. 29,	5, P. L. 190.....	Guardian, appointment....	213 4
	Mar. 29,	6, P. L. 190.....	Guardians	219 17
	Mar. 29,	7, P. L. 190.....	Foreign guardian.....	221 22
	Mar. 29,	8, P. L. 190.....	Security by guardian.....	221 23
	Mar. 29,	9, P. L. 190.....	Guardian's inventory.....	224 31
	Mar. 29,	10, P. L. 190.....	Accounts	255 92
	Mar. 29,	11, P. L. 190.....	Discharge of guardian.....	268 118
	Mar. 29,	12, P. L. 190.....	Removal of guardian.....	271 126
	Mar. 29,	14, P. L. 190.....	Investments	233 47
	Mar. 29,	14, P. L. 190.....	Investment	854 14
	Mar. 29,	14, P. L. 190.....	Dower	361 95
	Mar. 29,	15, P. L. 170.....	Notice of account.....	385 7
	Mar. 29,	15, P. L. 190.....	Notice of account.....	38 34
	Mar. 29,	19.....	Time to present claims... ..	122 25
	Mar. 29,	19, P. L. 190.....	Auditors	420 1
	Mar. 29,	20, P. L. 190.....	Notice of accounts.....	285 8
	Mar. 29,	20, P. L. 190.....	Notice	421 4
	Mar. 29,	21.....	Discharge of executor.....	881 40
	Mar. 29,	21, P. L. 190.....	Discharge	60 3
	Mar. 29,	22, P. L. 190.....	Security	62 7
	Mar. 29,	23, P. L. 190.....	Removal	63 8
	Mar. 29,	24, P. L. 190.....	Security	63 9
	Mar. 29,	25, P. L. 190.....	Security by executrix.....	835 36
	Mar. 29,	26, P. L. 190.....	Removal of executor.....	834 33
	Mar. 29,	26, P. L. 190.....	Removal	65 11
	Mar. 29,	27, P. L. 190.....	Removal	65 11
	Mar. 29,	27, P. L. 190.....	Executors	834 34
	Mar. 29,	28, P. L. 190.....	Petition of sureties.....	65 12
	Mar. 29,	28, P. L. 190.....	Surety of executor.....	835 35
	Mar. 29,	31, P. L. 190.....	Sale of minor's real estate..	242 64
	Mar. 29,	31, P. L. 190.....	Sales, etc.....	133 1

		PAGE	PAB.
1833	Mar. 29, § 32, P. L. 190.....Sales, etc.....	133	2
	Mar. 29, 33, P. L. 190.....Inventory	140	10
	Mar. 29, 33, P. L. 190.....Mansion house.....	645	4
	Mar. 29, 35, P. L. 190.....Widow's election.....	358	91
	Mar. 29, 35, P. L. 190.....Widow's election.....	646	6
	Mar. 29, 36, P. L. 190.....Jurisdiction	309	2
	Mar. 29, 37, P. L. 190.....Owelry	343	65
	Mar. 29, 37, P. L. 190.....Appraisalment	328	35
	Mar. 29, 38, P. L. 190.....Equalization	328	36
	Mar. 29, 39, P. L. 190.....Appraisalment	328	37
	Mar. 29, 40, P. L. 190.....Partition	336	47
	Mar. 29, 41, P. L. 190.....Widow's dower.....	355	84
	Mar. 29, 42, P. L. 190.....Partition	349	73, 74
	Mar. 29, 43, P. L. 190.....Widow's share.....	353	82
	Mar. 29, 44, P. L. 190.....Partition	314	12
	Mar. 29, 45, P. L. 190.....Partition	343	62
	Mar. 29, 46, P. L. 201.....	311	6
	Mar. 29, 49, P. L. 190.....Liens	365	107
	Mar. 29, 49, P. L. 190.....Ascertainment of liens.....	370	117
	Mar. 29, 52, P. L. 190.....Notice	81	27
	Mar. 29, 53, P. L. 190.....Notice	82	28
	Mar. 29, 55, P. L. 190.....Issue to C. P.....	323	25
	Mar. 29, 55, P. L. 190.....Demand for issue.....	892	1
	Mar. 29, 55, P. L. 190.....Issues	96	65
	Mar. 29, 56, P. L. 190.....Witness	91	47
	Mar. 29, 57, P. L. 190.....Process	95	61
	Mar. 29, 57, P. L. 190.....Decree pro confesso.....	83	30
	Mar. 29, 57, P. L. 190.....Service of citation.....	80	26
	Mar. 29, 57, P. L. 190.....Procedure	74	1
	Mar. 29, Arts. 14, 15, § 57, P. L. 190.....Execution	517	27
	Mar. 29, Arts. 17, 18, 19, § 57, P. L. 190.....Attachment and execution.....	514	17, 18, 19
	Mar. 29, Arts. 20, 21, 22, 23, 24, 13, § 57, P. L. 190.....Process	516	21, 22, 23, 24, 25, 26
	Mar. 29, Art. 25, § 57, P. L. 190.....Decrees	513	15
	Mar. 29, 58, P. L. 190.....Return days.....	77	6
	Mar. 29, 59, P. L. 213.....Appeals	523	1
1833	Mar. 27, 1, P. L. 99.....Appeals	233	46
	April 6, 1, P. L. 207.....Inheritance	467	23
	April 8, 3, P. L. 315.....Inheritance	473	34
	April 8, 4, P. L. 315.....Collateral heirs.....	475	41
	April 8, 5, P. L. 315.....Inheritance, real estate....	476	42
	April 8, 1, P. L. 315.....Law of descent.....	458	6
	April 8, 1, P. L. 315.....Widow's share.....	645	4
	April 8, 2, P. L. 315.....Lineal descent.....	459	9
	April 8, 9, P. L. 315.....Real estate, descent.....	463	17
	April 8, 10, P. L. 315.....Husband or wife as heir..	466	21
	April 8, 11, P. L. 315.....Heir at common law.....	460	10
	April 8, 12, P. L. 315.....Escheat	482	53
	April 8, 16, P. L. 315.....Advancements	481	52
	April 8, 18, P. L. 315.....Distribution	479	49
	April 8, 19, P. L. 315.....Limitation, seven years....	479	50
	April 8, 19, P. L. 315.....Seven years as bar.....	452	75
	April 8, P. L. 315.....Estates tail.....	457	1

			PAGE	PAGE
			PAGE	PAGE
1833	April 8,	1, P. L. 249.....	Wills	537 13
	April 8,	3, P. L. 249.....	Wills	537 14
	April 8,	4, P. L. 249.....	Wills	537 16
	April 8,	5, P. L. 249.....	Wills	538 17
	April 8,	6, P. L. 249.....	Wills	538 19
	April 8,	6, P. L. 249.....	Probate of will.....	547 3
	April 8,	§§ 7, 8, 17, P. L. 249.....	Nuncupative will.....	566 2
	April 8,	13, P. L. 249.....	Revocation of will.....	581 7
	April 8,	14, P. L. 249.....	Revocation of will.....	581 8
	April 8,	11, P. L. 249.....	Widow's election.....	644 1
	April 8,	11, P. L. 249.....	Devise to widow.....	649 11
	April 8,	15, P. L. 249.....	After-born child.....	583 14
	April 8,	9, P. L. 249.....	Devises	730 4
	April 8,	10, P. L. 249.....	Devises	732 5
	April 8,	12, P. L. 249.....	Death of legatee.....	746 37
	April 8,	12, P. L. 249.....	Lapse of legacy.....	680 29
	April 8,	15, P. L. 249.....	.....	644 3
1834	Feb. 24,	1, P. L. 70.....	Notice	43 1
	Feb. 24,	2, P. L. 70.....	Appraisement	47 11
	Feb. 24,	3, P. L. 70.....	Additional inventory.....	45
	Feb. 24,	5, P. L. 70.....	Additional inventory.....	45
	Feb. 24,	6, P. L. 70.....	Executor's debt.....	45 6
	Feb. 24,	7, P. L. 70.....	Rents of life tenant.....	46
	Feb. 24,	8, P. L. 70.....	Arrears of rent.....	46 7
	Feb. 24,	9, P. L. 70.....	Estate <i>pur autre vie</i>	46 9
	Feb. 24,	10, P. L. 70.....	.....	56 32
	Feb. 24,	12, P. L. 70.....	Executor's power over realty	821 3
	Feb. 24,	13, P. L. 70.....	Power to sell.....	822 4
	Feb. 24,	14, P. L. 70.....	Executor's powers.....	624 15
	Feb. 24,	15 <i>et seq.</i> , P. L. 70.....	Specific performance.....	187 1
	Feb. 24,	19, P. L. 70.....	Payment into court.....	167 64
	Feb. 24,	20, P. L. 70.....	Order to sell.....	135 4
	Feb. 24,	21, P. L. 70.....	Debts	104 2
	Feb. 24,	22, P. L. 70.....	Debts, payment.....	121 25
	Feb. 24,	23, P. L. 70.....	Preference	109 10
	Feb. 24,	26, P. L. 70.....	Substitution	174 2
	Feb. 24,	27, P. L. 70.....	Parties	174 3
	Feb. 24,	28, P. L. 70.....	Actions	175 5
	Feb. 24,	29, P. L. 70.....	Distress	176 6
	Feb. 24,	30, P. L. 70.....	Suits	177 7
	Feb. 24,	34, P. L. 70.....	Parties	181 12
	Feb. 24,	35, P. L. 70.....	Stay	182 13
	Feb. 24,	36, P. L. 70.....	Sale, etc.....	136 4
	Feb. 24,	36, P. L. 70.....	Order to sell.....	183 14
	Feb. 24,	37, P. L. 70.....	Errors in pleading.....	183 15
	Feb. 24,	38, P. L. 70.....	Time of distribution.....	413 1
	Feb. 24,	39, P. L. 70.....	Distribution	414 3
	Feb. 24,	40, P. L. 70.....	Distribution	436 28
	Feb. 24,	42, P. L. 70.....	Debts of decedent.....	367 113
	Feb. 24,	43, P. L. 70.....	Security before sale.....	362 99
	Feb. 24,	41.....	Refunding bond.....	450 69
	Feb. 24,	45.....	Refunding bond heirs.....	450 70
	Feb. 24,	43.....	Security	143 14
	Feb. 24,	45, P. L. 70.....	Refunding bond.....	368 114
	Feb. 24,	47.....	Payment of legacies.....	693 3
	Feb. 24,	48, P. L. 70.....	Abatement of legacies.....	688 39
	Feb. 24,	48, P. L. 70.....	Abatement of legacies.....	713 31

			PAGE	PAGE
			PAGE	PAGE
1834	Feb. 24, § 49, P. L. 70.....	Security for interests in remainder	714	32
	Feb. 24, § 50, P. L. 70.....	Action for legacy.....	711	24
	Feb. 24, § 52, P. L. 70.....	Demand for legacy.....	711	25
	Feb. 24, § 51, P. L. 70.....	Legacies	692	2
	Feb. 24, § 51, P. L. 70.....	Legacies	694	4
	Feb. 24, § 53, P. L. 70.....	Plea of "no assets".....	712	26
	Feb. 24, § 54, P. L. 70.....	Stay of execution.....	712	27
	Feb. 24, § 55, P. L. 70.....	Nonsuit	713	28
	Feb. 24, § 56, P. L. 70.....	Costs	713	29
	Feb. 24, § 57, P. L. 70.....	Liability	450	68
	Feb. 24, § 58, P. L. 70.....	Distribution	436	29
	Feb. 24, § 59, P. L. 70.....	Recovery of charge on land	703	7
	Feb. 24, § 60, 61, P. L. 70.....	Charge on land.....	709	18
	Feb. 24, § 60, 61, P. L. 70.....	Charge on land.....	710	19
	Feb. 24, § 66.....	Notice of devises.....	642	13
	Feb. 24, § 68, P. L. 70.....	Administration	29	12
	April 24, § 8, P. L. 359.....	Widow's interest.....	357	89, 90
	April 24, § 46, P. L. 359.....	Life tenant.....	358	90
	April 14, § 55, P. L. 351.....	Seal	5	7
	April 14, § 56, P. L. 351.....	Duties of clerk.....	12	25
	April 14, § 57, P. L. 352.....	Terms	5	8
1835	April 11, § 4, P. L. 199.....	Publication, partition.....	348	69
	April 14, § 1, P. L. 275.....	Accounts, examination.....	386	11
	April 14, § 4, P. L. 275.....	Appeals	525	6
	April 14, § 3, P. L. 275.....	Transfer of loans.....	631	24
	April 14, § 2.....	.....	316	17
1836	June 13, § 83, P. L. 587.....	Notice to minor.....	213	3
	June 16, § 2, P. L. 682.....	Appeals	6	
	June 16, § 19, P. L. 784.....	Petition of sureties.....	65	12
	June 16, § 19, P. L. 784.....	Citation	16	5
	June 16, § 19, P. L. 784.....	Trustees	19	7
	June 16, § 21, P. L. 784.....	Rules of court.....	389	15
	June 16, § 21, P. L. 784.....	Masters	89	n48
	June 16, § 19, P. L. 784.....	Jurisdiction	15	3
1840	April 13, § 2, P. L. 319.....	Bond of guardian.....	234	49
	April 14, § 4, P. L. 349.....	Suits	177	8
	April 14, § 5, P. L. 349.....	Suits	178	9
	Oct. 13, § 1 (1841 P. L. 1).....	Review of account.....	399	1
	Oct. 13, § 1, P. L. 1841, P. L. 1.....	Review	526	7
1842	July 16, § 52, P. L. 374.....	Payment of debts.....	436	30
1843	Feb. 3, § 8, P. L. 9.....	Judges in Phila.....	5	8
1844	P. L. 214.....	Owely, due by nonresidents	347	69
	P. L. 214.....	Owely due by nonresidents	348	71
	April 29, § 2, P. L. 527.....	Docket	27	4
	April 29, § 2, P. L. 527.....	Records	36	
	May 6, § 2, P. L. 564.....	Collateral heirs.....	681	30
	May 6, § 2, P. L. 564.....	Bond for injunction.....	498	3
1846	April 20, §§ 1, 2, 3.....	Lien creditor.....	155	43-5
	April 20, § 2, P. L. 411.....	Issue	97	67
	April 21, § 1, P. L. 426.....	Jurisdiction	310	4
	April 21, § 2, P. L. 430.....	Executions	513	15
	April 22, § 1, P. L. 483.....	Vacancies in trusts.....	907	14
1847	Mar. 13, § 1, P. L. 319.....	Partition	312	7
1848	Jan. 27, § 1, P. L. 16.....	Will by mark	538	19
	Feb. 8, § 1.....	Contracts of decedents.....	196	17
	April 11, § 4, P. L. 506.....	Attachment by auditor.....	90	43
	April 11, § 1, P. L. 536.....	Married woman.....	466	21

			PAGE	PART
1848	April 11, § 9	Husband's share	655	4
	April 11, P. L. 537	Married woman's will	537	15
	April 11, § 11, P. L. 537	Widow's election	644	1
	April 11, § 9, P. L. 537	Inheritance	459	8
1849	Jan. 24, 4, P. L. 676	Sale of dower	361	96
	Mar. 14, 1, P. L. 164	Private sales	143	13
	April 9, 2, P. L. 511	Deed	195	16
	April 9, 4, P. L. 524		367	112
	April 9, 4, P. L. 524	Appraisement	47	
	April 9, 13, P. L. 534	Abatement	184	19
	April 9, 16, P. L. 527		353	81
	April 9, 16, P. L. 524	Title	168	65
	April 10 (§ 2), P. L. 597	Trustees	908	15
	April 10, § 10, P. L. 591	Partition	311	5
1850	Mar. 14, P. L. 195	Conveyance by attorney	831	22
	April 25, 10, P. L. 569	Residue after allotment	330	38
	April 25, 18, P. L. 569	Recording	453	76
	April 25, 18, P. L. 569	Records	13	25
	April 25, 44, P. L. 569	Guardian for nonresident	225	34
1851	Mar. 12, 1, P. L. 218	Wills in New Jersey	541	24
	April 3, 1, P. L. 305	Sale of ward's real estate	242	65
	April 3, 2, P. L. 305	Hearing and notice	243	66
	April 3, 4, P. L. 305	Petition for sale	244	67
	April 3, 5, P. L. 305	Bond—title	244	68
	April 3, § 10, P. L. 305		28	10
	April 14, P. L. 612	Widow's exemption	47	12
	April 14, § 5, P. L. 613	Appraisement	51	18
1853	Feb. 2, P. L. 31	Discharge of sureties	883	43
	Feb. 23, 1, P. L. 98	Disincumbering land	840	1
	Feb. 23, 2, P. L. 98	Annual report	840	2
	Feb. 23, §§ 3, 4, P. L. 98	Discharge	842	3, 4
	April 18, 1, P. L. 503	Power to sell land, etc.	274	1
	April 18, 3, P. L. 503	Petitioners	287	19
	April 18, 4, P. L. 503	Sales	288	20
	April 18, 5, P. L. 503	Effect of sale	288	21
	April 18, 6, P. L. 503	Purchase money	290	24
	April 18, 7, P. L. 503	Powers	289	22
	April 18, 7	Discharge	60	4
	April 18, 8, P. L. 503	Appeals	291	25
	April 18, 10, P. L. 305	Security	296	38
1854	Feb. 20, 1, P. L. 89	Partition	314	13
	Mar. 27, 1, P. L. 214	Venue	185	20
	April 13, 1, P. L. 368	Deed or mortgage	296	39
	April 13, 2, P. L. 368	Investments	233	47
	April 13, 2, P. L. 368	Investment in ground rents	855	16
	April 13, P. L. 368	Investment	281	11
	April 13, §§ 2, 3, P. L. 368	Ratification of sale	20	9
	April 13, § 3, P. L. 368	Ratification	297	40
	May 5, § 1, P. L. 570		184	16
1855	Sec. 3, P. L. 145	Expenditure of trust fund	936	17
	April 12, P. L. 214	Calculation	365	108
	April 26, 10, P. L. 328	Charitable gifts, etc.	574	8
	April 26, 11, P. L. 328	Charitable gifts, etc.	570	1
	April 27, P. L. 368	Jurisdiction	279	9
	April 27, § 1, P. L. 368	Estates tail	457	1
	April 27, 2, P. L. 368	Collateral heirs	461	11
	April 27, 2, P. L. 368	Collateral heirs	462	15
	April 27, 3, P. L. 368	Illegitimates	470	28
	April 27, P. L. 368	Limitation	445	61

			PAGE	PAGE
			PAGE	PAGE
1855	April 27, P. L. 368.....	Fee tail.....	755	13
	May 3, 2, P. L. 415.....	Surviving trustee.....	916	35
	May 3, 4, P. L. 415.....	Termination of trust.....	915	31
	May 4, P. L. 425.....	Interest	201	4
	May 4, 1, P. L. 430.....	Wife's will.....	459	7
	May 4, 1, P. L. 430.....	Inheritance by husband or wife	655	4
	May 4, 5, P. L. 430.....	Husband's loss by desertion.....	657	6
	May 4, 6, P. L. 430.....	Testamentary guardian....	861	4
	May 4, 7, P. L. 430.....	Adoption	468	25
1856	April 17, P. L. 386.....	Partition	315	14
	April 17, 2, P. L. 386.....	Fees	375	127
	April 22, 7, P. L. 532.....	Probate of will.....	557	26
	April 22, 6, P. L. 532.....	Trust <i>ex malificio</i>	912	26
	April 22, 8, P. L. 532.....	Bond of admr. c. t. a.....	35	24
	April 22, 10, P. L. 532.....	Allotment	334	46
1859	March 22, § 1, P. L. 207.....	Fixing terms of sale.....	147	24
	April 6, § 1, P. L. 384.....	Service	175	4
	April 7, P. L. 406.....	Removal of trustees.....	65	11
	April 7, P. L. 406.....	Dismissal of trustee.....	908	16
	April 8, P. L. 425.....	Widow's election.....	55	28
	April 13, P. L. 604.....	Refunding bond.....	451	71
	April 13, P. L. 611.....	Executors may renounce trust	910	20
	April 13, P. L. 611.....	Vacancy in trust.....	909	17
1861	May 1, 1, P. L. 420.....	Payment into court.....	710	20
	May 1, 2, P. L. 420.....	Distribution of fund.....	710	22
	May 1, 1, P. L. 431.....	Power of survivor.....	166	60
	May 1, P. L. 431.....	Deeds by surviving execu- tors, etc.....	917	35,
				36
	May 1, 2, P. L. 431.....	Deeds	298	42
	May 1, 2, P. L. 680.....	Dismissal of executor.....	834	32
	May 1, 2, P. L. 680.....	Dismissal of executor.....	932	7
	May 1, P. L. 680.....	Security	64	10
	May 1, § 2, P. L. 680.....	Removal	65	11
1863	April 1, P. L. 205.....	Testimony	96	64
	April 11, P. L. 341.....	Account after sale.....	368	115
1864	Mar. 17, P. L. 53.....	Compensation	266	115
	Mar. 17, P. L. 53.....	Compensation of trustee....	950	42
	April 27, P. L. 641.....	Costs in partition.....	375	128
	June 27, § 2, P. L. 951.....	Informer	485	4
	Aug. 25, § 1, P. L. 1029.....	Guardian for absent minors.....	225	35
1865	Mar. 22, P. L. 30.....	Minor wife's deed.....	212	2
	Mar. 22, P. L. 31.....	Lunatic, partition.....	340	55
	Mar. 27, P. L. 45.....	Payment into court.....	368	115
	Mar. 27, P. L. 45.....	Debts of decedent.....	367	113
	Nov. 27, P. L. 1866, p. 1227.....	Exemption	55	30
1866	April 17, P. L. 111.....	Citation of trustees.....	935	12
	May 7, P. L. 1096.....	Charges on land.....	502	1
	May 14, §§ 1, 2.....	Owerty	347	68
	May 17, § 1, P. L. 1085.....	Recording releases.....	231	43
	May 17, 2, P. L. 1096.....	Payment into court.....	356	87
1867	Jan. 7, P. L. 1367.....	Widow's interest.....	357	88
	Feb. 13, § 1, P. L. 160.....	Partition	313	11
	Mar. 23, § 1, P. L. 43.....	Recording deeds.....	298	44
	April 15, P. L. 86.....	Publication	38	
	April 15, P. L. 86.....	Publication of notices.....	38	34
1868	April 2, § 7, P. L. 10.....	Fees of register.....	39	3'

		PAGE	PAGE
1868	April 9, P. L. 785.....Removal of trustee, Phila..	909	19
	April 9, P. L. 785.....Removal of trustee, Phila..	955	51
	April 14, §§ 1, 2, 3.....Setting out curtilage.....	846	10,
			11, 12
	April 28, P. L. 105.....Payment into court.....	366	109
	April 28, P. L. 105.....Payment into court.....	368	115
1869	Feb. 26, § 1, P. L. 4.....Partition	312	9
	Mar. 18, § 1, P. L. 409.....Mineral lands.....	297	41
	Mar. 30, P. L. 15.....Partition	315	
	April 15, P. L. 30.....Competency of witness....	555	19
	April 17, § 1, P. L. 70.....Contingent interests.....	715	33
	April 17, § 1, P. L. 72.....Appraisalment	734	8
	April 17, § 2, P. L. 72.....Appointment of appraisers..	735	10
	April 17, § 3, P. L. 72.....Return of appraisalment...	736	14
	April 17, § 4, P. L. 72.....Decree of title.....	737	16
	April 17, § 5, P. L. 72.....Oath of appraisers.....	735	12
	April 17, § 6, P. L. 72.....Fees	737	17
	April 20, P. L. 77.....Widow's election.....	644	2
	April 20, § 2, P. L. 77.....Partition	312	8
1870	Feb. 26, P. L. 256.....Partition in Luzerne County	313	10
1871	May 17, § 1, P. L. 269.....Contingent interests.....	716	34
	May 17, P. L. 269.....Security	844	7
	May 23, P. L. 274.....Recognizance	364	104,
			105
	May 25, § 1, P. L. 279.....Payment to foreign guard-		
			ian
		225	36
1872	Feb. 27, P. L. 173.....Copy of will, Berks Co....	559	29
	April 8, P. L. 44.....Transfer of stocks,.....	629	21
	April 9, P. L. 47.....Wages	108	8
1874	April 29, § 29, P. L. 75.....Trust companies.....	961	2
	May 4, P. L. 168.....Valuation	302	2
	May 14, § 1, P. L. 156.....Partition	315	15
	May 14, § 2, P. L. 156.....Partition	316	16
	May 14, § 2, P. L. 156.....Partition	312	10
	May 15, P. L. 194.....Affidavit of death.....	28	6
	May 15, P. L. 195.....Public loans.....	632	24
	May 19, § 2, P. L. 206.....Judges	4	4
	May 19, § 3, P. L. 206.....Separate courts.....	5	8
	May 19, P. L. 206.....Auditing accounts.....	386	11
	May 19, § 6, P. L. 206.....Judge as auditor.....	422	6
	May 19, P. L. 206.....Clerk	27	3
	May 19, § 6, P. L. 206.....Jurisdiction	6	10
	May 19, § 7, P. L. 206.....Injunctions	497	1
	May 19, § 7, P. L. 206.....Injunctions	6	11
	May 19, § 8, P. L. 206.....Appeals	7	12
	May 19, § 8, P. L. 206.....Appeals	531	1
	May 19, § 9, P. L. 206.....Rules	7	13
	May 19, § 9, P. L. 206.....Rules	77	6
	Mar. 19, § 10, P. L. 216.....Apartments	7	14
	May 23, P. L. 222.....Transfer of stocks, etc....	937	19
	June 8, § 1, P. L. 277.....Mining leases.....	290	23
1875	Mar. 18, P. L. 29.....Form of notice.....	82	29
	Mar. 18, P. L. 29.....Rules of court.....	7	13
1876	April 28, § 1, P. L. 50.....Title	168	66
	April 28, § 1, P. L. 50.....Title clear.....	298	43
	May 8, P. L. 133.....Investments	233	47
	May 8, P. L. 133.....Investments	855	15
	May 8, § 1, P. L. 140.....Owelty	330	39
	May 8, P. L. 140.....Owelty	347	68

	PAGE	PAGE
.....Interest on owelty.....	348	70
.....Oath of trust executed....	963	9
.....Costs	102	81
.....Fees in orphan's court....	39	36
.....Fees in orphan's court....	40	37
.....Fees in orphan's court....	41	38
.....Pauper's estate.....	642	12
.....Deed	165	59
.....Leave to bid.....	150	28
.....Process	79	20
.....Trustees <i>durante absentia</i> ..	910	21
.....Number of jury.....	309	3
.....Will	559	28
.....Will speaks when.....	659	1
.....General devise.....	739	24
.....Citation of trustee.....	935	13,
		14
....Refunding bond.....	451	72
....Mother's right to appoint..	862	7
....	52	20-
		23
...Illegitimates	470	28
...Wages	108	8
..Revival of judgment.....	631	23
..Proof of inheritance.....	480	51
..Transfer of decrees.....	95	62
..Estate of presumed dead...	851	3
..Estate of presumed dead..	851	4, 5,
		6
..Estates of presumed dead..	852	7, 8,
		9
Costs	853	10
Presumed death.....	432	20
Surety companies.....	35	23
Distribution in same class.	461	12
Suit on refunding bond....	451	73
Charitable gifts.....	575	8
Adoption	468	25,
		26
ark	27	3
lateral tax.....	198	1
c on bequests.....	200	2
c on reversions.....	200	3
ount on tax.....	201	4
ection of tax.....	202	5
on legacy.....	203	6
on legacy.....	202	7
e to register.....	203	8
receipts.....	203	9
on stocks, etc.....	204	10
d by legatees.....	204	11
iser	204	12
y	206	15
ser's return.....	206	16
a	206	17
f register.....	207	19
al tax.....	207	20
's returns.....	207	21
collateral tax.....	208	22

			PAGE	PAGE
1887	May 19, P. L. 125.....	Adoption	468	25
	May 19, P. L. 128.....	Age of consent.....	212	
	May 23, P. L. 158.....	Competency of witness....	555	19
	May 23, P. L. 170.....	Marriage license.....	212	2
	May 23, § 5, P. L. 158.....	Witnesses	116	22
	May 24, P. L. 199.....	Stenographer	102	83
	May 25, P. L. 264.....	Testamentary guardian....	861	5
	May 25, P. L. 261.....	Inheritance	463	15
	May 25, P. L. 261.....	Inheritance	477	44
	June 3, § 5, P. L. 332.....	Married woman's will....	557	25
	June 6, § 1, P. L. 359.....	Costs on caveat.....	587	4
	June 6, § 2, P. L. 359.....	Bond for costs.....	588	6
	June 6, § 3, P. L. 359.....	Decree on appeal.....	594	23
	June 6, P. L. 359.....	Costs	102	84
1889	April 4, P. L. 23.....	Partition docket.....	13	26
	April 4, P. L. 23.....	Partition docket.....	375	126
	April 22, P. L. 42.....	Incorporation	831	23
	April 23, § 1, P. L. 48.....	Exemplification of will....	562	32
	April 25, P. L. 52.....	Clerks	6	9
	May 2, § 1, P. L. 66.....	Escheat	484	1
	May 2, § 2, P. L. 66.....	Property escheated.....	484	2
	May 2, § 3, P. L. 66.....	<i>Cestui que trust</i> , escheat..	485	3
	May 2, § 4, P. L. 66.....	Escheator	485	4
	May 2, § 5, P. L. 66.....	Jurisdiction	486	5
	May 2, § 6, P. L. 66.....	Letters to escheator.....	486	7
	May 2, § 7, P. L. 66.....	Proceeding by petition, etc..	486	8
	May 2, § 8, P. L. 66.....	Powers of court.....	487	10
	May 2, § 9, P. L. 66.....	Issue, escheat.....	489	14
	May 2, § 10, P. L. 66.....	Finding, etc.....	489	15
	May 2, § 10, P. L. 66.....	Exceptions	489	16
	May 2, § 12, P. L. 66.....	Escheat, appeals.....	490	17
	May 2, § 13, P. L. 66.....	Reversal on appeal.....	490	18
	May 2, § 14, P. L. 66.....	Bond	490	19
	May 2, § 15, P. L. 66.....	Copy final decree.....	490	20
	May 2, § 16, P. L. 66.....	Surrender sale.....	491	21
	May 2, § 17, P. L. 66.....	Sale of real estate.....	491	23
	May 2, § 18, P. L. 66.....	Title, escheat.....	492	24, 25
	May 2, § 19, P. L. 66.....	Escheat	492	26
	May 2, § 20, P. L. 66.....	Tax title saved.....	493	27
	May 2, § 21, P. L. 66.....	Payment into State treas- ury	493	28
	May 2, § 22, P. L. 66.....	Traverse of finding.....	493	29
	May 2, § 23, P. L. 66.....	Orders enforced by attach- ment	494	30
	May 2, § 24, P. L. 66.....	Informers share, bond....	494	24
	May 2, § 25, P. L. 66.....	Dispute about reward.....	495	32
	May 2, § 26, P. L. 66.....	Bar after 21 years.....	495	33
	May 2, § 27, P. L. 66.....	Fees	495	34
	May 7, P. L. 102.....	Citations, etc.....	80	25
	May 8, P. L. 123.....	Transfer of property.....	909	18
	May 9, § 1, P. L. 102.....	Private sales.....	143	13
	May 9, P. L. 146.....	Partition under will.....	310	4
	May 9, P. L. 146.....	Jurisdiction	15	4
	May 9, P. L. 159.....	Trust companies.....	962	5
	May 9, P. L. 168.....	Adoption of adult.....	469	27
	May 9, P. L. 173.....	Trusts and trustees.....	907	13
	May 9, P. L. 173.....	Appointment of trustee....	575	10
	May 9, P. L. 182.....	Sale of real estate.....	135	3

			PAGE	PAGE
			PAR.	
1889	May 13, § 2, P. L. 190.....	Discharge of guardian.....	268	119
	May 13, P. L. 201.....	Pauper's estate.....	642	12
1891	April 22, P. L. 25.....	Married woman as trustee.....	958	60
	May 12, P. L. 54.....	Wages.....	108	8
	May 14, § 1, P. L. 59.....	Collateral tax.....	207	18
	May 16, P. L. 88.....	Burial companies as trustees.....	963	10
	May 20, § 1, P. L. 98.....	Copy of foreign will.....	561	31
	June 11, §§ 1, 2, P. L. 287.....	Witnesses.....	117	23
1893	May 19, § 2.....	Mortgages.....	138	6
	June 3, P. L. 273.....	Surety may demand statement.....	934	11
	June 8, § 1, P. L. 356.....	Discharge of dower, etc.....	848	16
	June 8, P. L. 344.....	Curtesy.....	656	4
	June 8, § 5, P. L. 344.....	Married woman's will.....	537	15
	June 8, §§ 2, 3, P. L. 392.....	Lien of debts.....	122	27, 28
	June 12, P. L. 462.....	Clerk.....	6	9
	June 12, § 1, P. L. 461.....	.....	302	1
1895	May 22, P. L. 114.....	Sales, public or private.....	362	100
	May 23, P. L. 114.....	<i>Cy pres</i>	576	10
	June 24, P. L. 248.....	Suretyship.....	156	46
	June 24, P. L. 237.....	Tenants in common.....	372	119
	June 25, P. L. 300.....	Wills.....	609	49
	June 25, P. L. 305.....	Probate of will.....	557	26
	June 27, P. L. 399.....	Surety companies.....	962	5
1897	May 19, § 4, P. L. 67.....	Appeals.....	523	525
	June 14, P. L. 142.....	Inheritance.....	472	32
	June 14, P. L. 144.....	Remainders, etc.....	279	7
	June 15, § 1, P. L. 159.....	Sale of life estate.....	830	20
	June 15, § 2, P. L. 159.....	Sale of life estate.....	830	21
	July 9, § 1, P. L. 213.....	Failure of issue.....	746	39
	July 9, P. L. 213.....	Failure of issue.....	802	45
	July 12, § 2, P. L. 256.....	Gifts to classes.....	682	31
	July 14, § 1, P. L. 269.....	Charges on land.....	503	3
	July 14, § 2, P. L. 269.....	.....	504	5
1899	April 28, P. L. 120.....	Widow's dower.....	360	95
	April 28, § 1, P. L. 157.....	Contracts of decedent.....	188	2
	April 28, P. L. 157.....	Specific performance.....	187	1
	April 28, § 2, P. L. 157.....	Record of decree.....	194	14
	April 28, § 3, P. L. 157.....	Deed.....	195	15
	April 28, § 4, P. L. 157.....	Parol contracts of decedent.....	188	3
1901	May 8, P. L. 141.....	Mortgages.....	138	6
	May 21, P. L. 272.....	Sale of real estate.....	134	2
	May 21, § 2, P. L. 272.....	Private sales.....	143	13
	May 21, P. L. 272.....	Sale of ward's land in different counties.....	863	11
	June 4, P. L. 425.....	Recording resultant trust.....	912	26
	June 4, P. L. 425.....	Recording trust.....	255	28
	June 4, P. L. 426.....	Sale of life estate.....	361	97
	June 10, P. L. 551.....	Illegitimates.....	471	28
	June 10, P. L. 553.....	Partition, service on committee of lunatic.....	322	23
	July 10, P. L. 639.....	Illegitimates.....	471	28, 29, 30
	July 11, P. L. 663.....	Fees of sheriff.....	375	127
1903	Mar. 5, P. L. 10.....	Valuation under a will.....	836	37-38

			PAGE	PAR.
1903	Mar. 26, P. L. 70.....	Illegitimates	471	70
	April 3, P. L. 151.....	Trustee in partition.....	374	124
	April 21, P. L. 223.....	Trust companies.....	961	2
	April 21, P. L. 223.....	Deposits	505	9, 10
1905	Feb. 28, P. L. 26.....	Appeal from register.....	589	8
	Mar. 16, P. L. 42.....	Corporate stock, voting....	643	15
	Mar. 31, P. L. 91.....	Transfer to foreign execu- tors	632	25
	Mar. 30.....	Trustees <i>durante absentia</i> ..	910	21
	April 6, P. L. 114.....	Debts when due.....	122	26
	April 14, P. L. 153.....	Estate of presumed dead where there is a will....	853	11, 12, 13
	April 18, § 1, P. L. 208.....	Equity cases.....	8	17
	April 18, § 2, P. L. 208.....	Equity cases.....	8	18
	April 18, § 3, P. L. 208.....	Equity cases.....	9	19
	April 18, § 4, P. L. 208.....	Equity cases.....	9	20
	April 20, P. L. 239.....	Possession	364	103
	April 20, P. L. 239.....	Leaseholds	161	54
	April 22, § 1, P. L. 258.....	Collateral tax	198	1
1907	Mar. 22, P. L. 29.....	Charges on land.....	502	1
	Mar. 22, P. L. 29.....	Charges on land.....	846	13
	Mar. 22, P. L. 29.....	Charges, satisfaction of....	711	23
	April 4, P. L. 48.....	.....	7	15
	May 1, § 9, P. L. 135.....	Stenographer	102	83
	May 8, P. L. 192.....	Distribution of assets of trust companies.....	963	11
	May 28, P. L. 271.....	Investment	156	46
	June 1, P. L. 364.....	Allotment	334	46
1909	April 1, P. L. 79.....	Probate of will.....	559	27
	April 1, P. L. 87.....	Widow's inheritance.....	648	10
	April 1, P. L. 87.....	Descent, widow and no is- sue	458	6
	April 1, P. L. 95.....	Auditors, appointment....	420	2
	April 1, P. L. 95.....	Appointment of auditors, etc.	386	11
	April 1, P. L. 95.....	Auditors, etc.....	89	n4
	April 27, P. L. 197.....	Collection of rents.....	491	22
	April 27, P. L. 202.....	Administration account....	392	20
	April 27, P. L. 202.....	Satisfaction	453	77
	May 3, P. L. 386.....	Lien of debts.....	641	12
	May 3, P. L. 386.....	Lien of debts.....	369	116
	May 3, P. L. 424.....	Legal notices.....	44	1
	May 6, P. L. 431.....	Clerks, etc.....	5	9
	May 6, P. L. 459.....	Widow's exemption.....	54	27
	May 8, P. L. 489.....	Widow's right to bid.....	335	46
1911	April 21.....	Recording of election by widow or husband.....	651	16
	May 11.....	Amendment of secs. 3, 5, 7, 24 and 27 <i>escheats</i> , see insert	P. 484	
	May 11.....	Manner of taking exceptions in all courts, see insert.		

INDEX.

VOLUME 8
COURT—PRACTI

.....
.....
legacies.....
.....
.....
.....
.....
will.....
on will.....

.....
.....
y to pass.....

.....
.....
.....
.....
.....

.....
.....
tled.....
.....
.....
.....
.....
.....



ACCOUNTS OF FIDUCIARIES — (Continued)		PAGE	PAGE
Blending, etc.....	868—	9	
Certificate of balance.....	391—	19	
Certificate by register.....	391—	17	
Citation to file.....	867—	5	
Confirmation, effect.....	393—	21	
Confirmation, after due notice.....	38—	34	
Confirmation, nisi and absolutely.....	387—	12	
Costs on guardian's.....	264—	112	
Deceased executor, who must be cited.....	870—	11	
Distribution of balance.....	875—	22	
Distribution of balance.....	413—	1	
Duties of register, filing and advertising.....	384—	6	
Examination by the court.....	386—	11	
Exceptions.....	874—	17	
Exceptions to guardian's.....	263—	110	
Exceptions, practice.....	388—	14	
Executor when not cited.....	866—	3	
Filing of.....	864—	1	
Final, form of.....	261—	106	
Final of guardian, manner of stating.....	260—	105	
Form, see "Forms."			
Form of confirmation.....	387—	13	
Form of exceptions.....	390—	16	
Form, final after partial.....	386—	10	
Form of notice by register.....	391—	17	
Form of partial, administration.....	385—	9	
Form petition for citation to guardian.....	257—	95	
Guardian's, answer to citation.....	258—	97	
Guardian's, citation, who may require.....	258—	98	
Guardian's, citation who subject to.....	258—	99	
Guardian's credits and allowances.....	261—	107	
Guardian's, manner of stating.....	259—	103	
Guardian's, power to compel.....	256—	94	
Guardian's, triennial.....	256—	93	
Guardian and trustee.....	259—	102	
Interest in.....	393—	21	
Judgment upon balance certified.....	392—	20	
Jurisdiction of.....	19—	8	
Jurisdiction of.....	395—	23	
Loss by laches, of right to.....	259—	100	
Manner of, partial, joint, etc.....	868—	9	
Notice of filing.....	868—	9	
Notice to non-residents.....	385—	8	
Notice prerequisite.....	385—	7	
Petition for citation.....	867—	4	
Petition for review.....	399—	1	
Power of court, on escheat.....	487—	10	

ACCOUNTS OF FIDUCIARIES — (Continued)	PAGE	PAR.
Publication of notice.....	38—	33
Register of wills.....	37–32; 39—	35
Register's fees.....	42—	40
Required by guardian.....	255—	92
<i>Res judicata</i> , as to decree.....	507—	2
Review of, practice.....	402—	3
Review of, when of right.....	400—	2
Rules in Allegheny county.....	390—	15
Statement by auditor.....	867—	6
Supplemental	870—	12
Triennial of guardian, form.....	200—	
Trustee	945—	35
Trustee, citation.....	935—	12, 13
Trustee, citation.....	948—	37
Trustee, credits and allowances.....	948—	38
Trustee, counsel fees and legal expenses.....	950—	41
Trustee, finality.....	954—	48
Trustee, interest and expenses.....	949—	39
Manner of stating, trustee.....	946—	35
Trustee, principal and income.....	949—	40
Trustee, who may demand.....	947—	36
ACCRETION, lapsed inheritance.....	478—	46
ACCUMULATIONS, STATUTE AGAINST.		
Charity exempt from prohibition.....	294—	30
Construction of law.....	295—	36
Effect on estate limited.....	295—	33
Implied directions.....	293—	26
Limit upon, Price Act.....	291—	26
Restraint upon.....	804—	47
Scope and effect of limitation.....	292—	27
Statute of.....	829—	17
Vesting of void.....	295—	35
ACKNOWLEDGMENT.		
Deed or mortgage.....	296—	39
Release	231—	43
Satisfaction	453—	77
ACTIONS.		
Abatement of.....	184—	19
By and against legal representatives.....	173—	
Creditor of an estate.....	424—	8
Executors, etc.....	175—	5
Foreign executors, etc.....	629—	21
Guardians, against.....	231—	45
Guardians, by.....	231—	44
Necessary to toll statute.....	428—	15

ACTIONS — (Continued)	PAGE	PAGE
Parties to.....	181-	12
Refunding bond, concerning.....	451-	73
Recovery of legacy, when not charged.....	711-	24
ACTIVE TRUST — creation.....	904-	7
distinguished from passive trusts.....	913-	28
ADEMPMENT, LEGACY.....	686-	36
Legacy charged on land.....	687-	37
When not wrought.....	687-	38
ADJOURNMENT OF SALES.....	159-	53
ADJUDICATIONS BY AUDITING JUDGE.....	439-	40
Escheat, in.....	489-	15
Opening of.....	451-	74
Procedure on petition.....	441-	47
Re-commitment	445-	61
Rules in Phila.....	442-4-	48-60
Trust estate, form of petition.....	440-	45
AD LITEM, guardian or committee.....	322-	23
See "Guardian."		
ADMINISTRATION.		
Accounts to be examined by the court.....	386-	11
Accounts, nature of.....	382-	1
Bond, on what uses to be held.....	35-	25
Citation to file account.....	383-	3
<i>Durante minore aetate</i>	618-	2
Escheats in.....	486-	7
Expenses of.....	430-	19
Form of petition to revoke.....	31-	17
General features.....	58-	1
Kinds and forms.....	59-	2
Letters, will probated after.....	562-	33
Power to grant letters.....	27-	5
Practice on accounts filed.....	387-	12
Not impeached by discovery of will.....	29-	12
Right and preference to.....	29-	13
Vacancy, filling.....	28-	9
ADMINISTRATORS AND OTHER FIDUCIARIES.....	58-	1
ADMINISTRATORS.		
Account, after sale in partition.....	368-	115
Account, form of citation.....	383-	4
Account for deceased guardian.....	259-	101
Account, when and where to be filed.....	382-	2
Actions by.....	175-	5

ADMINISTRATORS — (Continued)

	PAGE	PAGE
Additional bail.....	62-	7
Answer to citation to account.....	384-	5
Claims against estate.....	433-	22
Condition of bond.....	32-	20
<i>C.t.a.</i> — to give bond.....	35-	24
<i>Cum testamento annexo</i>	623-	11
<i>Cum testamento annexo</i> powers.....	624-	13, 14
<i>D.b.n.</i> , appointment.....	626-	17
<i>D.b.n.</i> , form of bond.....	626-	18
<i>D.b.n.</i> , suit for assets.....	178-	10
<i>D.b.n. c.t.a.</i> , successor of trustee.....	936-	16
<i>D.b.n. c.t.a.</i> , power to sell realty.....	826-	14
Discharge of.....	60-	4
Discharge of.....	881-	40, 41
Discharge of sureties.....	883-	43
Distinguished from executor.....	59-	1
<i>Durante minoritate</i>	32-	18
Effect of discharge.....	61-	6
Executor, of.....	59-	2
Form, deed on specific performance.....	196-	18
Form of final account.....	386-	10
Form of partial account.....	385-	9
Guardian, not to be appointed.....	219-	17
Interest in distribution.....	417-	6
Manner of discharge.....	61-	5
Notice of appointment.....	43-	1
Notice of collateral tax.....	203-	8
Oath of form.....	36-	26
<i>Pendente lite</i> , form of petition for.....	587-	3
Power to sell or mortgage, etc.....	133-	1, 2
Power to sell or mortgage, etc.....	134-	3
Removal for failure to give additional security.....	63-	8
Resignation	60-	3
Selection of exemption by.....	52-	21
Suit or distress for rent.....	176-	6
Surcharge of.....	440-	19
When not liable to creditors.....	450-	68
ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE.....	115-	20
ADOPTED CHILDREN, beneficiaries.....	724-	13
ADOPTION.		
Adult as heir.....	469-	27
Child as heir.....	468-	25
Inheritance by.....	469-	26
ADVANCEMENTS.		
Distribution	434-	24

ADVANCEMENTS — (Continued)	PAGE	PAR.
How treated.....	481-	52
Testator, by.....	876-	24
ADVERSE CLAIM OF TITLE, PARTITION.....	320-	21
ADVERTISEMENT, ACCOUNTS BY REGISTER.....	384-	6
AFFIDAVIT.		
Death of decedent.....	28-	6
Death of decedent, form.....	28-	7
Notice, form.....	153-	38
Publication, partition.....	326-	31
Service of notice, partition.....	326-	32
Sureties in bond.....	34-	21
Value, guardian.....	217-	9
Value, real estate.....	152-	35
AFTER-ACQUIRED REAL ESTATE, when embraced in will	660-	2
AFTER-BORN CHILD, provision required in will.....	583-	14
AGES.		
Capacity of minors.....	211-	2
Competency to make a will.....	537-	14
Competency to make a will.....	818-	33
Man at common law.....	860-	1
Woman at common law.....	860-	2
AGNATES.		
Collaterals, civil law.....	474-	38
Females equalized.....	475-	40
AGNATION BY ADOPTION.....	475-	39
AGREEMENTS.		
Concerning construction of will.....	791-	15
Counsel, among.....	442-	47
Devise or bequeath.....	790-	13
Distribution under will.....	416-	5
Family, see "Family agreements."		
Heirs concerning real estate.....	309-	n2
ALIAS ORDER AND RE-SALE.....	158-	52
ALIEN, AS EXECUTOR.....	618-	2
ALIENATION OF REMAINDER OR REVERSION.....	782-	37
ALIENATION OF LEGACY.....	674-	5
ALIMONY, CLAIM AGAINST ESTATE.....	131-	14
ALLEGHENY COUNTY RULES OF PRACTICE.		
Appeals from register.....	589-	10

ALLEGHENY COUNTY — (Continued)

	PAGE	PAG.
Appeal from probate of will.....	590-	11
Approval of bond.....	145-	17
Argument list.....	879-	34
Attendance of audit.....	439-	42
Attorneys' briefs of the argument.....	879-	36
Attorney's fee in partition.....	376-	128
Audit list.....	439-	40
Auditor, appointment.....	421-	2
Auditor, costs and fees.....	422-	4, 5
Auditor, notice by.....	421-	3
Auditor's reports, confirmation.....	437-	34
Auditor's reports, exceptions.....	437-	33
Auditor's report, form.....	437-	32
Citation	136-	4
Collateral tax—notice.....	203-	8
Commissions beyond the state.....	92-	50
Confirmation of accounts.....	390-	15
Depositions	92-	48, 49
Depositions on motions and rules.....	93-	51
Discharge of fiduciaries.....	61-	5
Discharge of guardian.....	269-	120
Examiners	965-	18
Fees of clerk.....	10-	23
Fees of register.....	40-	37
Notice of citation, etc.....	80-	24
Notice and time of argument.....	879-	35
Partition	318-	18
Payment into court.....	418-	8
Petitions	76-	3
Petition for appointment of guardian.....	216-	5
Petition for sale or mortgage of real estate.....	140-	9
Receipts on distribution to be recorded.....	439-	43
Recognizances, justification.....	344-	66
Request for issue.....	97-	66
Return days of orders of sale, etc.....	148-	24
Rule for attachment.....	95-	60
Sale or mortgage of real estate.....	135-	3
Security	62-	7
Special examinations, revocation.....	965-	19
Special returns.....	156-	44
Terms and return days.....	77-	7
Time of payment over.....	440-	44
Trust companies, application.....	963-	12
Trust companies, deposits and withdrawals.....	964-	13
Trust companies, foreign surety companies.....	964-	14
Trust companies, qualification.....	965-	17
Trust companies, trust funds to be kept separate.....	965-	15

ALLEGHENY COUNTY — (Continued)	PAGE	PAR.
Trust companies, trust funds and investments to be kept separate	965—	16
Widow's appraisalment.....	51—	18
ALLOTMENT.		
Form of petition for.....	284—	16
Higher bid in partition.....	334—	46
Primary duty, in partition.....	328—	34
Residue after in partition.....	330—	38
Rule to accept or refuse.....	335—	47
ALLOTTEE, SECURING OWELTY.....	343—	65, 6
ALLOTTEE, TITLE IN PARTITION.....	342—	63
ALLOWANCE AND FILING ACCOUNTS, BY REGISTER... 384—		6
ALLOWANCE, MINOR BEYOND THE STATE.....	234—	49
ALTERATIONS, ETC., IN A WILL.....	557—	24
ALTERNATIVE REQUESTS.....	695—	6
AMENDMENTS IN THE ORPHANS' COURT.....	79—	22
"AMONG" GIFTS.....	729—	19
ANCESTOR, BLOOD OF.....	464—	18, 19
ANCILLARY LETTERS OF ADMINISTRATION.....	629—	22
ANNUITIES.		
Apportionment	796—	26
Charges against land.....	433—	23
Collateral tax on.....	202—	6
Deficiency, making up.....	698—	16
Interest upon.....	698—	14
Limitation over, etc.....	847—	n5a
<i>Pur autre vie</i>	744—	n22
<i>Pur autre vis</i>	771—	n26
Setting aside funds for.....	696—	8
Term of.....	698—	15
ANSWER, ADMINISTRATOR, CITATION TO ACCOUNT... 384—		5
Citation of guardian to account.....	258—	97
Citation to widow to elect.....	647—	8
Form, petition for removal.....	67—	14
Partition	322—	24
Petition	85—	36
Petition — form	87—	37
Phila. decree <i>pro confesso</i>	599—	36

	PAGE	PAGE
ANTE-NUPTIAL CONTRACTS	482-	53
Effect on widow's rights.....	645-	5
Apocrypha. Hist. Susanna, Ch. 1.....	527-	8
APPEALS.		
See Vol. I, "Johnson's Practice".....	P. 107-	
And Vol. II, "Johnson's Practice".....	P. 132-	
Accounts, certified for judgment.....	393-	20
Contest <i>d.v.n.</i>	615-	61
Contest of will.....	601-	40
Decrees, authorized.....	523-	1
Decree definitive.....	524-	4
Decree of Orphans' Court.....	894-	6
Escheats.....	490-	17
Forms, see Vol. I, "Johnson's Practice."		
Guardian.....	233-	46
Hearing on merits.....	525-	6
Order for costs, on will.....	595-	24
Order of register granting an issue on a will.....	589-	8
Partition, right of.....	376-	130
Petition and request, certificate to Orphans' Court by register.....	601-	41
Petition for re-hearing.....	526-	8
Price Act.....	291-	25
Requisites.....	524-	5
Review by Orphans' Court.....	526-	7
Right of.....	523-	2
Time of hearing, Phila.....	594-	20, 21
Time of taking.....	523-	2
See Vol. I, Act of 1897.		
Will, final decree, contents.....	594-	23
APPELLATE COURT, powers exercised on appeal	525-	6
APPOINTMENT.		
Acceptance by guardian.....	219-	16
Appraisers, form.....	50-	14
Auditors to distribute.....	420-	1-2
Collateral tax appraiser.....	204-	12.
Executor.....	618-	2
Guardian for absent minors.....	225-	35
Guardian, manner.....	862-	9
Guardian for non-resident minor.....	225-	34
Guardian, petition for.....	215-	5
Guardian, petition form.....	216-	7
Trustee.....	930-	3
Trustee, petition.....	931-	4
Irregularity not to affect title.....	298-	43
Deputy register of wills.....	27-	2

APPOINTMENT — (Continued).	PAGE	PAG.
Power of, definition.....	740—	n1
Power of, in devises.....	739—	24
Power of, must be exercised as given.....	805—	48
Revocation, guardian.....	220—	21
Testamentary guardian.....	861—	6
Trustee	907—	13, 14
Trustee, during life of co-executor.....	908—	15
Trustees, <i>durante absentia</i>	910—	21
Trustees, notice petition for.....	931—	5
APPORTIONMENT, COST OF AUDIT.....	448—	64
APPORTIONMENT, INCOME.....	796—	26
APPRAISEMENTS.		
Children taking goods at.....	47—	11
Collateral tax, form.....	205—	13
Decedent's estate.....	46—	10
Decree adjudging title at.....	737—	16
Exceptions	56—	33
Exemption, form under Act of 1883.....	53—	23
Exemption without letters.....	52—	22
Fees of sheriff and appraisers, under will.....	737—	17
Form of.....	50—	16
Form of order.....	305—	8
Form, under Act of 1883.....	54—	26
Growing crops.....	55—	29
Method of making.....	47—	11
Partition	328—	35
Partition	330—	40
Partition, order of taking.....	329—	35
Proceedings in.....	51—	19
Purparts in partition.....	329—	37
Real estate, direction by will.....	734—	8
Real estate under will, return, etc.....	736—	14
Recording of.....	36—	27
Right to take goods at.....	736—	n12
Rule in Allegheny county.....	51—	18
Testator's goods — exceptions.....	639—	9
Title to vest in widow and children.....	56—	31
Widow's exemption.....	47—	12
Widow's Act of 1909.....	50—	17
Under will, acceptance or refusal.....	736—	15
APPRAISERS.		
Collateral tax.....	204—	12
Fees of.....	56—	32
Form of appointment.....	50—	14

APPRAISERS — (Continued)	PAGE	PAGE
Form of appointment.....	53-	24
Form of appointment.....	305-	7
Form of oath of.....	50-	15
Form of oath of.....	53-	25
Form of return of.....	306-	9
Petition for, form.....	304-	5, 6
Real estate, under will.....	735-	10
Real estate, form of notice of meeting.....	735-	11
Real estate, oath.....	735-	12
APPROVAL OF RETURN AND ORDER OF SALE.....	306-	10
APPURTENANCES, CARRIED BY WILL.....	731-	4
APPURTENANCES, ETC., IN DEVISE.....	797-	29
ARGUMENT IN BANC, PHILA.....	7-	13
ARGUMENT, PAPER BOOK OF.....	78-	15
ARGUMENT, QUESTIONS FOR — list.....	879-	33
ARREARS OF RENT BELONG TO PERSONAL ESTATE....	46-	7
ASCENDING LINE OF HEIRS.....	473-	35
ASSENT BY CHILDREN TO SALE.....	825-	n18
ASSENT, LEGACY.....	694-	5
ASSETS.		
Arrears due a soldier.....	129-	11
Distribution of further.....	436-	28
Emblems.....	129-	10
Errors, etc. in pleading not to affect question of.....	183-	15
Estate of testator.....	640-	10
Funds of beneficiary.....	128-	8
Goods and chattels.....	126-	3
Guardian liable to ward.....	250-	83
Hands of trustee.....	938-	21
Insurance money.....	129-	9
Jurisdiction of.....	20-	9
License and good will.....	128-	7
Liquor license, personal privilege.....	877-	28
Marshaling, contribution.....	434-	25
Payment of debts for.....	126-	4
Suit by admr. <i>d.b.n.</i>	178-	10
Things in the hands of legal representatives.....	124-	1
Trust company — distribution.....	963-	11
ASSIGNEE OF DEVISEE, LIABILITY TO WIDOW.....	739-	22

	PAGE	PAGE
ASSIGNMENT — PARTITION — RECOGNIZANCE	356—	86
ATHEISTS' RELIEF ACT — AS EXPERT WITNESS.....	612—	54
ATTACHMENTS.		
Costs	449—	66
Distributive share.....	397—	25
Distributive share — Vol. I, Johnson.....	671—	
Distributive share — Vol. II, Johnson.....	415—	
Enforcement of orders, etc., in escheat.....	494—	30
Execution, form of petition for.....	513—	14
Form	512—	11
Form of bond for appearance.....	512—	13
Form of order for.....	511—	10
Form, order for rule to show cause.....	511—	9
Form of petition for.....	511—	8
Form of petition for.....	515—	20
Form of sheriff's return.....	512—	12
Against fiduciary.....	63—	9
ATTESTATION, WITNESSES, MUST SUBSCRIBE.....	572—	4
ATTORNEY.		
Conveyance by, for executors or trustees.....	831—	22
Fees, Vol. I, Johnson.....	P. 253—	
Jurisdiction of other county.....	869—	10
Payment to.....	446—	61
AUDIT.		
Accounts by court.....	386—	11
List, Phila.....	78—	12
Re-opening	439—	39
AUDITORS.		
Appointment on accounts.....	386—	11
Appointment in Philadelphia.....	421—	2
Appointment in Philadelphia.....	874—	18
Appointment to ascertain liens.....	363—	101
Appointment to ascertain liens.....	365—	107
Appointment to make distribution.....	420—	1-2
Ascertainment of liens.....	370—	117
Bequest subject to payment of debts.....	430—	18
Claims before, practice.....	431—	20
Claims insufficiently proved.....	427—	15
Conclusiveness of findings of fact.....	94—	58
Confirmation of report.....	94—	57
Demand for issue, before.....	892—	1
Distribution, scope of duties.....	422—	6
Duties, distribution on partition.....	372—	119

AUDITORS — (Continued)

	PAGE	PAGE
Effect of distribution.....	452-	75
Evidence, admission of.....	91-	45
Exceptions to report.....	709-	16
Filing report of.....	93-	54
Form of appointment.....	708-	14
Form of appointment to state account.....	867-	7
Form of appointment on exceptions.....	875-	21
Form of approval of report.....	193-	11
Form of reference.....	193-	10
Form of subpoena by.....	708-	15
Hearings before.....	90-	43
Incompetent testimony before.....	426-	12
Limitation, statute of.....	428-	15
Notice outside the jurisdiction.....	421-	4
Notice by, Phila.....	421-	3
Presentation of claims.....	423-	7
Procedure before.....	426-	14
Proof of claims.....	425-	10
Recommittal of report.....	94-	56
Reference to.....	89-	42
Report	437-	31
Report	708-	16
Report, form and substance.....	93-	53
Report, notice of.....	93-	52
Report, recording.....	453-	76
Return of testimony.....	93-	55
Sale of real estate.....	146-	19
Statement of account.....	867-	6
Sufficiency of proof.....	425-	11

AUDITOR GENERAL.

Appointment of escheator.....	485-	4
Collateral tax.....	206-	16
Duties on collateral taxes.....	203-	9

BAIL, ADDITIONAL FROM FIDUCIARIES.....	62-	7
---	-----	---

BALANCE — ACCOUNT, CERTIFICATE.....	391-	19
--	------	----

BALANCE, ADMINISTRATION ACCOUNT, JUDGMENT...	392-	20
---	------	----

BANK, FUNDS DEPOSITED IN, LIABILITY OF TRUSTEE	939-	24
---	------	----

BAR.

Claims against decedent.....	428-	15
Commonwealth's claim.....	429-	16
Escheat, after 21 years.....	495-	33
Price Act — by sale.....	288-	21
Statute of limitation, removal.....	946-	35

	PAGE	PAGE
BASTARDS, INHERITANCE BY	470-	28
BENEFICIAL ORDERS, DISTRIBUTION OF DEATH BENEFITS	876-	23
BENEFICIARIES.		
Disappointed, compensation to.....	650-	13, 14
Effect of acts on will.....	610-	51
Funds not assets.....	128-	8
Spendthrift trust.....	924-	50
Uncertain designation by the will.....	718-	1
Will, confidential relation.....	611-	52
REQUESTS.		
Collateral tax on.....	200-	2
Conditional, defeat of.....	676-	17
Condition and conditional limitation.....	741-	27
"Flock," means increase or decrease.....	674-	7
"House" carries additions.....	674-	8
Notice of, by register.....	37-	30
Specific things.....	674-	4
Subject to debts of decedent.....	430-	18
"BETWEEN," GIFTS	727-	19
BID.		
Allotment on higher.....	334-	46
Form in partition.....	340-	56
Leave by legal representative.....	150-	28
Leave to, in partition.....	317-	18
Life tenant by curtesy.....	338-	54
Life tenant in partition.....	317-	18
Widow's right, in partition.....	334-	46
BIDDING.		
Legal representative at his own sale.....	150-	28
Partition, purpose.....	339-	55
Return to leave.....	150-	31
Sales	159-	53
BILL.		
Costs — separate Orphans' Courts.....	9-	21
Review, application for.....	403-	3
Review of account.....	399-	1
BLOOD OF THE ANCESTOR	464-	18
Inheritance of real estate.....	463-	17
Restriction	478-	45
First purchaser.....	464-	19
BLOOD, PERSONALTY DIVIDED WITHOUT DISTINCTION	476-	41

	PAGE	PAGE
BONDS.		
Administrator, conditions.....	32-	20
Administrator, form.....	33-	21
Administrator, exceptions to, etc.....	34-	22
Administrator, uses of.....	35-	25
Administrator <i>c.t.a.</i>	35-	24
Administrator <i>c.t.a.</i>	625-	16
Administrator, <i>d.b.n. c.t.a.</i>	626-	18
Allegheny county.....	62-	7
Attorney, family agreement, form.....	410-	3
Condition, for delivery of estate to surety.....	72-	27
Condition of — non-resident executor.....	625-	16
Escheator, escheats.....	490-	19
Form, for appearance.....	512-	13
Form of approval.....	145-	17
Form, on caveat.....	588-	5
Form in partition.....	379-	135
Form, sale of real estate.....	144-	15
Guardian's, adjudication of breach.....	224-	29
Guardian, condition.....	221-	23
Guardian, discretionary with the court.....	234-	49
Guardian, form of.....	218-	14
Guardian's, liability of sureties.....	222-	25, 26
Guardian's, requisite.....	222-	24
Justification of sureties.....	145-	16
Liability of surety.....	145-	18
Married ward's to guardian to refund.....	451-	72
Non-resident executor to give.....	32-	19
Prerequisite to injunction.....	498-	3
Reciprocal, to refund.....	451-	71
Refunding, in escheat.....	494-	31
Refunding, from distributee.....	450-	69, 70
Refunding, by heir, form.....	455-	79
Refunding, suit upon.....	451-	72
Register — collateral tax.....	207-	19
Sale of minor's real estate.....	244-	68
Suits upon, see Vol. II, Johnson's Pr., "Assumpsit."		
Surety company may be sole surety.....	35-	23
Surplus, tax sales, suit on.....	178-	9
Trustee, form.....	933-	8
Trustee, etc., removal of property.....	226-	37
BREACH OF PROMISE, ACTION, SURVIVAL OF.....	635-	3
BROTHERS AND SISTERS, FAILURE OF.....	476-	41
BROTHERS AND SISTERS, ONLY, AS HEIRS.....	475-	41
BROTHERS AND SISTERS AND NEPHEWS AND NIECES.....	476-	41

	PAGE	PAGE
BURDEN OF PROOF, CONTEST OF WILL	610-	52
Wills, "disposing mind and memory".....	609-	49
BURIAL COMPANY, MAY ACCEPT TRUSTS	963-	10
"CALENDAR MONTH"		
Form of will evading restraint.....	577-	12
Gifts to charity, etc., void within.....	570-	1, 2
New will or codicil, within.....	571-	3
CANCELLATION OF WILL — METHODS	581-	6
CANCELLATION, WILL, MUST FOLLOW THE LAW	582-	8, 9
CAPACITY, AGES OF	211-	2
Disposing mind and memory.....	606-	47
CAPIAS, effect of arrest and discharge	Vol. II-	P. 414
CAPITAL.		
May include realty.....	729-	1
Trust company made liable.....	962-	5
CAPITALIZATION, INCOME DURING MINORITY	293-	29
CAPAX DOLI	212-	2
"CASH," MEANING OF IN WILL	669-	19
CAVEAT.		
Against granting letters, form.....	30-	14
Against probate of will.....	558-	26
Dismissal for want of bond.....	588-	6
Form of bond.....	588-	5
Form, will.....	587-	2
Probate of will.....	586-	1
Register's duties.....	588-	7
Security for costs on.....	587-	4
CAVEAT EMPTOR, as to Orphans' Court sales	159-	53
CAVEAT EMPTOR, as to Orphans' Court sales	160-	54
CERTIFICATE OF CONTEST TO ORPHANS' COURT	589-	7
Certificate, form, trial of issue <i>d.v.m.</i>	614-	59
CESTUI QUE TRUST, see trusts	904-	5
CESTUI QUE TRUST, see trusts	907-	12
Escheat after seven years.....	485-	3
Foreign trustee — bond.....	226-	37
Rights of.....	915-	32
Rights under Price Act.....	280-	10
Sale of lands.....	278-	6

	PAGE	PAGE
CESTUIS QUE TRUSTENT , not liable for contributory negligence when.....	938-	22
CESTUI QUE USE — title when vested.....	280-	10
CHANCERY.		
Petition derived from.....	2-	2
Powers and procedure.....	3-	3
CHARGES OR ANNUITIES — DISTRIBUTION	433-	23
CHARGES ON LAND.		
Action of court on auditor's report.....	709-	16
Blending estates.....	702-	5
Created by what.....	700-	1
Created not by mere request.....	701-	2
Decree by court.....	505-	8
Deficiency of personalty not enough.....	702-	4
Deposit with trust company.....	505-	9
Distribution after sale.....	741-	29
Distribution of fund paid into court.....	710-	22
Distribution of moneys paid into court.....	504-	5
Executors entitled to notice.....	705-	9
Form of appointment of auditor.....	708-	14
Form of auditor's subpoena.....	708-	15
Form of citation.....	708-	13
Form of decree of court for petitioner.....	709-	17
Form of decree of discharge.....	710-	21
Form of notice.....	504-	7
Form of order for citation.....	707-	12
Form of petition.....	707-	11
Intention to charge indicated by will.....	701-	3
Interest of devisee.....	740-	25
Liable to what extent.....	737-	19
Land lying in another county.....	709-	18
Owner may pay into court.....	503-	2
Payment into court by devisee or owner.....	710-	20
Petition for discharge of lien.....	502-	1
Petition of legatee.....	706-	10
Proceedings to relieve land from.....	503-	3
Provisions for maintenance, etc.....	703-	6
Recovery in Orphans' Court.....	703-	7, 8
Satisfaction of, on petition.....	711-	23
Widow's interest.....	353-	82
CHARGE ON RESIDUARY ESTATE, DISINCUMBERING ..	840-	1
CHARITABLE AND RELIGIOUS USES.		
Accumulations for.....	294-	30

CHARITABLE AND RELIGIOUS USES — (Continued)		PAGE	PAR.
Bequests, when void or not.....	573-		6
Doctrine of <i>cy pres</i>	576-		10
Donees and trustees.....	576-		11
Effect of new will or codicil.....	571-		3
Form of will evading restraint.....	577-		12
Gifts void for vagueness.....	572-		6
Gifts — when not to fail.....	574-		8
Seek aggregates rather than segregates.....	573-		6
Will, restraint upon time.....	570-		1
CHATELS DISTINGUISHED FROM GOODS.....	126-		3
CHESTER COUNTY, COSTS, RULE AS TO.....	334-		46
CHILD.			
Adoption as heir.....	468-		25
<i>En ventre sa mere</i>	803-		47
<i>En ventre sa mere</i> , next friend.....	598-		32
Unborn, gift to.....	724-		11
CHILDREN.			
Adopted, beneficiaries.....	724-		13
Advancements to.....	481-		52
Birth, effect on will.....	583-	13, 14	
Dead, when will was made.....	684-		34
Exemption without demand.....	52-		20
Exemption, when entitled.....	47-		12
Gifts to.....	683-		33
Include grandchildren, when.....	721-		6
Interpretation of.....	774-		21
Order of maintenance.....	234-		48
Posthumous — equal heirs.....	473-	33-4	
Word of purchase generally.....	756-		17
CHOSES IN ACTION OF TESTATOR, PASSING TO EXECU- TOR	125-		2
CHOSES IN ACTION, WIDOW MAY RETAIN.....	55-		28
CHURCH LAWS — trustee.....	929-		1
CHURCH AND STATE, the law of the land.....	573-	n14	
CITATIONS.			
Account	867-		5
Account to be filed by administrator.....	383-		3
Account, answer by administrator.....	384-		5
Default in collateral tax payments.....	206-		17
Defined	80-		23
Executor to file account.....	865-	1, 2	
Form, administration account.....	383-		4

PAGE

.....	257-
.....	171-
.....	258-
.....	257-
.....	74-
.....	648-
.....	599-
.....	287-
.....	80-
....	80-
....	192-
....	948-
....	935-
....	358-
...	474-
...	527-
..	112-
..	424-
..	425-
..	427-
.	111-
.	431-
.	423-
.	113-
.	114-
.	428-
.	641-
.	429-
	607-
	682-
	462-
	475-
	'25-
	'25-
	6-
	16-
	12-
	17-
	2-
	4-
	3-

CLERK OF ORPHANS' COURT — (Continued)	PAGE	PAR.
Assistants of separate Orphans' Courts.....	5-	9
Phila., fees.....	9-	22
CLERKS, PHILA., SALARIES OF.....	7-	15
COAL, SUBJACENT, WHEN CARRIED BY WILL.....	731-	4
COAL AND TIMBER RIGHTS — PARTITION.....	312-	10
CODICIL.		
Effect on will.....	670-	20
Form	564-	3
Office in Pennsylvania.....	564-	4
Origin of, Roman.....	563-	1
Probate with original will.....	561-	30
Probate with original will.....	564-	4
Republication of will.....	565-	5
Revocation of will.....	670-	21
Revocation of will.....	580-	5
Separate use trust created by.....	921-	43
Use of in England.....	563-	2
CO-EXECUTORS.		
Character and relation.....	877-	29
Joint account.....	878-	30
Liability, when joint and when several.....	878-	30
COGNATION, LINEALS DESCENDING AND ASCENDING	474-	36
COKE, RULES FOR MAKING A WILL.....	536-	12
COLLATERAL ATTACK OF DECREES OF ORPHANS'		
COURT	4-	6
COLLATERAL ATTACK OF DECREES OF ORPHANS'		
COURT	506-	1
COLLATERAL HEIRS, CLASSES.....	475-	41
Half-blood, descent of realty.....	476-	43
Inheritance by.....	461-	11
Void or lapsed legacies.....	681-	30
COLLATERAL INHERITANCE TAX.		
Appointment of appraiser.....	204-	12
Bequests, when payable.....	200-	2
Citation to parties in default.....	206-	17
Collection by executors, etc.....	202-	5
Collection by register.....	206-	16
County treasurer to collect when.....	207-	20
Discount and interest.....	201-	4
Executors, etc., to notify register.....	202-	8

INDEX.

COLLATERAL INHERITANCE TAX — (Continued)	PAGE
Executor's receipts for.....	203-
Foreign executors' payment.....	204-
Form of appointment of appraiser.....	205-
Form of appraisement.....	205-
Legacy charged on land.....	202-
Lien until paid.....	208-
Legacy, limited, etc.....	202-
Non-residents' liability.....	199-
Parties liable.....	198-
Penalty for taking fee, etc.....	206-
Record of appraiser's return.....	206-
Register's quarterly return.....	207-
Repayment	204-
Reversionary interests.....	200-
COMITY BETWEEN STATES AND COUNTRIES.....	630-
COMMISSIONS, BEYOND THE STATE.....	92-
Competency of witnesses.....	117-
Evidence, etc.....	91-
Examination of witnesses.....	37-
Power of register to issue.....	551-
Proof of will.....	545-
Trustee, discretionary.....	951-
Trustee, on real estate.....	951-
COMMISSIONER, FORM OF REPORT ON DEPOSITIONS..	554-
COMMISSIONERS, determining curtilage of reservation..	846- 10
Partition by.....	313-
COMMITTEE AD LITEM, SERVICE UPON.....	322-
COMMITTEE, INVESTMENT OF FUND.....	281-
COMMITTEES, LUNATICS, SERVICE, PRICE ACT.....	287-
COMMON LAW, JUDGMENT AT.....	833-
COMMON PLEAS.	
Ascertainment of claim in.....	397-
Concurrent jurisdiction.....	424-
Jurisdiction under Price Act.....	274-
Precept to, in partition.....	323-
Question of title, for.....	320-
Trial of issue <i>d.v.n.</i>	605-
COMMON RECOVERY, as destroying a contingent remainder	782-
COMMONWEALTH, BAR, AS TO DECEDENTS' ESTATE...	429-

	PAGE	PAGE
COMMONWEALTH, ESTATE LIMITED, IN ESCHEAT....	488-	13
COMMUNIS ERROR FACIT JUS.....	713-	n8
COMPENSATION.		
Claim for additional.....	112-	16
Guardian	266-	115
Guardian, amount.....	266-	116
Guardian, loss of.....	267-	117
Judges holding Equity Courts.....	9-	20
Register, collateral tax.....	207-	18
Trustee, allowance.....	952-	46
Trustee, increase or decrease.....	952-	45
Trustee	950-	42
Trustee, forfeiture for bad faith.....	953-	47
See " Fees."		
COMPETENCY, MAKING A WILL.....	537-	13
COMPETENCY OF WITNESSES.....	116-	20
Competency of witnesses.....	91-	47
Competency of witnesses.....	117-	23
Competency of witnesses, scope of acts.....	117-	24
Competency of witnesses, scope of acts.....	555-	19
COMPETENCY, WITNESSES TO CHARITABLE REQUEST.	572-	4
COMPROMISE, CONTEST OF WILL.....	791-	10
COMPROMISES, GUARDIAN WITH WARD.....	230-	43
CONCLUSIVENESS.		
Accounts, extent of.....	507-	2
Distribution, extent of.....	507-	3
Auditor's findings.....	94-	58
Decrees	508-	4
Partition proceedings.....	374-	123
Probate of will.....	557-	26
CONDITIONS.		
Effect of annexing.....	785-	3
Forfeiture	786-	6
Imposed by codicil.....	784-	n8
CONDITION WITH A LIMITATION.....	675-	15
CONDITIONAL LIMITATION DISTINGUISHED FROM RE- MAINDER	767-	5
CONDITIONS PARTICULAR IN A WILL.....	785-	4
CONDITIONS PRECEDENT IN A WILL.....	784-	2

	PAGE	PAG.
CONDITION PRECEDENT — MARRIAGE, ETC.	784—	n11
CONDITIONS IN A WILL	783—	1
CONDITIONS SUBSEQUENT	774—	22
CONDITIONS SUBSEQUENT	786—	5
Valid nuncupation.....	567—	4
CONFIDENTIAL RELATION	116—	21
Effect on burden of proof.....	611—	52
CONFIRMATION.		
Account of administrator, effect.....	393—	21
Accounts, form of.....	387—	13
Accounts, notice first to be given.....	385—	7
Appraisement, conclusive.....	640—	9
Manner of on accounts.....	387—	12
Report, effect.....	94—	57
Sale, nisi.....	151—	33
Sale by guardian.....	247—	77
Sale, partition.....	363—	102
CONSENT, AGE OF, IN FEMALE	212—	2
Heirs, to purchase by administrator.....	150—	30
CONSIDERATION — EXECUTOR'S SALE	824—	9
CONSTITUTION OF 1790 — AS TO ORPHANS' COURTS...	3—	4
CONSTITUTION OF 1873 — AS TO ORPHANS' COURTS...	3—	4
CONSTRUCTIVE POSSESSION	200—	n12
CONSUME, POWER TO EFFECT ON ESTATE	733—	7
CONTEST, SALES OF REAL ESTATE	155—	44
CONTEST OF A WILL.		
Addition, etc., of parties.....	599—	37
Appeals	615—	61
Compromise of encouraged.....	791—	16
Costs	615—	62
Effect	616—	63
Fixing security.....	600—	39
Forfeiture by.....	787—	8
Issue upon the right.....	598—	33
Issue when awarded or refused.....	602—	43
Party entitled.....	597—	32
Loss of right by laches.....	600—	38
Notice	599—	34

CONTEST OF A WILL — (Continued)	PAGE	PAR.
Replication, etc.....	595-	25
<i>Res judicata</i>	616-	64
Verdict and judgment — costs.....	614-	58
See "Will"; also, "Issues <i>d.v.n.</i> "		
CONTINGENT CONCURRENT REMAINDERS.....	776-	26
CONTINGENT GIFTS.....	744-	35
CONTINGENT INTERESTS, PROTECTION.....	715-	33
CONTINGENT LEGACIES AND DEVISES.....	742-	31
CONTINGENT REMAINDER.....	745-	n25
Defined	768-	7
Defined	770-	12
Classes	769-	9
May become vested remainder.....	769-	10
Quasi-remainder	767-	4
CONTRACT, ANTE-NUPTIAL.....	482-	53
CONTRACT, SALE OF LAND BY CO-TRUSTEE.....	829-	18
CONTRACT OF DECEDENT.		
Kind which may be enforced.....	189-	5
Approval of report of auditor.....	193-	11
Deed by administrator.....	196-	18
Deed by executor, etc.....	195-	15
Deed when executor is purchaser.....	195-	16
Form of decree.....	193-	12
Form of petition.....	191-	7
Lands held in common.....	196-	17
Notice	190-	6
Notice	188-	2
Notice, form of acceptance of.....	192-	8
Parol, decedent.....	188-	3
Proof on death of joint vendor.....	194-	13
Recording decree.....	194-	14
Requisites of petition.....	189-	4
Specific performance.....	187-	1
CONTRIBUTION, DISTRIBUTION OF ESTATE.....	434-	25
CONTRIBUTION AND MARSHALING, UNDER DEVISES..	739-	23
CONVERSION, POWER TO SELL.....	827-	16
CONVERSION, SALE IN PARTITION.....	374-	122
CONVERSION, UNDER WILL.....	828-	17

	PAGE	PAGE
CONVEYANCE, END OF TRUST	919-	40
CONVEYANCE, PRICE ACT	289-	22
COPIES OF PAPERS, ETC., TO BE CERTIFIED BY REGISTER	37-	29
COPY — WILL, MADE IN ANOTHER STATE, FILING....	561-	31
CORPORATION.		
Adult <i>c'estuis que trustent</i> to consent in writing.....	832-	25
Devises to, notice.....	642-	13
Executors may join in.....	831-	23, 24
Executor may vote stock.....	643-	15
Guardian, rules as to.....	220-	19
Sanction of Orphans' Court to executors joining in....	832-	26
CORPUS OR CHATTELS IN SPECIE	794-	23
Carried by gift of income, when.....	792-	17
Legatee may take, on giving security.....	843-	6
Power to consume.....	794-	23
COSTS.		
Action for legacy, discretionary.....	713-	29
Apportionment	448-	64
Attachment and execution for.....	449-	66
Attorney's fees, collateral tax.....	206-	17
Bill of in separate Orphans' Courts.....	9-	21
Contest of will.....	615-	62
Contest of will, order appealable.....	595-	24
Filing guardian's account.....	264-	112
Fixing amount.....	448-	65
Generally	102-	82
Generally, Vol. II, Johnson.....	P. 79-	
Issue	894-	5
Issue <i>d.v.n.</i>	614-	58
Liability for.....	103-	85
Liability of accountant for.....	446-	62
Liability of the loser.....	447-	63
Partition, generally.....	375-	128
Payable out of estate in partition.....	376-	129
Before register, recovery.....	42-	39
Security for.....	449-	67
Security for, on caveat.....	587-	4
Separate Orphans' Courts.....	102-	81
CO-TRUSTEES, LIABILITY, JOINT OR SEVERAL.....	957-	55
COURT.		
Decree of — character, etc.....	506-	1

COURT — (Continued)	PAGE	PAG.
Payment into.....	417—	8
Province of — and jury, will contests.....	613—	57
Powers in escheat.....	487—	10
COURT OF RECORD — ORPHANS' COURT IS.....	4—	6
COUNSEL FEES.....	102—	84
Legal expenses, trustee's account.....	950—	41
COUSINS, HALF-BLOOD AND WHOLE BLOOD.....	477—	43
COUNTIES, DIVISION OF LANDS BY LINES.....	314—	12, 13
COUNTIES — SEPARATE ORPHANS' COURTS IN.....	5—	8
COUNTY TREASURER, COLLATERAL TAX, when to collect	207—	20
COVENANT OF WARRANTY — EXECUTOR'S LIABILITY	636—	5
CRAWFORD COUNTY, RECORDS OF REGISTER.....	36—	28
CREDITORS.		
Actions for claims.....	424—	8
Application for sale of real estate.....	136—	4
Claims by.....	425—	10
Claims against estate.....	423—	7
Claims against estate.....	424—	8, 9
Interest on legacy.....	697—	12
Legacy to.....	680—	28
Lien, as purchaser.....	155—	43-5
Proof of claims, sufficiency.....	425—	11
Proof, insufficient when.....	427—	15
Remedy against distributee.....	397—	25
CREDITS AND ALLOWANCES.....	261—	107
CROPS, APPRAISEMENT OF.....	55—	30
CROSS REMAINDERS.....	775—	23
CUMBERLAND COUNTY, EXCEPTIONS TO ACCOUNTS...	263—	110
CURTESY.		
Initiate and fructified.....	654—	3
Loss or bar of.....	657—	6, 7
Nature of the estate.....	653—	2
Tenancy by, defined.....	652—	1
Tenant by, right to bid in partition.....	317—	18
CURTILEGE, IN WILL.....	731—	4
CURTILEGE DETERMINED, HOW.....	846—	10, 11, 12

	PAGE	PAGE
CUSTODY, COURT HAVING, JURISDICTION IN ESCHEAT	486-	6
CUSTODY OF ESTATE, BY EXECUTOR	819-	1
CUSTOM OF KENT	581-	n13
CY PRES —applied to wills.....	575-	10
DEATH BENEFITS, CONTESTS FOR	876-	23
DEATH.		
Calendar month, within, effect on will.....	570-	1, 2
Contingency, gift over.....	744-	33
Decedent—affidavit	28-	6
Decedent—affidavit, form.....	28-	7
Determines status of debts.....	129-	12
Fiduciary, deed how made.....	165-	59
Fixes rights of parties.....	478-	48
Form of proof of.....	617-	1
Lineal legatee, effect on lineal issue.....	746-	37
Time when will takes effect.....	659-	1
Trustee, title after.....	367-	112
And life, presumption of each.....	851-	1
DEBTS OF DECEDENT		
Application to, distribution.....	436-	30
Assets for payment of.....	126-	4
Bequest subject to.....	430-	18
Confidential relation of claimant.....	116-	21
Decree divesting lien.....	123-	29
Effect of will, on.....	429-	17
Estate when not liable.....	367-	113
Evidence, admissibility.....	115-	20
Exclusive power of Orphans' Court.....	123-	30
Executor bound to pay.....	635-	5
General	109-	11
Interest on.....	110-	12
Judgments, order of.....	130-	14
Jurisdiction of Orphans' Court.....	19-	7
Lien of general or unsecured.....	641-	12
Lien, relieving land from.....	122-	27
Limitation	429-	16
Medical attendance.....	105-	5
Mortgage	131-	15
Order of payment.....	105-	4
Parent and child.....	113-	17
Personalty first liable for.....	105-	3
Preference of liens.....	130-	13
Preference of payment.....	104-	2

DEBTS OF DECEDENT — (Continued)	PAGE	PAR.
Reference to master or examiner to ascertain.....	122-	28
Sale or mortgage of real estate for payment.....	133-	1
Status when determined.....	129-	12
Testator's, payment of.....	641-	12
Time of payment.....	121-	25
DEBTS DUE DECEDENT.		
Assets of estate.....	125-	2
Distributee to estate, set off.....	433-	24
Included in inventory.....	45-	5
Executor's becomes asset of estate.....	45-	6
Executor's becomes asset of estate.....	619-	4
Executor's becomes asset of estate.....	640-	9
Time	122-	26
DEBTOR, DISCHARGE BY WILL.....	679-	26
DEBTOR, LEGACY TO.....	679-	27
DECEDENT, CONTRACTS OF — ENFORCEMENT.....	188-	2
DECEDENT.		
Contracts, petition for performance.....	189-	4
Goods, inventory of.....	44-	3
Non-resident, jurisdiction of asset.....	630-	22
Parol contracts of.....	188-	3
DECLARATIONS, TESTATOR AND BENEFICIARIES.....	613-	55
DECREES.		
Accounts, <i>res adjudicata</i> — as to.....	507-	2
Appeal from.....	523-	1
Appeal from register, on will.....	594-	23
Charge on land.....	709-	17
Conclusiveness of.....	508-	4
Conclusiveness and character.....	506-	1
Definitive, appeal from.....	524-	4
Delivery of trust property.....	516-	21
Disposition of trust property.....	516-	22
Distribution	879-	31
Distribution, form.....	520-	34
Divesting land of lien.....	123-	29
Effect in Orphans' Court.....	97-	68
Enforcement	95-	59
Enforcement	509-	6
Enforcement by execution.....	513-	15
Escheat, filing copy.....	490-	20
Evidence	509-	5
Final, when entered.....	516-	25

DECREES — (Continued)

	PAGE	PAG.
Finality of.....	876-	25
Form of petition for attachment.....	511-	8
Form, removal of ward.....	522-	37
Form, specific performance.....	193-	12
Form of writ of sequestration.....	516-	26
Maintenance, form.....	236-	51
Petition for order to pay over.....	510-	7
<i>Pro confesso</i> , for want of appearance.....	83-	30
Recording, specific performance.....	194-	14
<i>Res judicata</i> as to distribution.....	507-	3
Reversal, effect.....	510-	6
Satisfaction of.....	98-	69
Sequestration on non-appearance.....	516-	23
Setting aside sale, form.....	172-	73
Time to defend against.....	516-	24
Transfer to other counties.....	95-	62

DEEDS.

Clerk of court, when trustee dies.....	367-	112
Death of fiduciary, how executed.....	165-	59
Execution when legal representative is incapacitated..	165-	58
Execution on specific performance.....	195-	15
Executor as purchaser, specific performance.....	195-	16
Form of.....	163-	57
Power of surviving fiduciary.....	166-	60
Purchaser, to.....	160-	54
Recording of.....	298-	44
Survivors or successors, by.....	298-	42

DEED OR MORTGAGE ACKNOWLEDGMENT.....	296-	39
---	------	----

DEEDS AND MORTGAGES, BY TRUSTEES.....	945-	34
--	------	----

DEFICIENCY IN ANNUITY, MAKING UP.....	698-	16
--	------	----

DEFICIENCY, PERSONALTY, CHARGE ON LAND.....	702-	4
--	------	---

DELAWARE, EXECUTION OF WILL.....	543-	29
---	------	----

DELAWARE, WILL TO CHARITY.....	571-	3
---------------------------------------	------	---

DELUSIONS.

Affecting validity of will.....	607-	47
Defined with reference to a will.....	608-	48
Ground for contest of will.....	604-	44

DEMAND, BEFORE ACTION FOR LEGACY.....	711-	25
--	------	----

DEMAND — INSUFFICIENT TO TOLL STATUTE.....	428-	15
---	------	----

DEMONSTRATIVE LEGACY.....	678-	22
----------------------------------	------	----

	PAGE	PAGE
DEMONSTRATIVE AND SPECIFIC LEGACIES, ABATEMENT	688-	41
DEMURRER	84-	31
Form	84-	32
Petition for citation	867-	4
DEPOSIT—MONEY PAID INTO COURT—TRUST COMPANY	505-	9, 10
DEPOSIT, TRUST COMPANY, ORDER OF COURT	962-	3
DEPOSITIONS, ALLEGHENY COUNTY	92-	48, 49, 50
Commissions to take	551-	11
Form of report of commissioner	554-	17
Motions, etc., Allegheny	93-	51
DEPOSITORY, MONEY PAID INTO COURT, PHILA.	366-	110
DEPUTY REGISTER OF WILLS, APPOINTMENT	27-	2
DESCENT , see "Inheritance."		
DESCENT, LAW OF	458-	6
DESCENT, WHEN LEGACY IS VOID OR LAPSES	681-	29
DESCENT, LINEALLY, OF REALTY	459-	9
DESCENT , new stem of, the test of the exclusion of the rule in Shelley's case	756-	16
DESCENDANTS, COLLATERAL, PARTITION TO	311-	6
DESERTION, HUSBAND FORFEITS RIGHT IN WIFE'S ESTATE	657-	6, 7
DESTRUCTION—EXECUTORY DEVISE	765-	14
DEVASTATION, EXECUTOR, HOW COMMITTED	636-	6
DEVASTAVIT, PLEADINGS	183-	15
DEVOLUTION, LEGAL TITLE OF TRUST ESTATE	916-	34
DEVISES.		
Avoiding the rule in Shelley's case	749-	2
Bodies corporate—notice	642-	13
Class, rule as to death of one or more	771-	15
Condition not to marry	740-	27
Contribution	434-	25
Contribution and marshaling	739-	23

INDEX.

	PAGE
DEVISE, DEDUCTION FROM	787-
General, includes what.....	739-
Impinging rule against perpetuities falls immediately to the heirs.....	804-
Nature of.....	730-
Passes whole estate.....	730-
Subject to charges.....	800-
Subject to incumbrances.....	742-
Unequal portions, partition.....	311-
Vested and contingent.....	742-
Widow in lieu of dower... ..	649-
DEVISEE, ACCEPTING, LIABLE FOR INTEREST, WHEN	739-
Interest in sum charged.....	740-
Right to take at the appraisement.....	735-
DIRECTION TO SELL	799-
DISCHARGE.	
Administrator	60-
Administrator or executor.....	881-
Administrator, effect.....	61-
Dower, legacies, etc., after presumption of payment....	848-
Fiduciaries, Phila.....	72-
Form of decree.....	70-
Form of decree.....	72-
Guardian	268-
Guardian, application.....	269-
Guardian, domestic.....	268-
Guardian, form of petition.....	270-
Land from charges.....	846-
Legacy by sale.....	741-
Lien on land.....	502-
Lien on land.....	503-
Manner of procuring.....	61-
Residuary estate.....	842-
Residuary estate, purpose of the act.....	842-
Sureties of administrator.....	883-
Surety of guardian.....	223-
Trustee	956-
DISCLAIMER TO PETITION	85-
DISINHERITANCE, RULE AS TO	663-
DISMISSAL, EXECUTOR	882-
Executor for disability.....	834-
Trustee for misbehavior.....	908-

	PAGE	PAG.
DISCONTINUANCE OF PETITION.....	89-	41
DISCOUNT, COLLATERAL TAX.....	201-	4
DISCRETION OF COURT — APPOINTMENT OF GUARDIAN	214-	4
“DISPOSING MIND AND MEMORY”.....	606-	47
“DISPOSING MIND AND MEMORY”.....	609-	49
DISPUTES, REFERENCE BY WILL TO PERSONS NAMED	790-	14
DISSOLUTION, EXECUTION, ON SECURITY.....	514-	18
DISTINCTION BETWEEN ESTATE AND EASEMENT OR PRIVILEGE	732-	7
DISTINCTION BETWEEN ADMINISTRATOR AND EXECU- TOR	173-	1
DISTRESS BY EXECUTORS, ETC.....	176-	6
DISTRESS — WIDOW'S DOWER INTEREST.....	361-	95
DISTRIBUTUTES.		
Ascertainment of claim against.....	397-	25
Claims against.....	373-	120
Claims against — jurisdiction.....	396-	25
Refunding bond required.....	450-	69, 70
Security to refund.....	368-	114
Set-off of debt against share.....	433-	24
DISTRIBUTION.		
Administrators when not liable to creditors.....	450-	68
Advancements	434-	24
Annuities or charges.....	433-	23
Application to debts.....	436-	30
Appointment of auditors.....	420-	1-2
Apportionment of costs.....	448-	64
Assets of trust company.....	963-	11
Audit, re-opening.....	439-	39
Auditing judge, by.....	439-	40
Auditor, duties, etc.....	422-	6
Balance of account.....	875-	22
Balance being in property.....	415-	4
Balance due by administrator.....	413-	1
Bar of party.....	877-	26
Claims before auditor.....	431-	20
Claims of creditors.....	424-	8, 9
Claims of legal representative.....	433-	22
Claims of non-residents.....	433-	21

DISTRIBUTION — (Continued)	PAGE	PAG.
Conclusiveness of decree.....	507-	3
Costs, liability of accountant.....	446-	62
Death benefits.....	876-	23
Decree.....	879-	31
Delay as affecting interest.....	699-	17
Different from settlement.....	417-	7
Effect, by auditor.....	452-	75
Equalization of partial.....	435-	27
Estate of absentee.....	911-	23
Executor's interest in.....	417-	6
Expenses of administration.....	430-	19
Form of petition to compel.....	454-	78
Fund paid into Court.....	710-	22
Further assets.....	436-	28
Issue on.....	97-	67
Liability of loser for costs.....	447-	63
Manner of.....	414-	3
Marshaling, contribution and subrogation.....	434-	25
Modes and rules, after sale.....	371-	119
Particular circumstances.....	416-	5
Payment to counsel.....	446-	61
Personal estate by inheritance.....	459-	9
<i>Per stirpes</i> and <i>per capita</i>	462-	15
Presentation of claims.....	423-	7
Proceeds of real estate.....	479-	49
Proceeds of sale of land charged.....	741-	29
Proof of claims.....	425-	10
Refunding bonds.....	432-	20
Restitution by distributee.....	451-	74
Risk of fiduciary, at.....	436-	29
Sale in partition, after.....	369-	117
Security, without, when.....	845-	9
Set-off against share, debt due decedent.....	433-	24
Stay or suspension of.....	414-	2
Stocks, bonds, etc. in kind, Act June 10, 1911		
Suspension pending appeal, etc.....	445-	61
Trust estate.....	919-	41
Will, under.....	435-	26
DIVIDENDS, LEGACIES.....	696-	9
DIVIDENDS, ETC., FROM STOCK.....	795-	25
DIVORCE, DEVISE TO HUSBAND OR WIFE.....	723-	10
DIVORCE, EFFECT ON EXEMPTION.....	49-	12
DOCKET OF REGISTER.....	27-	4
DOCKET — PARTITION.....	375-	126

	PAGE	PAG.
DOCTOR'S BILLS	106-	5
DOCTOR'S COMMONS — CITATION DERIVED FROM	2-	2
DODDERIDGE, JUSTICE, WENTWORTH ON EXECUTORS, ASCRIBED TO	633-	n1
DOMICIL OF ADMINISTRATOR, AS TO JURISDICTION ..	19-	8
Collateral tax.....	204-	12
Defined	578-	1
Description in will.....	579-	2
Law as to preference.....	109-	10
Nuncupation, relation to.....	587-	2
Orphans' Court may determine.....	629-	21
Respecting personalty.....	579-	3
Respecting realty.....	580-	4
Transmission of fund to.....	879-	32
Ward, change of.....	214-	4
DONATIO MORTIS CAUSA	532-	3
DONATIO MORTIS CAUSA AND GIFT INTER VIVOS	533-	4
DONATIO MORTIS CAUSA, rights of executor	635-	4
DONEES AND TRUSTEES OF CHARITABLE, ETC., USES	576-	11
DOWER, WIDOW'S.		
Collection of interest.....	360-	95
Devise to widow in lieu of.....	649-	11
Discharge after presumption of payment.....	848-	16
Discharge, jurisdiction.....	504-	4
Election of, citation.....	358-	91
Form of citation to elect.....	359-	93
Form of petition for citation to widow.....	359-	92
Form of widow's election.....	360-	94
Sale of interest by <i>vend. ex.</i>	361-	96
Status of.....	355-	85
DRY TRUST	940-	25-n15
DRUNKARD, HABITUAL, WILL OF	557-	25
DRUNKARD, HABITUAL, ETC., WILL	609-	49
EASEMENT OR PRIVILEGE DISTINGUISHED FROM ES- TATE	732-	7
ECCENTRICITIES — WILLS	606-	47
ELECTION.		
Husband against wife's will.....	459-	7

ELECTION — (Continued)	PAGE	PAR.
Husband against wife's will.....	656-	5
Legatees to take land.....	824-	7
Loss of right by widow.....	645-	5
Widow, for or against a will.....	644-	1
Widow, for or against a will.....	358-	91
Widow or husband, recording of.....	651-	16
Will, necessity to make.....	789-	12
EMANCIPATION, FEMALE AT 18.....	212-	2
EMBLEMENTS AS ASSETS.....	129-	10
EMBLEMENTS, WILLED BY LIFE TENANT.....	538-	17
ENFORCEMENT OF ORDERS AND DECREES.....	95-	59
ENTIRETIES, ESTATE BY.....	473-	35
EQUALIZATION ACT OF 1855, HUSBAND AND WIFE... 	655-	4
EQUALIZATION, PARTIAL DISTRIBUTIONS.....	435-	27
EQUALIZATION, PURPARTS IN PARTITION.....	329-	36
EQUITABLE ASSIGNMENT BY MORTGAGE.....	356-	86
EQUITABLE POWERS OVER MINOR'S ESTATE.....	220-	20
EQUITABLE POWERS OF ORPHANS' COURT IN INJUNCTIONS	497-	1
EQUITY.		
As administered in the Orphans' Court.....	14-	1
Bill to settle partnership account.....	3-	3
Cases, heard by judges of separate Orphans' Courts....	8-	17
Cases, heard by judges of separate Orphans' Courts....	9-	19-20
Court of, jurisdiction as to will.....	616-	65
Distinguished from law.....	497-	n9
Orphans' Court accounts.....	395-	23
Orphans' Court not a court of.....	2-	3
Replication in.....	88-	38
Rules in Phila.....	74-	n1
Spirit of fair play.....	748-	1
ERASURES, ETC., IN A WILL.....	557-	24
ESCHEATS.		
Act of 1911, see insert.....	484-	1
Appeal — supersedeas	490-	17
Auditor general, appoint escheator.....	485-	4
Bar, after 21 years.....	495-	33
Bond by escheator.....	490-	19

ESCHEATS — (Continued)

	PAGE	PAG.
<i>Cestui que trust</i> unknown for seven years.....	485-	3
Collection of rents.....	491-	22
Dispute about the reward.....	495-	32
Estate of commonwealth limited.....	488-	13
Estates, kind and time.....	484-	1
Exceptions	489-	16
Failure of heirs.....	482-	53
Fees	495-	34
Filing copy of final decree.....	490-	20
Finding and adjudication.....	489-	15
Informers	485-	4
Informers share — bond to refund.....	494-	31
Issue on dispute, trial, appeal, etc.....	489-	14
Jurisdiction, court having custody.....	486-	6
Jurisdiction of the Orphans' Court.....	486-	5
Notice in case of real estate.....	488-	11
Orders, etc., enforced by attachment.....	494-	30
Payment into state treasury.....	493-	27
Power of court over account, etc.....	487-	10
Proceeding by petition and citation.....	486-	8
Proceedings, real estate in another county.....	492-	26
Property in court, seven years.....	484-	2
Purchase money, application.....	492-	25
Recovery of property of intestate.....	488-	12
Reversal or modification.....	490-	18
Sale of real estate — security.....	491-	23
Statement and description of real estate.....	487-	9
Surrender of moneys, sale of personalty.....	491-	21
Tax title saved.....	493-	27
Title of purchaser — incumbrances.....	492-	24
Traverse within three years — practice.....	493-	29

ESCHEATOR.

Appointed by auditor general.....	485-	4
Bond by.....	490-	19
Letters of administration to.....	486-	7

ESTATE.

Allowance for ward's support from.....	241-	62
Assets of.....	640-	10
Comprehends what.....	729-	1
Curtesy, by, immune from execution during marriage..	654-	3
Sale under <i>vend. ex.</i>	654-	2
Defeasible on re-marriage.....	733-	7
Devise of, covers what.....	730-	4
Devised, guardian of.....	862-	8
Distinguished from easement or privilege.....	732-	7
Guardian of.....	227-	38

ESTATE — (Continued)

	PAGE	PAR.
"Portion," etc., in will.....	800-	38
<i>Pur autre vie</i>	771-	26
<i>Pur autre vie</i>	794-	21
Residuary, disincumbering of charge with legacies.....	840-	1
Restraint or alienation, when not cut down by.....	802-	44
Tail, enlarged to a fee, tenant by curtesy.....	653-	1
Tenancy by the curtesy.....	653-	2
Transfer to foreign trustee.....	909-	18
Transfer of fund from domestic to foreign guardian...	886-	4

ESTATE OF ONE PRESUMED DEAD.

Administration	851-	2
Bond refunding, form.....	858-	24
Bonds, municipal, investment in.....	855-	15
Costs of administration	853-	10
Decision, probate of will, revocation.....	853-	13
Distribution of fund.....	852-	8
Form, advertisement.....	857-	20
Form, advertisement, notice of hearing.....	858-	22
Form, certificate of register.....	856-	18
Form, decree directing advertisement.....	856-	19
Form, decree upon hearing.....	857-	21
Form, directing letters to issue.....	858-	23
Form, petition to register, estate of presumed dead....	856-	17
Form, refunding bond.....	858-	24
Ground rents, investment in.....	855-	16
Investment, bonds of municipality.....	855-	15
Investment of fund.....	852-	8
Investment of trust moneys.....	854-	14
Letters when issued.....	851-	6
Notice	851-	5
Proceedings after revocation of letters.....	852-	9
Probate of will, when discovered.....	853-	11
Register to issue citation.....	853-	12
Revocation of letters, when presumed dead is alive....	852-	7
Security to refund.....	852-	8
Statute of repose — presumption of death.....	851-	6
Will of one presumed dead, probate.....	853-	11
Witnesses, competent, though interested.....	851-	4

ESTATES ABROAD.

Classes	884-	1
Austria-Hungary, treaty.....	886-	3, 4
Bavaria	886-	5
Belgium	887-	6
France	887-	7
Germany	887-	8

ESTATES ABROAD — (Continued)	PAGE	PAG.
Great Britain.....	888—	9
Greece	889—	10
The Netherlands.....	889—	11
Italy	890—	13
Prussia	890—	12
Russia	890—	14
Scandinavia	891—	16
Spain	891—	15
 ESTATES.		
Blending, charge on land.....	702—	5
Intention and power to pass.....	728—	1
Property that may be sold.....	139—	7
<i>Pur autre vie</i> , go to executor.....	46—	9
Spendthrift trust.....	926—	52
 ESTATES TAIL, FROM ENGLISH LAWS.....	457—	1
Failure of issue.....	803—	46
Preferred to executory devises.....	763—	8
 ESTATES, UNFETTERING —“THE PRICE ACT”.....	274—	1
 ESTATES, VESTED AND CONTINGENT.....	743—	32
 ESTOPPEL, ELECTION TO TAKE UNDER A WILL.....	789—	12
 ESTOPPEL, TITLE BY	163—	56
 ESTREPEMENT, DECEDENT'S ESTATE.....	Vol. II, P. 670—	31
 EVIDENCE.		
Admissibility and sufficiency.....	115—	20
Admission by auditor.....	91—	45
Admission by examiner.....	91—	46
Commissioners, etc.....	91—	47
Decree as.....	509—	5
Experts — admissible but dubious.....	612—	54
Extrinsic, of testamentary intent.....	534—	7
Will as.....	613—	56
Will, incapacity or undue influence.....	612—	53
Witnesses, trial of issue <i>d.v.n.</i>	606—	46
 EXAMINATION, ACCOUNTS, BY COURT.....	386—	11
Register's accounts.....	37—	32
 EXAMINER.		
Practice before.....	90—	44
Reference to.....	89—	40, 42
Taking of evidence by.....	91—	46
Trust companies.....	962—	7

	PAGE	PAG.
EXCEPTIONS.		
Accounts	388-	14
Account	874-	17
Administration account, form	390-	16
Account of guardian	263-	110
Accounts and decrees, Allegheny county	390-	15
Appraisement	56-	33
Auditor, time of taking	425-	10
Auditor's report	709-	16
Bond of administrator	34-	22
Form, appointment of auditor	875-	21
Inventory and appraisement	639-	9
Petition	86-	36
Rules of court	389-	15
EXCLUSION FROM A CLASS, WORDS IN WILL	725-	15
EXECUTION IN THE ORPHANS' COURT	100-	77
Administration account, balance	392-	20
Costs	449-	66
Defendant having left—practice	514-	17
Dissolution, on security given	514-	18
Enforcement of decree, by	513-	15
Form, order staying	520-	33
Form, petition to stay	520-	32
Issuing writ in Orphans' Court	514-	16
Legacy for, stay for want of assets	712-	27
Petition for, form	518-	29
<i>Sci. fa.</i> to issue first	180-	11
Sheriff to seize trust property	514-	19
Stay of, until executors can sell	182-	13
EXECUTOR, OFFICE OF	633-	2
Acceptance or renunciation	620-	6
Account, joint, separate, etc.	868-	9
Account, when not compelled	866-	3
Acting, and administrator <i>c.t.a.</i> powers	624-	13
Acting, power over real estate	624-	12
Actions by	175-	5
Acts he may do before letters issued	634-	2
Additional bail	62-	7
Appointment of	618-	2
Assets of estate	640-	10
Assets do not pass to his personal representative	640-	10
Bequests, collateral tax on	200-	2
Blended accounts	868-	10
Borrower from estate	640-	10
Choses in action passing to	125-	2

EXECUTOR — (Continued)

	PAGE	PAR.
Citation to account.....	865-	2
Citation to account, petition.....	867-	4
Claims against estate.....	433-	22
Conveyance by attorney.....	831-	22
Corporate stock, voting of.....	643-	15
Corporation, joining in.....	831-	23, 24
Creditors, when not liable to.....	450-	68
Custody of property.....	819-	1
Debt due testator.....	45-	6
Debts he is bound to pay.....	635-	5
Debtor or creditor, as.....	619-	4
Debtor, revival of judgment against.....	642-	14
Deceased, personal representative to account.....	870-	11
Deed when executor is vendee.....	195-	16
Deed on specific performance.....	195-	15
Deposit of trust funds with trust company.....	962-	6
<i>De son tort</i>	637-	7
Devastation as to debts.....	636-	6
Discharge of.....	881-	40, 41
Discretionary power to sell.....	825-	11
Discretionary power as trustee.....	832-	27
Discretionary power which dies with him.....	832-	27
Dismissal for disability.....	834-	32
Dismissal or release.....	882-	42
Divided or conditional powers.....	639-	8
Duty to collect collateral tax.....	202-	5
Duty to make annual report of charges.....	841-	2
Effect of power to sell.....	823-	6
<i>En ventre sa mere</i>	618-	2
Extent of power to sell.....	826-	14
Foreign, duties as to collateral tax.....	204-	10
Foreign, revival of judgment by.....	631-	23
Foreign, transfer of public loans by.....	631-	24
Form of certificate of appointment.....	621-	8
Form of letters.....	621-	9
Guardian, not to be appointed.....	219-	17
Interest in distribution.....	417-	6
Interest in testator's goods — trust.....	635-	4
Interpretation of power to sell.....	822-	5
Inventory and appraisement.....	639-	9
Joint liability.....	878-	30
Judgment against his own goods.....	833-	29
Liability for legacy.....	738-	20
Life tenants, of, may sue sub-tenants.....	177-	7
Meaning of naked power to sell.....	822-	3
Nature of possession of goods.....	634-	3
Non-resident, must give bond.....	625-	16

EXECUTOR — (Continued)

	PAGE	PAG.
Non-resident, must give bond.....	32-	19
Non-resident, service of <i>sol. fa.</i>	175-	4
Notice of collateral tax.....	203-	8
Notice of devises to bodies corporate.....	642-	13
Notice of letters testamentary.....	43-	1
Office of — duties.....	618-	2
Parties to proceeding, legacy charged on land.....	704-	8
Parties to proceeding, legacy charged on land.....	705-	9
Payment of testator's debts.....	641-	12
Plea of "no assets"—effect.....	712-	26
Pleas by.....	832-	28
Possession of the goods of the testator.....	633-	2
Process against for waste.....	833-	31
Promise to pay the debt of another.....	637-	6
Power over real estate.....	821-	2
Power over realty, under will.....	821-	3
Power to sell, execution of.....	824-	8
Power to sell, control by courts.....	824-	10
Power to sell, duration.....	827-	15
Power to sell or mortgage, etc.....	133-	1, 2
Power to sell or mortgage, etc.....	134-	3
Purchase for his own use.....	829-	19
Removal for drunkenness or lunacy.....	834-	33
Removal from state — vacating letters, etc.....	834-	34
Renunciation of testamentary trust.....	910-	20
Resignation	60-	3
Right to letters.....	619-	5
Sale, effect of.....	827-	16
Sale by, purchaser's duty as to proceeds.....	826-	13
Setting aside sale and re-sale.....	826-	12
Suit or distress for rent.....	176-	6
Suit on tax bonds.....	177-	8
Surcharge, finality of decree.....	876-	25
Surety of — protection.....	835-	35
Surviving, powers.....	624-	15
Things as assets.....	124-	1
Transfer of funds by.....	632-	25
EXECUTRIX — MARRIED WOMAN	619-	3
Security for minor when she marries.....	835-	36
EXECUTORY DEVISE, DEFINITIONS, SMITH	760-	1
Defined	676-	16
Failure and destruction of.....	765-	14
Failure of issue in testator's lifetime.....	762-	6
Incidents of.....	765-	13
Indefinite failure of issue.....	763-	8
Limitation over to children of first taker.....	763-	7

EXECUTORY DEVISE — (Continued)	PAGE	PAGE
Limitation over after fee or fee tail.....	762-	4
Limitation in future without particular estate.....	764-	11
Limitation over on death without "heirs".....	764-	9
Limitation over on death during minority, etc.....	764-	10
Limitation over on failure of issue.....	762-	5
Limitation when particular estate is ineffectual.....	765-	12
Sale of land.....	279-	7
Usual application.....	761-	3
EXECUTORY INTERESTS.....	761-	2
EXEMPLIFICATION.		
Certificate of clerk.....	98-	72
Certificate of judge.....	99-	73
Certificate of register.....	99-	75
Form of judge's certificate.....	100-	76
EXEMPLIFICATION OF RECORD.....	98-	71
Record of guardianship.....	268-	119
Record of will, to another county.....	562-	32
EXEMPTION OF WIDOW, OR CHILDREN.		
Appraisement	47-	12
Form of widow's demand.....	50-	13
Minor children, without demand.....	52-	20
Preference of.....	49-	12
Real estate.....	55-	30
Selection by guardian.....	52-	21
Widow	641-	11
Widow's, extended.....	54-	27
Widow may retain choses in action.....	55-	28
EXEMPTION, LEGACY FROM ABATEMENT.....	689-	42
EXEMPTION — PARTIES — COLLATERAL TAX.....	198-	1
"EXHIBITED" DEFINED.....	140-	10
EX MALEFICIO, TRUST.....	912-	25
EXPENDITURE, TRUST FUND, AUTHORIZATION.....	936-	17
EXPENDITURES, TRUSTEE.....	940-	26
EXPENSE OF GUARANTEEING INVESTMENT.....	156-	46
EXPENSES OF GUARDIAN.....	265-	113
EXPERTS — SIGNATURE TO WILL.....	548-	5
EXPERTS, TESTIMONY IN WILL CASES.....	612-	54

	PAGE	PAG.
FAILURE OF ISSUE.		
Construction of words importing.....	746-	38, 39
Definite or indefinite.....	747-	40
Indefinite, act of 1897.....	802-	45
Limitation over.....	762-	5
Testator's lifetime.....	762-	6
FALSO DEMONSTRATIO, APPLICATION.....	796-	27
FAMILY AGREEMENTS.		
Character of.....	407-	1
Form of bond by attorney.....	410-	3
Form of power of attorney.....	409-	2
Form, to refund.....	411-	5
Release, form.....	410-	4
Will, concerning.....	411-	5
Will, concerning.....	791-	15
FATHER, CUSTODY OF CHILD.....	229-	41
Guardian not to be appointed, as.....	219-	18
Guardian by nature.....	210-	1
Illegitimate, of law defined.....	471-	31
Loses right to appoint guardian by neglect.....	861-	4
Loses right to appoint guardian by drunkenness.....	861-	5
Power to will custody of unmarried minor.....	537-	16
FATHER AND MOTHER AS HEIRS.....	473-	35
FATHER AND MOTHER TAKE REAL ESTATE IN FEE..	476-	42
FAYETTE COUNTY, PARTITION IN.....	313-	11
FEE, EVOLVED FROM ESTATE TAIL, WHEN.....	803-	46
FEE — WORDS IN WILL NECESSARY TO PASS.....	793-	19
FEE TAIL, ACT OF 1855.....	755-	12, 13
FEE TAIL, ACT OF 1855.....	755-	15
FEES OF OFFICERS.		
Appraisers.....	56-	32
Attorney for guardian.....	265-	114
Clerk of the Orphans' Court.....	12-	24
Clerk in Allegheny county.....	10-	23
Clerk of Orphans' Court, Phila.....	9-	22
Escheat proceedings, in.....	495-	34
Register of wills in general.....	39-	36
Register of wills, Allegheny county.....	40-	37
Register of wills, Phila. county.....	41-	38

FEES OF OFFICERS — (Continued)	PAGE	PAGE
Register, annual account.....	42—	40
Sheriff and appraisers, under will.....	737—	17
Sheriff and jurors, in partition.....	375—	127
Stenographer	102—	83
FEMALES AS AGNATES — CIVIL LAW.....	475—	40
Included in masculine pronouns.....	578—	25
<i>Per stirpes</i> , under Roman law.....	462—	14
Will of, revoked absolutely by marriage.....	584—	15
FEOFFMENT, REVOCATION OF DEVISE.....	581—	6
FUDAL SYSTEM — ORIGIN OF THE RULE IN SHEL- LEY'S CASE.....	748—	1
FIDUCIARIES, CLASS ENLARGED.....	59—	2
Discharge, Phila.....	72—	26
Dismissal for disability.....	834—	32
Distribution at his own risk.....	436—	29
Powers under Price Act.....	289—	22
Protection of sureties.....	835—	35
Removal for cause shown.....	64—	10
Removal for lunacy, etc.....	834—	33
Removal from state, procedure.....	834—	34
Trust companies authorized.....	961—	1, 2
See also "Administrators," "Executors," "Guardians," "Committees and Trustees."		
FL. FA. AND OTHER WRITS OF EXECUTION.....	100—	77
Form in Orphans' Court.....	518—	30
Form of petition for.....	517—	28
FILING OF VENDUE LIST.....	57—	35
FINDING, ADJUDICATION, ESCHEAT.....	489—	15
Auditor, see "Auditor."		
FIRE, LOSS BY, AFTER PARTITION.....	343—	63
FIXTURES, ETC., IN DEVISE.....	797—	29
FLATS ON RIVER, WILL.....	732—	234
FLOCK, REQUEST OF, INCREASE OR DECREASE.....	674—	7
FOREIGN ESTATES, see "Estates Abroad," supra.		
FOREIGN EXECUTORS, suits in Pennsylvania.....	629—	21
FOREIGN GUARDIAN, PAYMENT TO.....	225—	36
Powers limited.....	221—	22
Removal of property by.....	226—	37

	PAGE	PAR.
FOREIGN LETTERS TESTAMENTARY, ETC.....	628-	21
FOREIGN WILLS, COPIES PROBATED.....	560-	30
FORFEITURE — CONDITION IN WILL.....	786-	6
Contest of will.....	787-	8
FORGERY, FINDING WHEN CONCLUSIVE.....	507-	n20
Will, issue upon.....	548-	5
FORMS.		
Acceptance of notice of petition.....	192-	8
Acceptance of purpart.....	340-	57
Acceptance of service of rule to accept, etc., partition..	337-	51
Account, administrator's.....	386-	10
Account, executors separate by.....	872-	14
Account after sale in partition.....	873-	15
Account proceeds of real estate for payment of debts..	871-	13
Acknowledgment of release.....	231-	43
Act to abrogate the rule in Shelley's case.....	752-	n15
Advertisement, estate of presumed dead.....	857-	20
Advertisement, estate of presumed dead.....	858-	22
Affidavit of death of decedent.....	28-	7
Affidavit of notice.....	153-	38
Affidavit to petition for sale by guardian.....	246-	72
Affidavit of publication, in partition.....	326-	31
Affidavit of reducing nuncupation to writing.....	569-	7
Affidavit of responsible person, appointment of guardian	217-	9
Affidavit of service of notice.....	184-	18
Affidavit, service of notice in partition.....	326-	32
Affidavit of statement by guardian.....	225-	33
Affidavit of value, guardianship.....	217-	9
Affidavit of value, real estate.....	152-	35
Alias order of sale.....	154-	41
Answer to citation to widow to elect.....	647-	8
Answer of guardian for petition of review.....	405-	6
Answer to petition.....	87-	37
Answer to petition for removal.....	67-	14
Appeal from order admitting will to probate.....	590-	11
Appeal from register, probate of will.....	591-	14
Appointment of appraisers.....	50-	14
Appointment of appraisers.....	305-	7
Appointment of appraiser of collateral tax.....	205-	13
Appointment of auditor.....	708-	14
Appointment of auditor to state account.....	867-	7
Appointment of auditor to pass upon exceptions.....	875-	21
Appointment of guardian, see "Guardian."		
Appointment of testamentary guardian.....	809-	11
VOL. III PRACTICE — 67		

FORMS — (Continued)	PAGE	PAGE
Appraisement under act of 1883.....	54—	26
Appraisement, widow's.....	50—	16
Appraisement of collateral tax.....	205—	13
Approval of bond.....	145—	17
Approval and order of sale.....	306—	10
Attachment.....	512—	11
Attachment against fiduciary.....	515—	20
Attestation of will.....	807—	2
Attestation of will executed by mark.....	807—	4
Attestation of will when signed by another at direction of testator.....	807—	3
Bid in partition.....	340—	56
Bond of administrator.....	33—	21
Bond for appearance, in attachment.....	512—	13
Bond of attorney, family agreement.....	410—	3
Bond on caveat against will.....	588—	5
Bond of guardian.....	218—	14
Bond by guardian, etc., for removal of property.....	226—	37
Bond for injunction.....	498—	4
Bond in partition.....	379—	135
Bond for sale of real estate.....	144—	15
Bond of trustee.....	933—	8
Caveat against granting letters.....	30—	14
Caveat against will.....	587—	2
Certificate, appointment of guardian.....	224—	30
Certificate of appointment of trustee.....	933—	9
Certificate of balance of account.....	391—	19
Certificate of letters testamentary.....	621—	8
Certificate of register, estate of presumed dead.....	856—	18
Certificate after trial of issue <i>d.v.n.</i>	614—	59
Certificate of clerk to judgeship.....	99—	74
Certificate of judge, exemplifying record.....	99—	73
Certificate of register, account.....	391—	18
Certificate of tenants in common.....	286—	17
Citation to administrator to account.....	383—	4
Citation, charge on land.....	708—	13
Citation to guardian to account.....	257—	96
Citation to produce will.....	550—	8
Citation, specific performance.....	192—	9
Citation to widow to elect dower.....	359—	93
Codicil to will.....	564—	3
Codicil, power to convey, etc.....	816—	27
Commission to take depositions of absent witness.....	553—	15
Common, will.....	806—	1
Condition of bond of non-resident executor.....	839—	43
Condition in bond by surety.....	72—	27
Confirmation of accounts.....	387—	13

FORMS — (Continued)	PAGE	PAGE
Confirmation of sale <i> nisi</i>	151-	33
Confirmation of sale to lien creditor.....	157-	48
Consent of parties to private sale.....	283-	14
Decree of allotment, Price act.....	286-	18
Decree, authorizing investment.....	897-	11
Decree, authorizing investment.....	898-	13
Decree after auditor's report.....	237-	52
Decree awarding purpart.....	340-	58
Decree awarding purpart.....	341-	59
Decree of discharge of fiduciary.....	70-	21
Decree of discharge of fiduciary.....	72-	25
Decree discharging land from legacy.....	710-	21
Decree of distribution.....	520-	34
Decrees, estate of presumed dead.....	858-	19
Decrees, estate of presumed dead.....	857-	21
Decree granting review of account.....	408-	7
Decree for issue <i>d.v.m.</i>	592-	16
Decree, leave to remove ward.....	522-	37
Decree for petitioner, charge on land.....	709-	17
Decree of private sale.....	299-	46
Decree of probate of will.....	555-	18
Decree of ratification of sale.....	838-	41
Decree of removal of guardian.....	272-	132
Decree setting aside sale, etc.....	172-	73
Decree, specific performance.....	193-	12
Deed by administrator, specific performance.....	196-	18
Deed after sale in partition.....	378-	134
Deed Orphans' Court sale.....	163-	57
Demurrer to petition.....	84-	32
Devise in lieu of dower.....	809-	13
Devise for life and after his death to his issue.....	754-	11
Disclaimer to petition.....	85-	34
Exceptions to administration account.....	390-	16
Exemplification of record.....	98-	72
Exemplification, judge's certificate.....	100-	76
Family agreement, to refund.....	411-	5
<i>Fi. fa.</i>	518-	30
Final administration account.....	386-	10
Final confirmation of sale.....	154-	39
Final confirmation of sale to lien creditor.....	158-	49
Final decree, sale of land.....	300-	48
First and final account of fiduciaries.....	873-	16
Guardian's final account.....	261-	106
Guardian's inventory.....	224-	3
Injunction to administratrix.....	500-	
Injunction to purchaser, Orphans' Court.....	501-	
Immaterial variations in.....	79-	

FORMS — (Continued)

	PAGE	PAGE
Interrogatories, with commission.....	554-	16
Issue <i>d.v.n.</i> Phila.....	590-	13
Justification	145-	16
Notice of abatement.....	184-	17
Notice, charge on land.....	504-	7
Notice of filing account.....	391-	17
Notice of letters.....	44-	2
Notice of meeting of appraisers, under will.....	735-	11
Notice of petition for sale of real estate, Phila.....	147-	23
Notice by publication in partition.....	326-	30
Notice by publication sale in partition.....	352-	79
Notice of rule to take depositions.....	880-	38
Notice of sale.....	149-	27
Notice of widow's election to take against the will....	648-	9
Nuncupative will.....	568-	5
Leave to bid at sale.....	150-	29
Letters <i>c.t.a.</i>	622-	11
Letters <i>d.b.n.</i>	626-	19
Letters <i>pendente lite</i>	627-	20
Letters testamentary.....	621-	9
Mortgage with bond in partition.....	380-	137
Oath of administrator.....	36-	26
Oath of appraisers.....	50-	15
	53-	25
Oath of jurors in partition.....	327-	33

FORMS, ORDERS OF COURT.

Allowing improvements.....	249-	81
Allowing injunction	500-	6
Appointing appraisers.....	53-	24
Appointment of guardian.....	219-	15
Appointing trustee to sell in partition.....	351-	77
Appraisement	305-	8
Attachment	511-	9
Awarding citation on will.....	593-	18
Citation	171-	72
Citation, charge on land.....	707-	12
Citation, to guardian.....	272-	130
Discharging guardian.....	270-	125
Dismissing appeal from probate of will.....	595-	26
File decision on issue <i>d.v.n.</i> in Orphans' Court.....	614-	60
Filing disclaimer.....	85-	35
Granting leave to deposit money.....	901-	17
Guardian to join in sale.....	300-	49
Inquest in partition.....	324-	27, 28
Removal	68-	17, 19
Rule to accept or refuse.....	336-	49

FORMS, ORDER OF COURT — (Continued)	PAGE	PAR.
Rule, appointment of guardian.....	218-	13
Rule to show cause.....	511-	9
Rule to show cause against injunction.....	501-	9
Sale of real estate.....	142-	12
Sale, Lancaster county.....	148-	25
Sale of minor's real estate.....	246-	73
Sale, under the Price act.....	283-	15
Sale, private.....	153-	36
Security	67-	16
Staying execution.....	520-	33
FORMS.		
Partial account of administrator.....	385-	9
Petition	76-	4
Petition for adjudication of intestate's estate.....	441-	46
Petition for adjudication of a testate estate.....	440-	45
Petition for administrator <i>pendente lite</i>	587-	3
Petition of administrator for discharge after distribution	69-	20
Petition for allotment under Price act.....	284-	16
Petition for allowance of improvements of ward's property	249-	80
Petition to appoint trustee.....	911-	24
Petition for appraisers of real estate.....	304-	5, 6
Petition for appraisalment under act of 1883.....	53-	23
Petition for attachment against administrator.....	511-	8
Petition for attachment execution.....	513-	14
Petition to auditor for issue.....	895-	7
Petition for authority to sell land.....	838-	42
Petition for citation on appeal from probate of will....	592-	17
Petition, citation to guardian to account.....	257-	95
Petition for citation to produce will.....	549-	7
Petition for citation to widow to elect.....	647-	
Petition for citation, widow's dower.....	359-	92
Petition to compel distribution.....	454-	78
Petition to compel purchaser to comply with his bid..	170-	70
Petition for discharge of guardian.....	270-	123
Petition for discharge of trustee appointed to sell real estate	71-	23
Petition, estate of presumed dead.....	856-	17
Petition of fiduciary to stay execution.....	520-	32
Petition for <i>fi. fa.</i>	517-	28
Petition of guardian to approve former investment....	900-	15
Petition by guardian to sell or mortgage.....	245-	71
Petition of guardian for repairs.....	236-	52
Petition for improvement of estate of <i>cestui que trust</i> ..	959-	61
Petition for injunction.....	499-	5

FORMS — (Continued)

	PAGE	PAGE
Petition for inquest in partition.....	323-	26
Petition for issue <i>d.v.n.</i> , undue influence, etc.....	591-	15
Petition for leave to pay money into court.....	900-	16
Petition for leave to remove ward from state.....	521-	35
Petition for leave to withdraw money from court.....	901-	18
Petition of minor over fourteen for guardian.....	217-	10
Petition when father is profligate.....	217-	12
Petition by next friend, for appointment of guardian..	216-	7
Petition for precept of issue on will to Common Pleas	596-	29
Petition for private sale.....	151-	34
Petition, private sale, Price act.....	282-	13
Petition to ratify sale.....	336-	39
Petition to recover charge on land.....	707-	11
Petition, removal of guardian.....	272-	129
Petition for removal of administrator for sickness, etc.	68-	18
Petition for review of guardian's account.....	404-	4
Petition for revocation of letters.....	31-	17
Petition for rule to accept or refuse.....	336-	48
Petition for sale of purpart.....	350-	76
Petition for sale of real estate.....	141-	11
Petition to satisfy recognizance.....	377-	132
Petition for security or removal.....	66-	13
Petition to sell in partition, etc.....	377-	131
Petition to set sale aside.....	171-	71
Petition for specific performance of contract.....	191-	7
Petition for support of ward.....	235-	50
Petition of trustee to invest funds.....	897-	12
Petition of trustee to invest in improvements.....	899-	14
Petition to value real estate, willed.....	734-	9
Petition of ward for execution.....	518-	29
Plea to a petition.....	84-	33
Pleadings on issue in Common Pleas.....	896-	9
Power of attorney by family.....	409-	2
Precept for issue to Common Pleas.....	596-	30
	895-	8
Probate of will.....	595-	27
Probate nuncupative will.....	569-	6
Proof of death of decedent.....	617-	1
Proof of will before register.....	551-	12
Proof of unsigned will <i>in extremis</i>	552-	14
Protocol, letters rogatory.....	880-	39
Publication of notice of rule to accept, etc.....	337-	50
Recognizance for owelty.....	345-	67
Reference to auditor, specific performance.....	193-	10
Refunding bond by heir.....	455-	79
Refunding bond, estate of presumed dead.....	858-	24
Refunding receipt.....	111-	13

FORMS — (Continued)	PAGE	PAGE
Refusing decree of review of account, order.....	406-	8
Register's certificate to exemplification of record.....	99-	75
Release, family agreement.....	410-	4
Release of legacy charged on land.....	849-	17
Release on recognizance <i>sur</i> partition.....	378-	133
Release of ward to guardian.....	230-	43
Release of widow and heirs.....	837-	40
Renunciation of letters.....	31-	15
Renunciation by executor.....	620-	7
Report of commissioner on depositions.....	554-	17
Replication, general.....	88-	39
Replication, removal.....	67-	15
Request of wards for discharge of guardian.....	270-	124
Return of appraisers.....	306-	9
Return of inquest by sheriff.....	332-	43
Return of inquest against division.....	331-	41
Return of inquest for division.....	332-	42
Return of land unsold.....	154-	40
Return to leave to bid.....	150-	31
Return of lien creditor as purchaser.....	157-	47
Return to order of sale.....	151-	32
Return of sale, partition.....	352-	80
Return of private sale.....	153-	37
Return of private sale of land.....	300-	47
Rule to accept or refuse in partition.....	337-	52
Rule to show cause.....	521-	36
Rule to show cause why trustee should not be dis- charged	71-	24
Rule to take depositions.....	880-	37
Sheriff's return of attachment.....	512-	12
Specific performance, joint vendors.....	194-	13
Subpoena by auditor.....	708-	15
Subpoena for witnesses.....	550-	9
Substitution for defendant.....	185-	22
Substitution for defendant in judgment.....	186-	23
Substitution for plaintiff.....	185-	21
Substitution for plaintiff when defendant is executor..	186-	24
Triennial account of guardian.....	260-	
<i>Vend. ex.</i>	518-	31
Warrant with bond in partition.....	380-	136
Widow's appraisement.....	50-	16
Widow's demand for exemption.....	50-	13
Widow's election of dower.....	360-	94
Wills, Chapter XLIX.....	P. 806-	
Will bequeathing all to wife.....	807-	5
Clause, avoiding rule in Shelley's case.....	811-	21
Clause, charging legacy on land devised.....	811-	22

FORMS — (Continued)

	PAGE	PAG.
Clause, on condition that wife remain a widow.....	817-	28
Clause, devise charging support of testator's widow....	818-	31
Clause, directing payment of legacy, without charging	818-	32
Clause, life estate and reversion.....	809-	12
Clause, with limitation over on failure of issue.....	809-	14
Clause, power of appointment.....	810-	18
Clause, with power to sell.....	808-	7
Clause, power of sale and conversion.....	810-	15
Clause, in restraint of re-marriage and devise over....	808-	9
Clause, rule against perpetuities.....	810-	19
Clause, separate use trust.....	817-	29
Clause, separate use trust.....	810-	17
Clause, spendthrift trust.....	810-	16
Clause, spendthrift trust.....	818-	30
Clause, trust with power to convey and substitution...	811-	20
Will, conversion and division.....	815-	25
Will, evading "Calendar month" restraint as to religious or charitable gift.....	577-	12
Will, giving wife personal estate, real estate for life and remainder to children.....	814-	24
Will, life estate and over, also fee.....	808-	8
Will, old time, charging legacies on land and providing manor and maintenance for the widow.....	812-	23
Will providing in case of death without issue.....	809-	10
Will, real estate for life and personal estate in trust..	815-	26
Will with residuary clause.....	807-	6
Writ of inquest in partition.....	325-	29
Writ of sequestration.....	516-	26
FRAUD, SETTING ASIDE PARTITION, FOR.....	341-	60
FREEHOLD ESTATE, DEFINITION.....	766-	2
FUND, TRANSMISSION TO DOMICILE.....	879-	32
FUNERAL EXPENSES, ETC.—PREFERRED DEBTS.....	104-	2
FUNERAL EXPENSES, ETC.—PREFERRED DEBTS.....	106-	6
FUNERAL EXPENSES, ETC.—PREFERRED DEBTS.....	641-	12
GIFT, DISTINGUISHED FROM WILL.....	531-	2
GIFTS.		
Absolute, cutting down.....	801-	42
Contingent	744-	35
"Heirs," etc., use of words — <i>inops consilii</i>	719-	2
Implied	744-	34
Implied, when.....	792-	18
Income, carries corpus when.....	792-	17
<i>Inter vivos</i> — jurisdiction.....	877	27-n26

GIFTS — (Continued)	PAGE	PAG.
Interest or proceeds of land.....	732-	6
Next of kin, etc.....	723-	9
Over, on contingency of death.....	744-	33
Reference, by.....	724-	14
Same class.....	796-	28
<i>Per stirpes</i> and <i>per capita</i>	726-	18
Vested, various cases.....	743-	32
Wife, of her marriage portion.....	674-	6
GIRARD CASE, RULES OF LAW AS TO PERPETUITIES..	804-	47
GOOD WILL AS ASSET OF ESTATE.....	128-	7
GOODS AND CHATTELS OF DECEDENT.....	126-	3
"GOODS," ETC., IN A WILL.....	797-	30
GOODS PURLOINED, ETC., EXECUTOR'S LIABILITY....	634-	3
GRANDPARENTS, ALLOWANCE FOR MAINTENANCE...	240-	59
GRANDPARENTS, DECEASED, REPRESENTATION.....	477-	44
GREAT-GRANDCHILDREN	722-	7
GROSS' PARALLELS OF CASES UNDER THE RULE IN SHELLEY'S CASE.....	752-	8
GROUND RENT DEFINED.....	296-	37
Distress for.....	176-	6
Letting on	274-	1
GUARDIAN AND WARD.....	209-	
Absent minors, appointment.....	225-	35
Acceptance of appointment.....	219-	16
Acceptance in partition.....	338-	54
Account, costs of filing.....	264-	112
Account, where also trustee.....	259-	132
Account, who may require.....	258-	98
Account, who may be cited.....	258-	99
Account when required.....	255-	92
Account, credits and allowances.....	261-	107
Account, manner of stating.....	259-	103
Account, practice on act June 9, 1911.		
Actions against.....	232-	45
Acts in partition.....	254-	90
Additional bail.....	62-	7
Adjudication of breach of bond.....	224-	29
<i>Ad litem</i> , office of.....	212-	3
Affidavit with offer of security.....	247-	75
Allowance to grandparents for maintenance.....	240-	59
Allowance to for maintaining ward.....	239-	56
Allowance for maintenance, amount of.....	242-	63

GUARDIAN AND WARD — (Continued)	PAGE	PAGE
Answer to citation to account.....	258—	97
Appeal without affidavit.....	233—	46
Application for discharge.....	269—	122
Appointment of.....	213—	4
Appointment for non-resident minor.....	225—	34
Appointment under Price act.....	287—	19
Balance after decree on account.....	264—	111
Bond, discretionary.....	234—	49
Bond from married ward.....	451—	72
Bond for removal of property by foreign.....	226—	37
Bond for sale of real estate.....	244—	68
Citation to account, form of petition.....	257—	95
Collection of funds due the ward.....	229—	42
Compensation.....	266—	115
Compensation, amount.....	266—	116
Confirmation of sale.....	247—	77
Corporation as.....	220—	19
Counsel fees.....	265—	114
Credits allowed or disallowed.....	263—	109
Deceased, account by administrator.....	259—	101
Devised estate.....	862—	8
Discharge.....	268—	118
Discharge, Allegheny county.....	269—	120
Discharge, Phila. county.....	269—	121
Discharge, form of petition.....	270—	123
Discharge of surety.....	223—	28
Domestic, discharge.....	268—	119
Duties of.....	863—	10
Duties and rights.....	227—	38
Duty to collect rents.....	247—	78
Effect of acts on ward.....	254—	89
Exceptions to account.....	263—	110
Expenses and costs.....	265—	113
Executor or administrator not to be appointed.....	219—	16
Estate from which ward shall be maintained.....	241—	62
Father and others not to be appointed.....	219—	18
Filing of inventory by.....	224—	31
Foreign, petition to remove ward.....	521—	35
Foreign, powers limited.....	221—	22
Form of answer to petition for review.....	405—	6
Form of bond.....	218—	14
Form of certificate of appointment.....	224—	30
Form of citation to guardian to account.....	257—	96
Form, decree of maintenance.....	236—	51
Form, decree of removal.....	272—	132
Form of final account.....	261—	106
Form of inventory.....	224—	32

GUARDIAN AND WARD — (Continued)	PAGE	PAGE
Form, order of appointment.....	219-	15
Form of order to join in sale.....	300-	49
Form of order and rule.....	218-	13
Form of petition of minor by next friend.....	216-	7
Form of petition by minor.....	217-	10
Form of petition of minor when father is profligate....	217-	12
Form of petition for allowance of repairs, etc.....	249-	80
Form of petition for removal.....	272-	129
Form, petition for repairs.....	236-	52
Form of petition to sell.....	245-	71
Form, petition to review account.....	404-	4
Form, request of wards for discharge.....	270-	124
Form of triennial account.....	260-	
Improvement and repairs.....	248-	79
Interest on funds mingled with his own.....	253-	87
Investments by.....	233-	47
Investment of funds.....	228-	39
Jurisdiction sale or mortgage.....	244-	69
Liability for assets of ward.....	250-	83
Liability for interest.....	252-	86
Liability for loss by predecessor.....	251-	85
Liability for profits.....	253-	88
Liability of surety for proceeds of land.....	223-	27
Loss of compensation.....	267-	117
Loss of funds, liability.....	250-	84
Loss of ward to right to account by laches.....	259-	100
Maintenance of ward.....	237-	53
Maintenance without prior order.....	238-	54
Manner of appointment.....	862-	9
Manner of stating final account.....	260-	105
Mother's right to appoint.....	862-	7
Nature, by.....	210-	1
Nature, by.....	860-	3
Notice, lands lying in different counties.....	246-	73
Notice to parent of petition to appoint.....	217-	11
Order discharging.....	270-	125
Order to maintain ward.....	234-	48
Payment to foreign.....	225-	36
Payments that are necessary.....	262-	108
Petition for appointment.....	215-	5
Petition for sale of real estate.....	244-	67
Petition for support of ward.....	235-	50
Power of Orphans' Court to compel account.....	256-	94
Power to re-invest.....	281-	11
Power to sell land divided by county lines.....	863-	11
Power to sell or mortgage real estate.....	133-	1, 2
Power to sell or mortgage real estate.....	134-	

GUARDIAN AND WARD — (Continued)	PAGE	PAGE
Principal and income.....	238-	54
Private sales by.....	143-	13
Private sale of ward's land.....	863-	12
Procedure to remove.....	272-	131
Purchase at his own sale.....	255-	91
Reimbursement and subrogation.....	249-	82
Releases and compromises.....	230-	43
Release by ward.....	273-	133
Relation to ward.....	228-	40
Restitution by.....	16-	5
Resulting trust.....	254-	91
Revocation of appointment.....	220-	21
Right of ward to choose.....	216-	6
Removal of.....	271-	128
Removal, grounds.....	271-	127
Removal, manner.....	271-	128
Sale of real estate of minor.....	242-	64, 65
Sale of real estate, hearing and notice.....	243-	66
Sale of real estate, petition, etc.....	244-	67
Sales, etc., statutory.....	245-	70
Security, condition of bond.....	221-	23
Security, requisites.....	222-	24
Selection for minors.....	52-	21
Services of ward as set-off.....	241-	61
Suit by.....	231-	44
Sureties on bond, liability.....	222-	25, 26
Sureties in sales of real estate.....	246-	74
Testamentary, father loses right to appoint when.....	861-	4, 5
See "Testamentary Guardian."		
Time of allowance for maintenance.....	240-	60
Triennial account.....	256-	93
Triennial account, practice, act June 9, 1911.		
GUARDIANSHIP, TWELVE TABLES.....	457-	2
HALF-BLOOD RELATION DEFINED.....	471-	30
HALF-BLOOD, COLLATERALS, DESCENT OF REALTY....	476-	43
HAND-WRITING, PROOF OF, IN WILL.....	556-	20
HEARING BY MASTER OR EXAMINER.....	90-	44
HEIR AT LAW.		
Absent and unheard from for 30 years.....	432-	20
Adoption of adult as.....	469-	27
Adoption of child as.....	468-	25
HEIR AT COMMON LAW, RESTRICTED.....	460-	10
HEIR, CREDITOR OF.....	373-	120
Dominion, when it begins.....	458-	4

HEIR — (Continued)	PAGE	PAG.
Husband or wife.....	466-	21, 22
Preference in partition.....	342-	62
Rule as to disinheritance.....	663-	7
HEIR AND TRUSTEE, JUSTINIAN.....	903-	2
HEIR AND WIDOW FAVORED IN INTERPRETATION..	664-	8
HEIRS.		
Ascertainment of liens against.....	363-	101
Collaterals, classes of.....	475-	41
Common use.....	719-	2
Determined as a class.....	772-	16
Father and mother.....	473-	35
Gifts to.....	683-	33
Gifts of personalty, in.....	720-	3
Gifts to, use of technical words.....	719-	2
Means "Children" when.....	720-	4
Notice to.....	81-	27
Proper and necessary.....	468-	24
Refunding bonds by.....	450-	70
Remainder, in a will.....	754-	11
Rights fixed by death.....	478-	48
"HEIRS AT LAW," IN LEGACY.....	684-	33
"HEIRS OF THE BODY," ESTATE TAIL.....	755-	15
See Rule in Shelley's case, <i>infra</i> .		
"HEIRS OF THE BODY"—INTERPRETATION OF.....	754-	12
HEIRS, ETC., TO BE MADE PARTIES TO ACTION.....	181-	12
HOME, RESERVATION FOR WIDOW OR DAUGHTER....	738-	19
"HOTCH POTCH," ADVANCEMENTS.....	481-	62
HOUSE, ADDITIONS PASS WITH BEQUEST.....	674-	8
HOUSEHOLD GOODS, RIGHT TO TAKE AT APPRAISE-		
MENT	736-	n12
HUSBAND.		
Bar or loss of curtesy.....	657-	7
Covinous judgment, not to defeat wife's rights.....	646-	5
Curtesy preserved by statutes.....	655-	4
Divorced, gift in will.....	723-	10
Election against wife's will.....	459-	7
Election against wife's will.....	656-	5
Equalized with wife—under will.....	655-	4
Heir with children.....	655-	4
Heirship	466-	21

HUSBAND — (Continued)	PAGE	PAG.
Heirship, loss of.....	466-	22
Lunatic, election by committee.....	656-	5
Proceedings to obtain inheritance.....	467-	23
Rights as tenant by curtesy.....	655-	3
Share forfeited by desertion.....	657-	6
Separate use, trust, relation to.....	923-	46
Surviving, Art. III.....	459-	6
Surviving, election, record of.....	651-	16
Surviving, right as tenant by the curtesy.....	652-	1
ILLEGITIMATES.		
Beneficiaries	724-	12
Capacity to inherit.....	471-	29
Inheritance by.....	470-	28
Status of as heirs.....	472-	32
IMPLICATION OF GIFT FROM DIRECTION TO PAY.....	779-	32
IMPLICATION, REVOCATION OF WILL BY.....	584-	16
IMPLIED GIFT AND CROSS LIMITATIONS.....	663-	6
IMPROVEMENT AND REPAIRS OF WARD'S ESTATE....	248-	79
IMPROVEMENTS UNDER PRICE ACT.....	279-	8
INCAPACITY, WILL, EVIDENCE.....	612-	53
"INCLUSIVE" AND "EXCLUSIVE" APPLIED.....	799-	34
INCOME.		
Apportionment' of.....	796-	26
Capitalization of, during minority.....	293-	29
Gift of, carries corpus, when.....	792-	17
Interest, bequest of.....	698-	13
Legacy of.....	696-	9
Rents, profits, etc., in a will.....	797-	31
INCUMBRANCES.		
Devises subject to.....	742-	30
Direction to pay.....	294-	32
Escheat	492-	24
INFANT CONTESTANT OF WILL, NEXT FRIEND.....	597-	32
INFORCEMENT, DECREES, PRACTICE BY RULE.....	509-	6
INFORMER, ESCHEATS.....	485-	4
INFORMER, ESCHEAT, SHARE, BOND TO REFUND....	494-	31
INHERITANCE.		
Adopted person, from.....	470-	27
Adoption Act of April 13, 1887.....	469-	26

INHERITANCE — (Continued)

	PAGE	PAR.
Adoption of child as heir.....	468-	25
Adoption, at civil law	469-	26
Agnates — collaterals, civil law.....	474-	38
Agnation by adoption.....	475-	39
Antenuptial contracts.....	482-	53
Advancements	481-	52
Bastards, status of.....	472-	32
"Blood of the ancestors".....	464-	18
"Blood of the ancestor," restriction.....	478-	45
Blood of the first purchaser.....	464-	19
Capacity of illegitimates.....	471-	29
Children	460-	9
Children only.....	460-	9
Collateral heirs.....	475-	41
Collateral — tax — liability	198-	1
Degrees of cognation — lineals — ascending and descend- ing	474-	36
Descendants in different degrees.....	460-	9
Descendants in same degree.....	460-	9
Descent of realty to collaterals of half blood.....	476-	43
Distribution, <i>per stirpes</i> and <i>per capita</i>	462-	15
Distribution of proceeds of real estate.....	479-	49
Escheat on failure of heirs.....	482-	53
Father of illegitimate.....	471-	31
Father and mother.....	473-	35
Father and mother take real estate in fee.....	476-	42
Females <i>per stirpes</i>	462-	14
Foreign countries, see "Estates."		
Grandchildren	460-	9
Grandchildren only.....	460-	9
Half-blood relation defined.....	471-	30
Heir at common law restricted.....	460-	10
Husband, loss of right.....	466-	22
Husband or wife as heir.....	466-	21
Husband or wife, proceedings to obtain.....	467-	23
Illegitimates	470-	28
Issue take by representation.....	460-	9
Lapsed — accretion of.....	478-	46
Lineal descent of realty and distribution of personalty.....	459-	9
Limitation, seven years, as to claimants.....	479-	50
Married woman's personal estate.....	459-	8
Mother recognized by the civil law.....	474-	37
Murderer not disinherited by his act.....	478-	47
Next of kin.....	461-	11
Origin of laws.....	456-	1
<i>Per stirpes</i> and <i>per capita</i>	461-	11,

INHERITANCE — (Continued)		PAGE	PAR.
Posthumous children.....	473—	33, 34	
Proof for record purposes.....	480—	51	
Proper and necessary heirs.....	488—	24	
Purchaser defined.....	465—	20	
Real estate, blood of the ancestor.....	463—	17	
Representation of deceased grandparents.....	477—	44	
Restriction on wife's power to will — husband's selection	459—	7	
Twelve tables of Rome.....	457—	2	
INJUNCTIONS.			
Powers of Orphans' Courts.....	6—	11	
Powers of Orphans' Courts.....	497—	1	
Bond a prerequisite.....	498—	3	
Form of to administratrix.....	500—	7	
Form of bond for.....	498—	4	
Form of order allowing.....	500—	6	
Form, order for rule to show cause.....	501—	9	
Form of petition for.....	499—	5	
Form, to purchaser.....	501—	8	
Time and manner of granting.....	497—	2	
IN LOCO PARENTIS	211—	1	
<i>In loco parentis</i>	241—	60	
<i>In loco parentis</i>	267—	116	
<i>In loco parentis</i> , ademption under will.....	713—	30	
<i>In loco parentis</i> — guardian.....	228—	40	
INQUISITION — PARTITION	309—	3	
Manner of.....	327—	34	
INQUEST — FORM OF RETURN — PARTITION	331—	41	
INQUEST — FORM OF RETURN — PARTITION	332—	42	
Form of writ.....	325—	29	
Form of petition for.....	323—	26	
Return of, in partition.....	333—	44	
Return of, in partition, confirmation.....	333—	45	
INSURANCE, ASSETS	129—	9	
Payable by guardian.....	262—	108	
"ISSUE," GIFTS TO	722—	8	
Interpretation of.....	774—	21	
Failure of, limitation over.....	757—	19	
Failure of, limitation over.....	762—	5	
Failure of, indefinite.....	802—	45	
Failure in testator's lifetime.....	762—	6	
Failure of, words importing.....	746—	38, 39	
Indefinite failure of.....	763—	8	
When word of purchase and when word of limitation..	756—	16	

	PAGE	PAGE
ISSUES TO COMMON PLEAS.....	323-	25
Agreement on form.....	894-	3
Appeal	894-	6
Awarding of.....	893-	2
Burden of proof.....	610-	52
Costs	894-	5
Demand before auditor.....	892-	1
Dispute in escheat.....	489-	14
Distribution on.....	97-	67
Form of.....	893-	3
<i>D.v.n.</i> form, Phila.....	590-	13
<i>D.v.n.</i> form and scope.....	604-	44
<i>Devisavit vel non</i> , see "Contest of will."		
Granting or refusing.....	595-	28
Granting appeal from.....	589-	8
Lost will, practice.....	546-	2
Parties, proponent, etc.....	605-	45
Request for.....	601-	41, 42
Request for, Allegheny county.....	97-	66
Right to contest will.....	598-	33
Sending to Common Pleas.....	96-	64
Trial in Common Pleas.....	605-	46
When it will or will not be awarded.....	602-	43
Verdict and decree.....	894-	4
INTENTION, ELEMENT IN WILL.....	534-	5
Essence of will.....	534-	7
Rule to defeat, Shelley's case.....	751-	7
INTERROGATORIES, FORM.....	554-	16
INTEREST EXECUTOR HAS IN GOODS OF HIS TESTATOR	125-	1
INTEREST OF PETITIONER.....	74-	1, 2
Contest of will.....	598-	32
INTEREST, ACCOUNTS, CHARGED IN.....	393-	21
Chargeable to trustees.....	942-	28
Claims against decedent.....	110-	12
Collateral tax.....	201-	4
Delay in distribution.....	699-	17
Distributive share, rate.....	699-	18
Expenses, trustee's account.....	949-	39
Filing exceptions.....	388-	14
Guardian's liability	252-	86
Guardian's liability.....	253-	87
Legacy	696-	9, 10
Legacies by parents.....	697-	11
Legacy to widow or creditor.....	697-	12
VOL. III PRACTICE—68		

INTEREST — (Continued)	PAGE	PAGE
Liability of devisee who accepts.....	739—	21
Owely in partition.....	348—	70
Or proceeds, gift of.....	732—	6
Rate of investment.....	233—	47
Specific legacy or annuity.....	698—	14
Widow's dower, collection.....	360—	95
INTERESTS, LIMITED OR CONDITIONAL UNDER WILL,		
SECURITY	718—	34
INTERPRETATION.		
Power to sell real estate.....	822—	5
Wills — time of taking effect.....	659—	1
INTESTATE DEFINED.....	458—	3
Recovery of property escheated.....	488—	12
INTESTACY — LAW OF DESCENT.....	458—	6
INVENTORY AND APPRAISEMENT OF TESTATOR'S		
GOODS	639—	9
Additional	45—	4
Debts to be included.....	45—	5
Decedent's goods.....	44—	3
Guardian's filing.....	224—	31
Guardian's form.....	224—	32
Sale of real estate.....	140—	10
INVENTORIES, ETC., TO BE RECORDED.....	36—	27
INVESTMENT.		
Expense of guaranty of.....	156—	46
Guardian	228—	39
Guardian, by.....	233—	47
Proceeds, <i>pendente lite</i>	156—	45
Trustee by	941—	27
Trustee under Price act.....	281—	11
JUDGES OF ORPHANS' COURTS.....	4—	4
Separate Orphans' Courts.....	8—	16
Separate Orphans' Courts may hear equity cases.....	8—	17, 18
Separate Orphans' Court, jurisdiction.....	15—	2
JUDGMENT, AT COMMON LAW.....	833—	30
Acknowledgment of satisfaction.....	453—	77
Decedent, against, Vol. II.....	P. 220—	15
Decedent, against, Vol. II.....	P. 226—	24
Generally, see Vol. II, "Johnson."		
Entry on balance of administration account.....	392—	20
Executor's own goods.....	833—	29

JUDGMENT — (Continued)	PAGE	PAG.
Executor, revival against.....	642-	14
Revival by foreign executor.....	631-	23
Verdict on will.....	614-	58
JUDGMENTS, ORDER AND PRIORITY.....	130-	14
JURY.		
Inquisition, in partition.....	309-	3
Partition, primary duty to allot.....	328-	34
Province, will contest.....	613-	57
JURIES TRIALS UPON ISSUES ARISING IN THE OR-		
PHANS' COURT.....	14-	1
JURISDICTION OF THE ORPHANS' COURT.....	14-	1
JURISDICTION OF THE ORPHANS' COURT.....	6-	10
Accounts of administrators, etc.....	395-	23
Alternative under Price act.....	279-	9
Assets of.....	20-	9
Charge on land.....	706-	9
Charge on land — dower.....	504-	4
Claims against distributees.....	396-	25
Collection of legacy	693-	3
Constitutional provisions.....	3-	4
Courts, legacy, recovery of.....	713-	30
Courts, see Vol. I, "Johnson."		
Determined by residence.....	213-	4
Escheats	486-	5, 6
Parties as to.....	16-	5
Parties in partition.....	318-	19
Particular of Orphans' Court.....	15-	3
Partition	309-	2
Partition of lands in different counties.....	314-	12
Partition of lands in one or more counties.....	314-	13
Partition under a will.....	15-	4
Partnership interest of decedent.....	23-	11
Power over debtors and parties.....	18-	7
Powers of Orphans' Court.....	23-	12
Real estate.....	21-	10
Sale or mortgage of minor's real estate.,.....	244-	69
Specific performance of contract.....	187-	1
Statutory	2-	2
Statutory	3-	3
Strangers	18-	6
Territorial limits of.....	19-	8
Territorial, personal asset.....	630-	22
Territorial of judges.....	15-	2

	PAGE	PAGE
JURISDICTION OF REGISTER.....	27-	3
JURISDICTION — REGISTERS' COURTS, FORMERLY....	4-	5
"JUSTICE AND EQUITY," ON APPEAL.....	525-	6
JUSTICE OF THE PEACE, JURISDICTION OF ACTION....	185-	20
JUSTIFICATION, SURETIES.....	346-	67
Sureties, form.....	145-	16
JUSTINIAN, CODICILS, ORIGIN OF.....	563-	1
Laws of inheritance.....	457-	16
KNOWLEDGE, CONTENTS OF WILL, BY TESTATOR.....	547-	4
LABORERS, WAGES OF PREFERRED.....	108-	8
LACHES.		
Effect on claim.....	527-	8
Effect on contest of will.....	600-	38
Loss of claim by.....	641-	12
Loss of right to account.....	259-	100
LACONIC WILLS.....	534-	6
LANCASTER COUNTY, form, order for inquest.....	324-	28
Form of order of sale.....	148-	25
LAND, see "Real Estate."		
LAND, CHARGE ON, BY WILL.....	700-	1
Charged with legacy, lying in another county.....	709-	18
Devised with charge thereon.....	737-	19
Devise of, law of situs determines.....	580-	4
Different counties, partition of.....	314-	12
One or more counties, partition of.....	314-	13
Petition to discharge lien.....	502-	1
Preference to, in another county.....	342-	61
Procedure to discharge lien.....	503-	3
LAPSED INHERITANCE — ACCRETION.....	478-	46
Void gift of residue goes to next of kin.....	685-	35
LAST CLAUSE, EFFECT OF.....	730-	3
LATENT AMBIGUITY IN WILL.....	668-	18
LAW, CICERO'S DEFINITION.....	724-	14
Distinguished from Equity, Vol. I, Johnson.....	4-	12
Domicil	579-	3
Domicil as to preference.....	109-	10
Situs	580-	4

	PAGE	PAR.
LEBANON COUNTY, TIME OF FILING ACCOUNTS.....	389-	n16
LEASING, PRICE ACT.....	288-	20
Security required.....	296-	38
LEGACY, ABATEMENT.....	713-	31
Action for, in Common Pleas.....	711-	24
Action for, costs in discretion of the court.....	713-	29
Ademption of.....	686-	36
Ademption of, under will.....	713-	30
Ademption, when not wrought.....	687-	36
After death of heir.....	675-	12
Alienation of the thing.....	674-	5
Assent to	694-	5
Bequests in the alternative.....	695-	6
Bequests of the same thing to two persons.....	673-	3
See "Charge on land."		
Charged on land, ademption.....	687-	37
Charged on land, petition of legatee.....	706-	10
Charged on land, recovery of.....	700-	1
Charged on land, recovery in Orphans' Court.....	703-	7, 8
Classes, Act of 1897.....	682-	31
Collateral tax on.....	202-	6
Conclusiveness of Orphans' Court's decree.....	713-	30
Contingent interests, protection of.....	715-	33
Creditor to.....	680-	28
Cumulative	679-	24
Debtor to, by his creditor.....	679-	27
Deduction from.....	787-	9
<i>De falsa causa adjecta</i>	676-	11
<i>De falsa demonstratione</i>	675-	10
Demand before suit for.....	711-	25
Demonstrative	678-	22
Discharge after presumption of payment.....	848-	16
Discharge by sale.....	741-	28
Disincumbering residuary estate charged.....	840-	1
Disposition of lapsed fund.....	685-	35
Execution stayed for want of assets.....	712-	27
Exemption from abatement.....	689-	42
General'	678-	23
General, abatement.....	688-	39
"Heirs," "legal representatives," etc.....	683-	33
How left—Justinian.....	673-	2
Income or interest of fund.....	698-	13
Interest, etc.....	696-	9
Interest, parents.....	697-	11
Interests in remainder, security.....	714-	32
Jurisdiction of the Orphans' Court to enforce payment.....	693-	3

LEGACY — (Continued)	PAGE	PAGE
Lapsed or void, collateral heirs.....	681-	30
Lapsed when it falls into residue.....	685-	35
Liability of executor.....	738-	20
Nature of.....	672-	1
Nonsuit, for want of assets.....	713-	28
Payable, when and to whom.....	692-	2
Personal estate primarily liable for.....	691-	1
Plea of "no assets," suspends suit.....	712-	26
Pledged goods.....	679-	25
Primarily payable out of personalty.....	712-	26
Priority of widow.....	690-	43
Procedure to recover, when charged.....	703-	8
Provision for children dead when the will was made..	684-	34
Recovery, Justinian.....	711-	24
Release of.....	695-	7
Release, when charged.....	740-	26
Residuary, abatement.....	688-	40
Revocation or transfer.....	675-	13
Security by holders of interests limited or conditional..	716-	34
Security by legatee, charge on land.....	710-	19
Specific	676-	18
Specific or otherwise, when.....	677-	21
Specific, courts averse to.....	677-	19
Specific, interest upon.....	698-	14
Specific, of money.....	677-	20
Substitution of legatees.....	682-	32
Tax on, when charged on land.....	202-	7
Time when due, when the will does not fix a time.....	694-	4
Time of payment fixed in will.....	696-	10
Vested and contingent.....	742-	31
Vested or contingent.....	675-	14
Void and lapsed.....	680-	29
Widow or creditor, interest.....	697-	12
LEGAL INTELLIGENCER, LEGAL PUBLICATION.....	44-	1
LEGAL JOURNAL — RULE OF COURT.....	389-	15
LEGAL REPRESENTATIVES DEFINED.....	173-	1
Claims against estate.....	438-	22
Compelled to become parties.....	174-	3
Gifts to.....	683-	33
"Heirs," in will.....	721-	5
Order to sell.....	183-	14
<i>Sci. fa.</i> to before execution.....	180-	11
Substitution	174-	2
Things in hands of, as assets.....	124-	1
LEGAL TERGIVERSATION.....	119-	24

	PAGE	PAG.
LEGATEES.		
Claiming by representation or substitution.....	788-	10
Devisees, and contribution.....	434-	25
Error in names.....	675-	9
Who may be.....	673-	4
Interest in personalty.....	737-	18
Right to take corpus on giving security.....	843-	6
Right to take land instead of proceeds.....	824-	7
Substituted	682-	32
LETTER, FORM OF WILL BY.....	533-	5
LETTERS OF ADMINISTRATION, ISSUANCE.....	27-	5
LETTERS OF ADMINISTRATION, PREFERENCE.....	29-	13
Administration <i>cum testamento annexo</i>	617-	1
Administration <i>c.t.a.</i> , form.....	622-	11
Administration <i>de bonis non. cum. t.a.</i>	622-	10
Administration, when void.....	32-	19
Administration, renunciation.....	31-	15
Ancillary, necessity for.....	629-	22
Caveat against granting — form.....	30-	14
<i>D.b.n.</i> , form.....	626-	19
Forms of.....	59-	2
Granted by the court.....	28-	10
Granted beyond the state.....	628-	21
Issuance after 21 years.....	28-	8
<i>Pendente lite</i>	587-	1
<i>Pendente lite</i> , form.....	627-	20
Revocation of.....	31-	16
Revocation, does not affect title in partition.....	353-	81
Right to have.....	619-	5
LETTERS ROGATORY, PROOF OF WILL BY.....	545-	1
LETTERS ROGATORY, PROTOCOL, FORM.....	880-	39
LETTERS, STATE TAX ON.....	29-	11
LETTERS, TESTAMENTARY, FORM.....	621-	9
Form of granting.....	621-	8
Issuance of.....	617-	1
Revocation of.....	622-	10
LEVARI FACIAS, COLLECTION OF LEGACY.....	704-	8
LICENSE, LIQUOR — NO ASSET.....	877-	28
LICENSE AND GOOD WILL.....	128-	7

	PAGE	PAGE
LIENS.		
Appointment of auditor.....	365-	107
Ascertainment by auditor.....	370-	117
Certificates of searches for.....	373-	121
Collateral tax.....	208-	22
Debts, relieving land from.....	122-	27
Discharge by sale.....	369-	116
Effect of partition.....	370-	118
Heirs, ascertainment by auditor.....	363-	101
Recognizance in partition.....	344-	66
Recognizance in partition.....	345-	66
Recognizance in partition.....	365-	106
Petition to discharge land.....	502-	1
Preference of.....	130-	13
Rents in partition.....	343-	64
LIEN CREDITOR AS PURCHASER.	155-	43
Rights as purchaser.....	167-	62
LIFE ESTATE.		
Creation of.....	793-	20
See Rule in Shelley's Case.		
Devise over, without.....	800-	40
Limited remainder with, sale of.....	830-	20, 21
Remainder in fee with, and alternative limitation over.	763-	n22
Notice of sale, to non-resident.....	361-	97
Sale of by guardian or trustee.....	243-	65
LIFE TENANT, EXECUTOR, SUIT BY.	177-	7
Protection in partition.....	358-	90
Relation to remainderman.....	794-	22
Rents due.....	46-	8
Right to bid in partition.....	317-	18
Will of emblements.....	538-	17
LIMITATIONS ON ESTATES.		
Future without particular estate.....	764-	11
Lives in being, and 21 years and 9 months.....	803-	47
Over after fee or fee tail.....	762-	4
Over to children of first taker.....	763-	7
Over on death during minority, etc.....	764-	10
Over on death without "heirs".....	764-	9
Over on failure of issue.....	757-	19
Over on failure of issue.....	762-	5
Substitutionary	779-	32
Substitutionary	773-	20
Words of.....	752-	9
Words of in will.....	684-	33, 34
See Rule in Shelley's Case.		

d)	PAGE	PAGE
last estate.....	428-	15
.....	479-	50
.....	208-	22
.....	122-	26
ured.....	429-	16
onveyances, <i>et cetera</i>	559-	27
y.....	946-	35
.....	912-	26
gins to run.....	913-	27
.....	429-	16
.....	397-	25
," 321.		
.....	493-	29
ASCENDING	474-	36
BY FOREIGN EXECUTOR..	631-	24
- PERPETUITIES	804-	47
.....	250-	84
.....	938-	22
.....	251-	85
.....	545-	2
ABITUAL DRUNKARD..	609-	49
OF	834-	33
.....	538-	18
.....	287-	19
.....	322-	23
.....	929-	2
ith leave of court.....	645-	5
.....	607-	47
accounts	387-	13
.....	313-	10
.....	239-	56
.....	239-	57
.....	240-	58
.....	240-	59
.....	242-	63
.....	237-	53
.....	234-	49
.....	703-	6
.....	799-	37
.....	241-	61

MAINTENANCE — (Continued)	PAGE	PAG.
Time of allowance for ward.....	240—	60
Ward, allowance of.....	238—	55
Ward, without prior order.....	238—	54
MALE PRONOUNS EMBRACE FEMALES.....	578—	n5
MAN, COMMON-LAW AGES OF.....	860—	1
MANSION, RIGHT OF WIDOW TO.....	645—	4
MARK, SIGNATURE OF WILL BY.....	539—	20
MARRIAGE.		
Condition in restraint of.....	786—	7
Devise in restraint of.....	740—	27
Effect on guardianship.....	212—	2
Effect on guardianship.....	861—	3
Effect on will.....	583—	12, 13
Estate defeasible upon.....	733—	7
MARRIED WOMAN.		
Allottee in partition.....	342—	63
Competency to make a will.....	537—	15
Executrix	619—	3
Power as trustee, to convey.....	958—	59
Power over trust estate.....	922—	45
MARSHALING, UNDER DEVISES.....	739—	23
Assets in distribution.....	434—	25
Sale in partition.....	369—	117
MARYLAND, EXECUTION OF WILL IN.....	543—	28
MASTER.		
Hearing by.....	90—	44
Reference to.....	89—	42
Reference of debts of decedent.....	122—	28
MAXIM — REASON OF THE LAW.....	748—	n3
MEDICAL ATTENDANCE, CLAIM FOR.....	105—	5
MEMORANDUM OF APPLICATION, PHILA.....	78—	10
MEMORY, DISPOSING, LUNATIC MAY HAVE.....	538—	18
MEMORY, SOUND AND DISPOSING.....	607—	47
MENTAL OR PHYSICAL WEAKNESS, EFFECT ON WILL.....	610—	50
MERCER COUNTY.		
Leasing minerals in.....	297—	41
Records of register.....	36—	28

	PAGE	PAGE
MERGER, UNDER WILL, BASIS OF PARTITION.....	649-	12
"MESSAGE," EMBRACES WHAT.....	731-	4
MESTREZAT, J., ON POWER OF APPOINTMENT.....	805-	48
MILL SITE PROPERTY, CARRIED BY WILL.....	731-	n30
MIND—AFFECTED BY MATERIAL CONDITIONS.....	607-	47
MIND, NORMAL RELATION TO BODY AND EXTERNAL WORLD	607-	47
MINERALS, LEASING, MERCER COUNTY.....	297-	41
MINING LEASES, CONSOLIDATION OF.....	290-	23
MINORITY, CAPITALIZATION DURING.....	293-	29
MINORS.		
Ages of capacity.....	211-	2
Allowance for maintenance.....	295-	34
Equitable powers over estate.....	220-	20
Legatees—"reasonable time".....	737-	19
Notice of appointment of guardian <i>ad litem</i>	213-	2
Notice of proceedings in the Orphans' Court.....	82-	28
Sale, etc., of estates.....	278-	5
Sale of vacant ground.....	299-	45
Security for, when executrix marries.....	835-	26
Unmarried, custody, willed by father.....	537-	10
"MONEY"—WHAT PASSES AS SUCH.....	798-	32
"MOIETY" CONSTRUED.....	732-	n35
MONUMENT OR TOMBSTONE.....	108-	7
MORTGAGE OF REAL ESTATE.		
Claims upon which it may be ordered.....	137-	5
Debt of decedent, to pay.....	131-	15
Debts, effect of sale.....	138-	6
Deed, or acknowledgment.....	296-	39
Discharged by sale, when.....	369-	116
Land divided by county line, by guardian.....	863-	11
Minor's real estate.....	244-	69
Partition, form.....	380-	137
Passes as personalty.....	729-	2
Payment of debts.....	133-	1
Price act, under.....	274-	1
Right of widow to have her interest relieved from out of personal estate.....	645-	4

	PAGE	PAGE
MORTGAGING OF REAL ESTATE	169-	69
MORTGAGING, PRICE ACT	288-	20
MORTGAGING OR SALE OF LIFE ESTATES, ETC.	830-	20, 21
Security required.....	296-	38
MOTHER.		
Allowance for maintenance of child.....	240-	58
Guardian by nature.....	211-	1
Inheritance at civil law.....	474-	37
Father and, as heirs.....	473-	35
Right to appoint guardian.....	862-	7
MOTIONS AND RULES, DEPOSITIONS ON	93-	51
MOTION LIST, PHILA.	78-	9
NAME, LEGATEE ERROR IN	675-	9
NAMES, UNCERTAINTY OF BENEFICIARIES	718-	1
"NEAREST RELATIVES," GIFTS TO	683-	33
NEPHEWS AND NIECES, ONLY, AS HEIRS	476-	41
NEW JERSEY.		
Administrator, suit for damages by.....	629-	21
Execution and attestation of will in.....	541-	24
Probate of will in.....	541-	24
Rule as to trustees.....	20-	8
Will, not probated, may be read to ascertain the inten- tion of testator.....	789-	12
NEW YORK, EXECUTION OF WILL, IN	542-	25
NEXT OF KIN, DEFINED	463-	16
Who are.....	723-	9
Gifts to.....	723-	9
Inherit from intestate, when.....	461-	11
When lapsed legacy falls to.....	685-	35
When void gifts, go to.....	575-	8
When void gifts, go to.....	574-	7
"NO ASSETS," PLEA OF SUSPENDS ACTION FOR LEGACY	712-	26
NON-RESIDENT EXECUTOR TO GIVE BOND	32-	19
Form of bond.....	839-	43
Rights in Penna.....	629-	21, 22
Venue.....	185-	20
NON-RESIDENTS.		
Claims against estate.....	433-	21
Notice of accounts.....	385-	8

NON-RESIDENTS — (Continued)	PAGE	PAGE
Payment of owelty by.....	347-	69
Notice, sale of life estate.....	361-	97
NONSUIT, WANT OF ASSETS, ACTION FOR LEGACY....	713-	28
NOTICE.		
Accounts to non-residents.....	386-	8
Administration, form.....	44-	2
Appointment of administrator.....	43-	1
Appointment of guardian.....	213-	2
Appointment of guardian.....	217-	11
Appointment of auditor, Phila.....	875-	19
Audit, beyond the state.....	421-	4
Auditor's report.....	93-	62
Bequests, by register.....	37-	30
Charge on land, proceedings.....	705-	9
Citations and rules, Allegheny.....	80-	24
Collateral tax, by executors, etc.....	203-	8
Contest of will.....	599-	34
Contracts of decedent.....	188-	2
Devises to corporations.....	642-	13
Exceptions to bond.....	34-	22
Filing administration accounts.....	38-	33
Filing administration accounts.....	38-	34
Filing executor's account.....	868-	8
Filing account, form.....	391-	17
Form, appraisers' meeting.....	735-	11
Form, charge on land.....	504-	7
Form of publication sale in partition.....	352-	79
Form in separate Orphans' Court.....	82-	29
Heirs, etc.....	81-	27
Justification of recognizance, Allegheny county.....	344-	66
Lien — actual	641-	12
Minors where interested.....	82-	28
Necessity for, in partition.....	327-	32
Non-resident, sale of life estate.....	361-	97
Partition, form of publication.....	326-	30
Petition for appointment of trustee.....	931-	5
Petition under Price act.....	287-	19
Prerequisite to confirmation of accounts.....	385-	7
Present claims, to.....	111-	13
Proof of service in partition.....	326-	32
Real estate in escheat.....	488-	11
Rule to accept, etc., in partition, form.....	337-	50
Sale of real estate.....	149-	26
Sale, form.....	149-	27
Sale of personalty.....	56-	34
Sale, private, act June 9, 1911.		

NOTICE — (Continued)	PAGE	PAGE
Sale of ward's real estate.....	243-	66
Sale of ward's lands in different counties.....	246-	73
See "Testamentary Guardian."		
Service in collection of collateral tax.....	206-	17
Specific performance.....	190-	6
Widow's election, form.....	648-	9
"NOW LIVING," "THEN LIVING," INTERPRETATION OF	683-	33
NUMBER, JURORS, IN INQUISITION.....	309-	3
NUNC PRO TUNC.		
Adding parties to contest of will.....	599-	37
Filing exceptions.....	527-	8
Parties in partition, adding.....	319-	19
Plaintiff filing leave to defendant to hold.....	514-	16
NUNCUPATION, CONDITIONS.....	567-	4
Form of reduction to writing.....	569-	7
How and when allowed.....	566-	2
Reduced to writing.....	534-	6
NUNCUPATIVE WILL — FORM.....	568-	5
Form of probate.....	569-	6
How and when it may be made.....	566-	2
Nature of.....	566-	1
Testimony, time of reducing to writing.....	567-	3
OATH OF ADMINISTRATOR.....	36-	26
Appraisers	46-	10
Appraisers, form.....	53-	25
Form of appraisers.....	50-	15
Form, jurors in partition.....	327-	33
OFFICERS, RULES UPON.....	95-	63
OHIO, LAW AS TO AGE OF FEMALE.....	264-	111
Will, execution and attestation.....	542-	26
OLD AGE.		
Capacity to make will.....	604-	43
Effect on will.....	607-	47
OMISSIONS IN PLEADING NOT TO AFFECT QUESTION OF ASSETS.....	183-	15
"OR" AND "AND" CONSTRUED.....	773-	19
ORDER OF ARGUMENT — PHILA.....	79-	17
ORDER OF COURT ON PETITION, PHILA.....	77-	5
Discharging guardian.....	270-	125

ORDER OF COURT — (Continued)	PAGE	PAG.
Enforcement	95-	59
Give security to.....	63-	9
Inquest in partition, forms.....	324-	27, 28
Legal representatives, to sell.....	183-	14
Petition, to pay over balance.....	510-	7
Private sale, form.....	153-	36
Removal, form of.....	68-	17
Sale of real estate.....	135-	4
Sale, form of alias.....	154-	41
Sale, return, form.....	151-	32
Sale, Price act, form.....	283-	15
ORIGIN AND CHARACTER OF THE ORPHANS' COURT..	1-	1
ORPHANS' COURT.		
Apartments of.....	7-	14
Bill of costs in.....	9-	21
Clerk of.....	6-	9
Constitutional provisions.....	3-	4
Duties of clerk.....	12-	25
Duty to examine accounts.....	386-	11
Exclusive forum to ascertain decedent's debts.....	433-	24
Exclusive jurisdiction of accounts.....	255-	92
Exclusive power over debts of decedent.....	123-	30
Executions in.....	513-	15
Equitable procedure in.....	2-	3
Fees of clerk of.....	12-	24
Fees of clerk in Allegheny.....	10-	23
Fees of clerk in Phila.....	9-	22
Injunctive orders.....	6-	11
Judges of separate.....	8-	17
Jurisdiction	6-	10
Jurisdiction	14-	1
Jurisdiction of accounts.....	395-	23
Jurisdiction of assets.....	20-	9
Jurisdiction of claims against distributees.....	396-	25
Jurisdiction collection of legacy.....	693-	3
Jurisdiction to disincumber land of charge.....	840-	1
Jurisdiction of distribution.....	415-	3
Jurisdiction of distribution.....	423-	7
Jurisdiction of escheats.....	486-	5
Jurisdiction of estate of absentee.....	911-	21
Jurisdiction exclusive of specific performance.....	187-	1
Jurisdiction of estate of one presumed dead.....	851-	3
Jurisdiction, gifts <i>inter vivos</i> , etc., none.....	877-	27
Jurisdiction of partition.....	309-	2
Jurisdiction, under Price act.....	274-	1
Jurisdiction over real estate.....	21-	10

ORPHANS' COURT — (Continued)	PAGE	PAGE
Jurisdiction, recovery of legacy charged on land.....	703-	7, 8
Jurisdiction of statutory.....	2-	2
Jurisdiction of testamentary trusts.....	918-	38
Jurisdiction of wards.....	237-	53
Limited jurisdiction, charge on land.....	504-	4
Origin and character of.....	1-	1
Particular jurisdiction.....	15-	3
Perpetuating testimony in.....	96-	64
Power on bill of review.....	402-	3
Power debtors and parties.....	18-	7
Power over partnership interest.....	23-	11
Power to fix time and manner of notice.....	421-	4
Power over funds.....	632-	25
Power to issue injunctions.....	497-	1
Power to make rules.....	7-	13
Power to order sale or mortgage.....	133-	1-2
Power to order sale or mortgage.....	134-	3
Power over partnership interest.....	23-	11
Power to require account.....	256-	94
Power over strangers.....	18-	6
Procedure in.....	74-	1
Process to other counties.....	95-	61
Record, court of.....	4-	6
Salaries in Phila.....	7-	15
Seal of.....	5-	7
Separate constituted.....	5-	8
Territorial jurisdiction.....	19-	8
Time and manner of granting injunctions.....	497-	2
OVERSEERS OF THE POOR, claim against pauper.....	642-	12
OWELTY.		
Collection of.....	347-	68
Effect of recognizance for.....	347-	68
Enforcement of recognizance.....	347-	68
Form of recognizance.....	345-	67
Interest on.....	348-	70
Partition securing by recognizance.....	343-	65, 66
Payment, non-residents.....	347-	69
Rule to pay.....	348-	71
Time of payment.....	330-	39
Widow, when lien.....	344-	66
OWNER, IN COLLATERAL TAX LAW.....	201-	3
PARALLEL CASES — RULE AS TO.....	661-	5
PAPER BOOKS OF THE ARGUMENT, PHILA.....	78-	15

	PAGE	PAGE
PAPER BOOKS ON EXCEPTIONS TO ADJUDICATION,		
PHILA.	70-	10
PARENS PATRIAE — DOCTRINE OF.....	214-	4
PARENT; CIVIL LAW AS TO GUARDIANSHIP.....	214-	4
PARENT AND CHILD, CLAIMS OF.....	113-	17
PAROL EVIDENCE.		
To construe will.....	668-	18
Testamentary intent.....	533-	5
Testamentary intent.....	534-	7
PARTIES.		
Concluded by sale under Price act.....	288-	21
Jurisdiction of.....	16-	5
Legal representatives to become.....	174-	3
Partition	318-	19
Recovery of legacy charged on land.....	704-	8
Unknown, trustee in partition, for.....	374-	124
Widow, heirs and devisees.....	181-	12
PARTITION IN THE ORPHANS' COURT.		
Absence of lineal descendants.....	311-	0
Acceptance, interpretation.....	338-	54
Account after sale.....	368-	113
Affidavit of service of notice.....	326-	32
Allotment, when a higher price is bid.....	334-	46
Amendment of petition, etc.....	319-	20
Answer to petition.....	322-	24
Appeal — right of.....	376-	130
Appointment of auditor to ascertain liens.....	363-	101
Appraisement and valuation.....	330-	40
Appraisement of purparts, fewer than heirs.....	329-	37
Assignment and proceeding on recognizance.....	356-	86
Auditor to ascertain liens.....	365-	107
Bidding, purpose.....	339-	55
Calculation of amounts due.....	365-	108
Certificates of searches.....	373-	121
Coal and timber.....	312-	10
Commissioners	313-	11
Conclusiveness	374-	123
Construction by legislature.....	315-	14
Conversion by sale, when it takes place.....	374-	122
Costs, generally.....	375-	128
Costs when payable out of estate.....	376-	120
Devise to children in unequal portions.....	311-	5
Discharge of liens by sale.....	369-	116
VOL. III PRACTICE — 69		

PARTITION IN THE ORPHANS' COURT—	(Continued)	PAGE	PAGE
Distribution and marshaling.....		369—	117
Distribution, modes and rules.....		371—	119
Distributive shares, claims upon.....		373—	120
Docket, clerk to keep.....		13—	36
Docket, clerk to keep.....		375—	126
Dower interest, status of.....		355—	85
Effect of adverse possession, etc.....		320—	21
Effect of recognizance.....		347—	68
Equalization of purparts.....		329—	36
Estate when not liable for debts.....		367—	113
Fees of sheriff and jurors.....		375—	127
Fewer parts than heirs.....		349—	72
Form, acceptance of purpart.....		340—	57
Form, acceptance of service of rule, etc.....		337—	51
Form, affidavit of publication.....		326—	31
Form of bid.....		340—	56
Form of bond.....		379—	135
Form, decree awarding purpart.....		340—	58
Form, decree awarding purpart.....		341—	59
Form of deed.....		378—	134
Form, mortgage with bond.....		380—	137
Form of notice by publication.....		326—	30
Form of notice by publication.....		352—	79
Form of oath of appraisers.....		327—	33
Form of order appointing trustee to make sale.....		351—	77
Form, order for inquest.....		324—	27
Form, order for inquest, Lancaster county.....		324—	28
Form of order for rule to accept, etc.....		336—	49
Form of petition for inquest.....		323—	26
Form of petition for rule to accept, etc.....		336—	48
Form of petition for sale of purpart.....		350—	76
Form, petition for sale, etc.....		377—	131
Form, petition to satisfy recognizance.....		377—	132
Form of publication of notice of rule.....		337—	50
Form of recognizance.....		345—	67
Form, release of claim on recognizance.....		378—	133
Form of return, against division.....		331—	41
Form of return for allotment.....		332—	42
Form, return of sale.....		352—	80
Form of return of sheriff.....		332—	43
Form of rule to accept or refuse.....		337—	52
Form of warrant with bond.....		380—	136
Form of writ of inquest.....		325—	29
Guardian's acts binding on ward.....		254—	90
Inquisition, manner of holding.....		327—	34
Interest on owelty.....		348—	70
Interests from different ancestors.....		312—	9

PARTITION IN THE ORPHANS' COURT— (Continued)	PAGE	PAGE
Jurisdiction, how acquired.....	318-	19
Jurisdiction of Orphans' Court.....	309-	2
Jurisdiction under a will.....	310-	4
Jury of inquisition.....	309-	3
Lands in different counties.....	314-	12
Lands in one or more counties.....	314-	13
Liens, effect on.....	370-	118
Nature of.....	309-	1
Order of taking at appraisement.....	329-	35
Owerty, fixing time of payment.....	330-	39
Owerty, securing.....	343-	65, 6
Parties to proceeding.....	318-	19
Payment into court.....	360-	109
Payment into court, release and set-off.....	356-	87
Payment, owerty by non-residents.....	347-	69
Plea in.....	321-	21
Practice on rule to accept or refuse.....	338-	53
Precept to Common Pleas.....	323-	25
Preference of heir limited.....	342-	62
Preference to lands in another county.....	342-	61
Proceeding by petition.....	316-	17
Publication of writ.....	348-	69
Purchaser's rights.....	364-	103
Recognizance, lien upon.....	365-	106
Rents and liens.....	343-	64
Requisite of notice.....	327-	32
Residue after allotment.....	330-	38
Return days.....	352-	78
Return of inquest.....	333-	44
Return of inquest, confirmation.....	333-	45
Right to petition.....	316-	17-18
Right of tenant by curtesy.....	655-	3
Rule to accept or refuse.....	335-	47
Rule to show cause, etc.....	321-	22, 23
Rule to show cause why land should not be sold.....	349-	73
Rule to show cause, when dispensed with.....	349-	74
Sale, confirmation.....	363-	102
Sale, judicial.....	350-	74
Sale may be public or private.....	362-	99
Sale of purparts, left over.....	350-	76
Security before sale.....	362-	99
Security to refund.....	368-	114
Separate suits.....	316-	16
Service on committee of lunatic.....	322-	23
Setting aside proceedings for fraud.....	341-	60
Tenancy in common.....	311-	6
Tenants in common, etc.....	315-	16

PARTITION IN THE ORPHANS' COURT — (Continued)	PAGE	PAGE
Time of proceedings.....	321-	22
Title acquired by sale.....	366-	111
Title of allottee.....	342-	63
Title completion after death of trustee.....	367-	112
Title unaffected by revocation of letters.....	353-	81
Trustee for parties unknown, etc.....	374-	124
Validating acts.....	375-	125
Valuation when land cannot be divided.....	328-	35
Widow's interest, valuation and charge.....	354-	83
Widow's right to petition.....	312-	8
Widow's share charged on land.....	357-	90
Widow's share charged on the land.....	353-	82
Widow's share remains a charge.....	355-	84
Widow's share when there is more than one tract.....	357-	88
Widow's share in tenancy in common.....	357-	89
Will — when applied for jurisdiction.....	15-	4
Writ, when awarded or not.....	310-	4
York and Fayette counties.....	313-	11
PARTNERSHIP.		
Interest in, bequest of.....	798-	33
Interest liable to collateral tax.....	199-	1
Jurisdiction over interest.....	23-	11
Sale of property.....	161-	54
PATRICIDE, INHERITANCE NOT LOST.....	478-	47
PAUPER, CLAIM AGAINST, HOW SECURED.....	642-	12
PAYMENT.		
Debts of decedent, order of.....	105-	4
Foreign guardian.....	225-	36
Funds, to non-resident trustee.....	958-	60
Legacies	691-	1
Legacies	692-	2
Necessary, by guardian.....	262-	108
Owely, fixing time.....	330-	39
Owely, non-residents.....	347-	69
Petition for order requiring.....	510-	7
PAYMENT INTO COURT.....	417-	8
When it may be done.....	847-	15
Charges on land.....	503-	2
Charges on land.....	847-	14
Deposit with trust company.....	505-	9, 10
Legacy charged on land, by petition and leave.....	710-	20
Partition	356-	87
Partition sale.....	366-	109
Phila., depository.....	366-	110
Purchase money.....	167-	64

	PAGE	PAR.
PENALTY — APPRAISER OF COLLATERAL TAX.....	206—	15
PENDENTE LITE, investment.....	156—	45
Letters, see "Letters."		
PERPETUATION OF TESTIMONY.....	96—	64
PERPETUITIES DEFINED.....	804—	47
PERPETUITIES, RULE AGAINST.....	803—	47
PERSON, GUARDIAN OF.....	227—	38
PERSON, GUARDIAN OF.....	229—	41
PERSONAL ESTATE, FIRST LIABLE FOR LEGACIES....	691—	1
PERSONAL ESTATE, FIRST LIABLE FOR LEGACIES....	712—	26
Law of domicile governs.....	579—	3
Revocation of will, as to.....	581—	8
PERSONAL PROPERTY.		
Married woman, inheritance of.....	459—	8
Meaning in will.....	729—	1, 2
PERSONALTY.		
Absolute bequest of.....	800—	41
Bequest with power to consume.....	794—	23
Division without distinction of blood.....	476—	41
Notice of sale.....	56—	34
Sale in escheat.....	491—	21
Seven years' limitation.....	479—	50
Shelley's case stretched to apply to.....	759—	22
Situs of movable.....	630—	22
PER STIRPES AND PER CAPITA, GIFTS.....	726—	18
PER STIRPES AND PER CAPITA INHERITANCE.....	461—	11, 12, 13
PETITION.		
Adjudication for, in intestate's estate.....	441—	46
Amendment in partition.....	319—	20
Answer to.....	85—	36
Answer in partition.....	322—	24
Appointment of guardian.....	215—	5
Appointment of trustee.....	931—	4
Appraisement of land willed.....	734—	9
Charge on land to relieve.....	504—	6
Charge on land, form.....	707—	11
Citation, in escheats.....	486—	8
Citations, etc., Phila.....	599—	35

PETITION — (Continued)	PAGE	PAR.
Discharge of land from lien.....	502—	1
Filing on appeal from probate.....	590—	12
Form of.....	76—	4
Form, for injunction.....	499—	5
Form for rule to accept or refuse.....	336—	48
Form, specific performance.....	191—	7
Inquest in partition, form.....	323—	26
Legatee, charge on land.....	706—	10
Orphans' Court, procedure by.....	74—	1
Partition	316—	17-18
Partition — parties	318—	19
Removal of fiduciary.....	70—	22
Requisites	75—	3
Review of account.....	399—	1
Sale of minor's real estate.....	244—	67
Sale, private, under Price act, form.....	282—	13
Sale of purpart, form.....	350—	76
Sale of real estate.....	139—	8
Sale of real estate, form.....	141—	11
Sale of real estate, Allegheny.....	140—	9
Sale of real estate, Phila.....	140—	9
Sale of real estate, act, 1893.....	303—	3, 4
Sale to satisfy recognizance, form.....	377—	131
Specific performance.....	189—	4
Support of ward, form.....	235—	50
To compel purchaser to comply with his bid — form...	170—	70
PETITIONER, INTEREST OF	75—	2
Parties entitled, Price act.....	287—	19
Right to withdraw.....	89—	41
PHILADELPHIA PRACTICE.		
Administration not to be blended with distribution....	442—	49
Advertisement of audit lists.....	443—	52
Agreements for confirmation of account.....	444—	60
Affidavit by accountant.....	441—	55
Affidavit with offer of security.....	247—	75
Appeals from register.....	589—	9
Appointment of auditors, etc.....	89—	25
Appointment of auditor.....	874—	18
Approval of sureties.....	246—	74
Argument <i>in banc</i>	78—	13
Argument list, placing causes on.....	78—	14
Assignment of judges formerly.....	5—	8
Audit list.....	78—	12
Audit list, division of.....	442—	51
Auditor, appointment.....	421—	2
Auditor, compensation, taxation.....	438—	37

PHILADELPHIA PRACTICE — (Continued)	PAGE	PAGE
Notice by.....	421—	3
Auditor's reports.....	93—	54
Auditor's reports, exceptions.....	437—	35
Auditor's report, filing and confirmation.....	438—	36
Citations and petitions.....	599—	35
Collateral tax.....	444—	55
Copy of inventory.....	444—	55
Costs of audit and security.....	438—	38
Depositions, rules.....	439—	41
Discharge of fiduciaries.....	72—	26
Discharge of guardian.....	269—	121
Enforcement of decrees.....	98—	70
Equity and Common Pleas — rules.....	92—	47
Equity rules in Orphans' Court.....	74—	nl
Examiner of continuing trusts.....	443—	54
Exceptions to adjudication.....	444—	57
Exceptions placed on list, of course.....	79—	19
Failure to answer citation.....	599—	36
Fees of clerk of Orphans' Court.....	9—	22
Fees of register.....	41—	38
Form of account.....	442—	48
Form of issue, <i>d.v.n.</i>	590—	13
Form of notice of petition for sale of real estate.....	147—	23
Judge to determine appeals, <i>nisi</i>	594—	22
Notice of appointment of auditor.....	875—	19
Notice of guardian's account, to ward.....	444—	56
Notice of petition for sale.....	147—	22
Order of argument.....	79—	17
Order of court.....	77—	5
Paper books of the argument.....	78—	15
Paper books on exceptions to adjudication.....	79—	16
Partial suspension of distribution by exceptions.....	444—	59
Parties to issue <i>d.v.n.</i>	605—	45
Payment into court, depository.....	366—	110
Petition for adjudication and schedules.....	443—	53
Petition for appointment of guardian.....	215—	5
Petition for partition.....	318—	19
Petition for sale of real estate.....	140—	9
Petition for sale of real estate, acts of 1874 and 1893..	303—	4
Petition for sale of real estate not for the payment of debts	146—	20
Petition for private sale of real estate.....	146—	21
Practice on petition.....	86—	26
Previous memorandum of application.....	78—	10
Rules as to corporate guardian.....	220—	19
Salaries of deputy register and clerks.....	7—	15
Satisfaction of decrees.....	98—	69

PHILADELPHIA PRACTICE — (Continued)	PAGE	PAGE
Saturday motion list.....	78—	9
Stenographer to attend register.....	389—	15
Striking from list, after third call.....	79—	18
Terms in.....	78—	8
Time of audit.....	442—	50
Time of hearing appeals.....	594—	20
Time limit on entering motion.....	78—	11
Time of report of auditor.....	875—	20
 PHILA. TRUST COMPANIES, RULES OF COURT.		
Annual statement required.....	967—	21
Application to act as surety.....	969—	28
Approval	968—	22
Capital of corporations.....	969—	25
Examiners, reports and fees.....	968—	23
List of estates.....	969—	27
Trust companies, petition, etc.....	966—	20
Report, advisory only.....	969—	24
Trust and surety docket.....	969—	26
Trustee of life estate, removal.....	909—	19
Witnesses, compelling attendance.....	426—	13
 PIEPOUDRE, COURT OF.....	637—	6
 PITTSBURG LEGAL JOURNAL, LEGAL NEWSPAPER....	43—	1
 PLEA.		
“No assets,” by executor.....	712—	26
Partition	321—	21
<i>Plene administravit</i>	395—	23
 PLEAS — BY EXECUTOR.....	832—	28
 PLEADING, DEMURRER.....	84—	31
Errors in, not to affect question of assets.....	183—	15
 PLEDGE, REQUEST OF.....	679—	25
 POSSESSION, ADVERSE, PARTITION.....	320—	21
Proceedings for, Vol. II, Johnson.....	504—	
Purchasers' rights at Orphans' Court sale.....	364—	103
 POWER.		
Appointment, in devise.....	739—	24
Appointment, when divisible.....	805—	48
Appointment, exercise of.....	805—	48
Appointment, not power to convey.....	922—	45
Appointment, no longer exercisable <i>pro tanto</i>	805—	48
Attorney, form.....	409—	2
Consume, effect of.....	733—	7

POWER — (Continued)	PAGE	PAG.
Divide, when exercisable.....	828—	17
Estate, over, by executor.....	820—	1
Orphans' Court after jurisdiction has attached.....	24—	12
Fix return days and make rules.....	77—	6
Order sale or mortgage in several counties.....	133—	2
Order sale or mortgage in different counties.....	134—	3
Ratify sale.....	297—	40
Sale of real estate for distribution.....	302—	1
Sale, etc., real estates.....	274—	1
Sale, control by the courts.....	825—	10
Sale, discretionary.....	825—	11
Sale, duration of.....	827—	15
Sale, effect of.....	823—	6
Sale, execution of.....	824—	8
Sale, extent of.....	823—	14
Sale, interpretation of.....	822—	5
Sale, meaning of "naked authority".....	822—	4
Surviving fiduciary as to deed.....	166—	60
POWERS.		
Administrator <i>c.t.a.</i> and <i>d.b.a.</i>	624—	13, 14
Equity decrees the exercise of.....	126—	3
Executor, acting.....	624—	13,
		14, 15
Executor, divided or conditional.....	639—	8
Exercise of, opinion of Penrose, J.....	805—	48
Duties of legal representatives as to sale.....	159—	53
Orphans' Court.....	73—	
Surviving or acting executor.....	624—	15
Trustee, sale and mortgaging.....	944—	31
POSTHUMOUS CHILDREN, INHERITANCE EQUAL.....	473—	33
POSTHUMOUS CHILDREN, PROPER HEIRS.....	473—	34
POSTPONEMENT, SALE.....	158—	51
PRACTICE BEFORE AUDITOR.....	90—	43
PRECEPT, COMMON PLEAS, IN PARTITION.....	323—	25
PRECATORY AND EXPLANATORY WORDS IN A WILL..	801—	43
PRECATORY WORDS — TRUST.....	907—	11
PRECEDENT, CONDITIONS.....	784—	2
PRECEDENTS, WEIGHT IN CONSTRUING WILLS.....	661—	5
PRECEPT, ISSUE ON WILL TO COMMON PLEAS.....	596—	30

	PAGE	PAGE
PREFERENCE.		
Decedent's debts.....	104-	2
Law of domicile.....	109-	10
Right of, to letters.....	29-	13
PRESUMPTION.		
Account.....	865-	1
Death — and life.....	851-	1
Payment — discharge of legacies, etc.....	848-	16
Payment, measure of proof.....	445-	61
Payment of services.....	111-	14
PRESUMPTIONS, ARTIFICIALLY CONSTRUCTED.....	662-	6
PRESUMPTIONS AND BURDEN OF PROOF — WILL.....	609-	49, 50
PRICE ACT — FOR UNFETTERING ESTATES.....	274-	1
Accumulations for charity.....	294-	30
Accumulations, limit upon.....	291-	26
Acknowledgment of deed or mortgage.....	296-	39
Allowance for minors.....	295-	34
Appeals.....	291-	25
Application.....	279-	10
Available when.....	276-	4
Capitalization of income, etc.....	293-	29
Consolidation of mining leases.....	290-	23
Construction on accumulations.....	295-	36
Contingent remainder and executory devise.....	279-	7
Deeds by surviving trustees or successors.....	298-	42
Direction to pay incumbrances, etc.....	294-	32
Effect of.....	276-	3
Effect of accumulation, on the estate.....	295-	33
Form of certificate of tenants in common.....	286-	17
Form of consent of parties.....	283-	14
Form of decree of court.....	286-	18
Form of decree of private sale.....	299-	46
Form of final decree.....	300-	48
Form of order on guardian to join in sale.....	300-	49
Form of order to sell.....	283-	15
Form of petition.....	282-	13
Form of petition for allotment.....	284-	16
Form of return of private sale.....	300-	47
Ground rent defined.....	296-	37
Implied directions to accumulate.....	293-	28
Irregularity of appointment not to effect title.....	298-	43
Jurisdiction when alternative.....	279-	9
Minor's realty.....	278-	5
Parties who may petition.....	287-	19

PRICE ACT — (Continued)	PAGE	PAB.
Petition under — requisites.....	281-	12
Power of court to ratify sale.....	297-	40
Powers of fiduciary to convey, etc.....	289-	22
Purposes of.....	275-	1
Recording of deeds.....	298-	44
Repairs and improvements.....	279-	8
Retention of contingent fund for future needs.....	294-	31
Sale, manner and conditions.....	288-	20
Sale of trust estates.....	278-	6
Scope and effect of limit on accumulations.....	292-	27
Security when mortgaged or leased.....	296-	38
Substitution of purchase money.....	290-	24
Vesting of void accumulations.....	295-	35
PRIEST, TRUSTEE, SUCCESSOR.....	929-	1
PRIMOGENITURE, NEVER ADOPTED IN PENNA.....	460-	10
PRINCIPAL AND INCOME, TRUST ACCOUNTS.....	949-	40
PRIVATE SALE, MINOR'S ESTATES.....	278-	5
PRIVILEGES AND RESERVATIONS IN WILL.....	733-	7
PROBATE OF WILL		
After letters of administration issued.....	562-	33
Caveat against.....	586-	1
Codicil and will, together.....	564-	4
Conclusiveness of.....	557-	26
Copies of foreign wills.....	560-	30
Form of decree.....	558-	18
Nature of.....	544-	1
Nuncupative will, form.....	569-	6
PROCEDURE IN THE ORPHANS' COURT.....	73-	
PROCESS TO BE ATTESTED BY THE PRESIDENT JUDGE	79-	20
Directed to other counties.....	95-	61
Enforcement of decrees by.....	513-	15
PROCHEIN AMI, FOR INFANT CONTESTANT OF WILL..	597-	32
PROCHEIN AMI, OFFICE OF.....	212-	3
PROCLAMATION IN OLD ENGLAND.....	111-	n10
PRO CONFESSO, REMOVAL OF GUARDIAN.....	272-	131
PROFITS, LIABILITY OF GUARDIAN FOR.....	253-	88
PROMISES TO DEVISE OR BEQUEATH.....	790-	13

	PAGE	PAGE
PRONOUNS, MASCULINE INCLUDE THE FEMININE....	578-	n5
PRONOUNS, MASCULINE INCLUDE THE FEMININE....	684-	33
PROOF OF CLAIM.....	111-	13
Execution of will.....	544-	1
Execution of will, <i>aliunde</i>	541-	24
Inheritance for record purposes.....	480-	51
Lost will.....	545-	2
Manner and form, will.....	551-	12
Measure of, preponderance.....	445-	61
Signature of deceased witness to will, form.....	552-	13
Sufficiency, claims against estate.....	425-	11
Unsigned will.....	556-	22
PROPERTY.		
Escheat after seven years in court.....	484-	2
Intestate, recovery of.....	488-	12
Passing as personality—by will.....	729-	2
PRO TANTO—REVOCATION OF WILL.....	581-	6
PROTOCOL, LETTERS ROGATORY, FORM.....	880-	39
PSYCHIC RELATIONS—MIND TO BODY, ETC.....	608-	48
PUBLICATION.		
Form, affidavit in partition.....	326-	31
Notice of writ of partition.....	348-	69
Notice of filing accounts.....	38-	33
Will	541-	23
PUR AUTRE VIE, SALE OF ESTATES.....	243-	65
PURCHASE, ESTATES, BY TRUSTEES.....	944-	33
PURCHASE, WORDS OF, IN WILL.....	684-	33, 34
PURCHASE, WORDS OF, IN WILL.....	752-	9
Defined	751-	n12
PURCHASE MONEY.		
Application, in escheat.....	492-	25
Liability for.....	167-	63
Partition, charged on land.....	353-	82
Payment into court.....	167-	64
Substituted under Price act.....	290-	24
PURCHASER DEFINED.....	465-	20
First, rule of descent.....	464-	19
Executor's sale, must look after the proceeds, when....	826-	13
See act 1911, insert.		
Orphans' Court sale, as first purchaser.....	465-	19

PURCHASER — (Continued)	PAGE	PAG.
Rights and duties.....	364—	103
Rights and liabilities.....	166—	61
Rights as lien creditor.....	167—	62
Rights when sale is set aside.....	169—	67
Title of.....	162—	55
PURPARTS IN PARTITION.		
Acceptance, form of.....	340—	57
Equalization of.....	329—	36
Fewer than heirs.....	329—	37
Form, decree awarding.....	340—	58
Form, decree awarding.....	341—	59
Form of petition for sale.....	350—	70
Sale of those left over.....	350—	75
Widow's, nature of.....	354—	83
QUALIFICATION, DEFECTIVE, DOES NOT AFFECT TITLE	168—	66
QUANTITY, MEASURE OF ESTATE.....	730—	4
QUANTUM MERUIT.		
Housekeeper	115—	20
Right to recover on.....	114—	19
Services for.....	112—	16
Services for.....	113—	17
RACE, devised with mill.....	733—	7
RATE, INTEREST ON SHARE.....	699—	18
RATIFICATION, EXECUTOR'S SALE.....	16—	5
RATIFICATION, SALE UNDER PRICE ACT.....	297—	40
"REASONABLE TIME" TO PAY A LEGACY.....	737—	19
REAL ESTATE, AFTER-ACQUIRED, CARRIED BY GEN-		
ERAL DEVISE.....	732—	5
Blood of the ancestor.....	464—	18
Blood of the first purchaser.....	464—	19
Contract to sell.....	829—	18
Contracts of decedents.....	187—	
Decree at valuation under a will.....	836—	37, 38
Descent, blood of the ancestor.....	463—	17
Descent to collaterals of half blood.....	476—	43
Devise of, intention and power to pass.....	728—	1
Devised, form of notice of appraisers.....	735—	11
Devised, oath of appraisers.....	735—	12
Discharge from charges.....	846—	13
Direction in will to appraise.....	734—	8
Distribution of proceeds.....	479—	49

REAL ESTATE — (Continued)	PAGE	PAGE
Divided by county line, sale by guardian.....	863-	11
Effect of sale.....	306-	11
Escheat — notice	488-	11
Escheat, statement and description.....	487-	9
Exemption, when taken, as.....	55-	30
Form of appointment of appraisers.....	305-	7
Form of bond, for sale.....	144-	15
Form of order of sale.....	142-	12
Form, petition for appraisers and sale.....	304-	5, 6
Jurisdiction of Orphans' Court.....	21-	10
Liability of surety of guardian.....	223-	27
Minor, sale of.....	242-	64, 5
Mortgaging of.....	169-	69
Notice of sale.....	149-	26
Owners may pay charges into court.....	847-	14
Petition for sale — all must join.....	303-	3
Power of acting executor, over.....	624-	12
Power of executor, over.....	821-	2, 3
Power of executor to sell.....	821-	3
	822-	4, 5
Power over, under will.....	795-	24
Power to sell for distribution.....	302-	1
Private sales.....	143-	13
Sale in escheat, security.....	491-	23
Sale by executors.....	824-	8
Sale by executors, manner and consideration.....	824-	9
Sale of, inventory.....	140-	10
Sale for payment of debts.....	133-	1
Sale or mortgage in several counties.....	133-	2
Sale or mortgage in different counties.....	134-	3
Sale, etc., Price act.....	274-	1
Sale, security before.....	143-	14
Taken in fee by father and mother.....	476-	42
Title to vest in widow and children.....	56-	31
Valuation of.....	302-	2
When not liable for debts.....	367-	113
RECEIPTS, COLLATERAL TAX.....	203-	
RECOGNIZANCE.		
Actions and <i>sci. fa.</i> on.....	344-	66
Form, petition to satisfy.....	377-	132
Lien without being indexed.....	345-	66
Owerty, effect.....	347-	68
Owerty in partition.....	343-	66
Partition, assignment.....	356-	86
Partition, release.....	378-	133

RECOGNIZANCE — (Continued)	PAGE	PAG.
Purchaser to give	364—	104
Refunding bond before suit on	364—	105
RECORD, COURT OF — IS THE ORPHANS' COURT.....	4—	6
RECORD, EXEMPLIFICATION OF.....	98—	71
RECORD OF PROBATED WILL.....	559—	29
RECORDS, LOST, PERPETUATION OF TESTIMONY.....	96—	64
Mercer and Crawford counties.....	36—	28
Orphans' Court, to be kept by clerk.....	13—	25
RECORDING ACCOUNTS, ETC.....	453—	76
Deeds	298—	44
Releases	231—	43
Widow's or surviving husband's election.....	651—	16
RECOVERY ON BONDS FOR SURPLUS.....	178—	9
RECOVERY, COMMON, SUFFERED IN SHELLEY'S CASE..	750—	3
REFERENCE TO AUDITOR, ETC.....	89—	42
REFUNDING.		
Bond by distributees.....	450—	69, 70
Bond, before suit on recognizance.....	364—	105
Bonds or receipts, necessity for.....	432—	20
Form of agreement.....	411—	5
Reciprocal bonds.....	451—	71
REGISTER OF WILLS.		
Accounts of, examination.....	37—	32
Annual account.....	39—	35
Appointment of appraiser of collateral tax.....	204—	12, 13
Appointment of deputy.....	27—	2
Bond to commonwealth for collateral tax.....	207—	19
Certificate, balance of account.....	391—	19
Character of.....	26—	1
Citation, collateral tax.....	206—	17
Citation in estate of presumed dead.....	853—	12
Clerk of the Orphans' Court.....	6—	9
Commissions to examine witnesses.....	37—	31
Compensation, collateral tax.....	207—	18
Costs, recovery of.....	42—	39
Court, former jurisdiction of.....	4—	5
Docket of	27—	4
Duties of	27—	3
Duties on caveat against a will.....	588—	7
Duties, filing and advertising accounts.....	384—	6
Duties in probating a foreign will.....	561—	30
Duty to certify copies of documents.....	37—	29

REGISTER OF WILLS — (Continued)	PAGE	PAR.
Duty to record inventories, etc.....	36—	27
Fees in Allegheny county.....	40—	37
Fees of in general.....	39—	36
Fees in Phila.....	41—	38
Fees in separate Orphans' Courts.....	39—	36
Filling of vacant administration.....	28—	9
Form of certificate of account.....	391—	17
Form of notice of filing account.....	391—	17
Issuance of letters.....	617—	1
Issuance of letters, after 21 years.....	28—	8
Judicial power, when ended.....	558—	26
Lancaster county, 15 C. C.....	479—	40
Letters of administration to escheator.....	486—	7
Letters granted by court, non-liability.....	28—	10
Notice of bequests.....	37—	30
Notice of accounts, etc., by publication.....	38—	33
Power on bond of non-resident executor.....	625—	16
Power to compel production of will.....	549—	6
Power to grant letters.....	27—	5
Power to issue letters.....	27—	5
Power to issue commissions to take depositions.....	551—	11
Proceedings before, on will.....	597—	31
Return of collateral tax.....	207—	21
Statements of collateral tax.....	206—	16
RE-HEARING, PETITION FOR.....	526—	8
REIMBURSEMENT, GUARDIAN.....	249—	82
RELATIVES, CLAIMS OF.....	114—	18
Claims against the estate.....	113—	17
RELEASES.		
Charges on land.....	740—	26
Family agreement, form.....	410—	4
Fiduciary	882—	42
Guardian by ward.....	273—	133
Legacy	695—	7
Partition	356—	87
Recording of.....	231—	43
Ward to guardian.....	230—	43
Widow and heirs, form.....	837—	40
RELIGION, IN APPOINTMENT OF GUARDIAN.....	213—	4
RELIGIOUS TRUSTS, SECRET, ABOLISHED IN ENGLAND.....	577—	12
RELIGIOUS AND CHARITABLE USES.		
Bodies militant contesting for funds.....	573—	6
Calendar month — new will or codicil.....	571—	3
<i>Cy pres</i>	576—	10

RELIGIOUS AND CHARITABLE USES — (Continued)	PAGE	PAGE
Gifts, attestation of will.....	572-	4
Gifts void for uncertainty.....	572-	6
Restraint of time on will.....	570-	1
Will avoiding "Calendar month" restraint.....	577-	12

REMAINDERS.

Defined	761-	3
Definition of.....	766-	1
Designation of remainderman.....	774-	21
Destruction of.....	782-	38
Distinguished from conditional limitation.....	767-	5
Distinguished from executory devise.....	775-	24
Distinguished from future bequest.....	767-	3
Accruing by implication.....	773-	18
Alienation	782-	37
Class, to.....	770-	13
Class, who are within.....	771-	15
Class, contingent upon birth.....	776-	28
Condition subsequent.....	774-	22
Contingent concurrent.....	776-	26
Contingent defined.....	768-	7
Contingent defined by the courts.....	770-	12
Contingent classes.....	769-	9
Contingent distinguished from vested.....	768-	8
Contingent may become vested.....	769-	10
Contingent, sale of land.....	279-	7
Cross, implication.....	775-	23
Effect of substitution on.....	780-	34
Heirs as a class, how determined.....	772-	16
Implication of gift from direction to pay.....	779-	32
Interests in personalty, security.....	714-	32
"Issue," etc., to.....	765-	16
"Other" or "others," who may take.....	781-	36
Presumption of vesting.....	776-	27
Protected by trust.....	914-	30
Quasi, contingent.....	767-	4
Substitutionary limitation.....	773-	20
Substitutionary limitation.....	779-	32
"Survivor" construed as "other".....	780-	35
"Then living," applied.....	778-	31
Time of accruing.....	772-	17
Vested	768-	6
Vested, defined by the courts.....	769-	11
Vested and contingent.....	766-	1
Vested and contingent, examples.....	775-	25
Vesting in interest and vesting in possession.....	777-	29
"When," "then," etc.—meaning.....	778-	30

	PAGE	PAGE
REMAINDERMAN.		
Designation of.....	774-	21
Election of widow against will, effect on.....	649-	12
Power to require security.....	844-	7
Relation to life tenant.....	794-	22
Security may be waived by.....	845-	9
REMOVAL, EXECUTOR FOR LUNACY, ETC.....	834-	33
REMOVAL OF FIDUCIARY FOR CAUSE SHOWN.....	64-	10
For failure to give security.....	63-	8
Form of petition.....	66-	13
Practice on.....	70-	22
Procedure	64-	11
Removal from the state.....	65-	11
REMOVAL OF GUARDIAN.....	271-	126
Grounds	271-	127
Manner	271-	128
Form of decree.....	272-	132
Form of petition.....	272-	129
Procedure	272-	131
REMOVAL AND DISCHARGE OF TRUSTEE.....	955-	50
Phila.	955-	51
Life estate, Phila.....	909-	19
Failure to give new bond.....	935-	14
Insufficient grounds.....	956-	52
Proceedings, costs.....	956-	54
REMOVAL OF PROPERTY BY FOREIGN GUARDIAN, ETC.	226-	37
REMOVAL FROM STATE, BY FIDUCIARY.....	834-	34
RENTS.		
Arrears belong to estate of decedent.....	46-	7
Claim for.....	109-	9
Collection of, in escheat.....	491-	22
Distress for, see "Executor."		
Due from decedent.....	104-	2
Due life tenant go to executor.....	46-	8
Duty of guardian to collect.....	247-	78
Executor answerable for, when.....	636-	5
Liens, in partition.....	343-	64
Liability of trustee for.....	939-	23
When heir entitled to them.....	822-	3
Suit or distress for.....	176-	6
RENUNCIATION OF LETTERS.....	31-	15
Executor	620-	6

RENUNCIATION — (Continued)	PAGE	PAGE
Executor, form.....	620—	7
Refusal to take oath.....	634—	2
Testamentary trust.....	910—	20
REPAIRS, UNDER THE PRICE ACT.....	279—	8
REPLICATION.		
Contest on will.....	595—	25
Effect of.....	87—	38
Form of general.....	88—	39
REPORT OF AUDITOR, RECOMMITTAL.....	94—	56
REPORTS, OF AUDITORS, RECORDING.....	453—	76
REPORT OF AUDITOR, RULES OF COURT.....	437—	32—35
REPRESENTATION.		
Claiming legacy by.....	788—	10
Deceased grandparents.....	477—	44
Issue take by.....	480—	9
REPUBLICAN, WILL, BY CODICIL.....	565—	5
REPUBLICAN — WILL, MANNER OF.....	585—	18
REPUGNANT CLAUSES IN WILLS OR DEEDS.....	730—	3
RETURN DAYS, POWER TO FIX.....	77—	6
RETURN DAYS — PARTITION.....	352—	78
RETURN.		
Form of, sale in partition.....	352—	80
Land unsold.....	154—	40
Lien creditor as purchaser — form.....	157—	47
Order of sale, form.....	151—	32
Sale, generally.....	158—	50
Sale, proceedings upon, contest.....	155—	44
RESEMBLANCE OF ORPHANS' COURT TO EQUITY.....	2—	2
RESCISSION, SALE.....	158—	51
RESERVATION, CURTILAGE DETERMINED BY COMMISSIONERS.....	846—	10, 11, 12
RES GESTAE — evidence as to wills.....	612—	53, 54
Evidence as to wills.....	613—	55
RESIDENCE COMPARED WITH DOMICIL.....	578—	I
RESIDENCE, DETERMINES JURISDICTION.....	213—	4

	PAGE	PAGE
RESIDUE, WHEN LAPSED FUND FALLS INTO.....	685-	35
RESIDUARY CLAUSE IN WILL.....	669-	19
RESIDUARY CLAUSE IN WILL, PURPOSE OF.....	663-	6
RESIDUARY ESTATE, DISCHARGE OF LEGACIES.....	842-	3
RESIDUARY ESTATE, RIGHTS PRESERVED.....	842-	4
RESIDUARY LEGATEES, PARTIES, CHARGE ON LAND..	705-	9
RESIGNATION, ADMINISTRATOR, ETC.....	60-	3
RES JUDICATA.		
Contest on will.....	616-	64
Decrees as to accounts.....	507-	2
Decree of distribution.....	507-	3
RESTITUTION BY DISTRIBUTE.....	451-	74
RESTRAINT ON ACCUMULATIONS.....	804-	47
RESTRAINT, ON MARRIAGE.....	740-	27
RESULTING TRUST, BY GUARDIAN.....	254-	91
Limitation	912-	26
When limitation begins to run.....	913-	27
Recording declaration.....	912-	n20
RETENTION OF FUND FOR FUTURE NEEDS.....	294-	31
REVERSION.		
Alienation of.....	782-	37
Collateral tax on.....	200-	3
Defined	761-	3
REVERSAL OR MODIFICATION, ON APPEAL, ESCHEATS	490-	18
REVIEW.		
Account, time and character.....	400-	2
Account, when of right.....	400-	2
Form of answer to petition.....	405-	6
Guardian's account, petition, form.....	404-	4
Orphans' Court.....	526-	7
Petition for.....	527-	9
Petition or bill of — account.....	399-	1
Practice on bill.....	402-	3
REVIVAL — WILL BY CODICIL.....	565-	5
REVOCATION.		
Appointment of guardian.....	220-	21

REVOCATION — (Continued)	PAGE	PAGE
Bequests, by codicil.....	565-	5
Intention	536-	n2
Law of England as to wills.....	581-	6
Legacy	675-	13
REVOCATION OF LETTERS.....	81-	16
Estate of one presumed dead.....	852-	7, 8, 9
Not to affect title.....	168-	65
Petition for.....	31-	17
Letters testamentary.....	10-	
Marriage and birth of children.....	582-	13
<i>Pro tanto</i>	584-	14, 15
Will or codicil.....	580-	5
Will by alienation.....	582-	11
Will, by cancelling, etc.....	582-	9
Will, by revival of earlier one.....	582-	10
Will by codicil.....	670-	21
Will, by implication.....	584-	16
Will, manner of.....	581-	7
Will, positive and substantive.....	585-	17
Will as to personalty.....	581-	8
REWARD.		
Escheat, dispute concerning.....	495-	32
Penalty for taking, by collateral appraiser.....	206-	16
"RIGHT HEIRS"—MEANING OF.....	772-	n15
ROMAN LAW OF INHERITANCE ORDAINED BY JUSTINIAN	457-	n6
RULE TO ACCEPT OR REFUSE IN PARTITION.....	338-	53
Form of publication of notice.....	337-	50
RULE FOR ATTACHMENT, ALLEGHENY COUNTY.....	95-	60
Form of order for, to accept or refuse.....	336-	49
Shelley's case, see "Shelley's case," <i>infra</i> .		
Partition, to accept or refuse.....	335-	47
Partition, to accept or refuse.....	337-	52
Show cause why land should not be sold.....	349-	73
Show cause, partition.....	321-	22, 23
Show cause, when dispensed with.....	349-	74
Wild's case.....	758-	20
RULES ON OFFICERS, ATTORNEYS, ETC.....	95-	63
RULES OF COURT.		
Auditors	420-	2
Exceptions	389-	15
Legal publications.....	38-	33

RULES OF COURT — (Continued)	PAGE	PAR.
Power to make.....	7-	13
Power to make.....	77-	6
SALE.		
Contingent remainder, etc.....	279-	7
Personal property.....	56-	34
Personalty, in escheat.....	491-	21
Life estate — notice to non-resident.....	361-	97
Trust lands.....	278-	6
<i>Vend. ex.</i> , widow's dower.....	361-	96
SALES OF REAL ESTATE.		
Payment of debts for.....	139-	7
Mortgage of real estate for the payment of debts.....	133-	1
Affidavit of notice, form.....	132-	
Alias order and resale.....	153-	38
Auditor upon.....	158-	52
Authority of legal representative to bid.....	146-	19
Claims upon which it may be ordered.....	150-	28
Confirmation, form.....	137-	5
Consent of heirs.....	154-	39
Deed to purchaser.....	150-	30
Enforcement of.....	160-	54
Real estate, fixing terms.....	169-	68
Real estate, form of petition.....	147-	24
Form of petition to set aside.....	141-	11
Investment of proceeds <i>pendente lite</i>	171-	71
Leave to bid at, form.....	156-	45
Lien creditor as purchaser.....	150-	29
Order to legal representatives.....	155-	43
Mortgage, order of court.....	183-	14
Partnership property.....	135-	4
Petition for.....	161-	54
Petition, Phila.....	139-	8
Phila.	140-	9
Postponement	146-	20, 21
Powers and duties of legal representative.....	158-	51
Proceedings on return — contest.....	159-	53
Private	155-	44
Private, form of petition.....	143-	13
Rescission	151-	34
Return of, generally.....	158-	51
Return of private, form.....	158-	50
Security by legal representative.....	153-	37
Setting aside, rights of purchaser.....	143-	14
Subject to mortgage.....	169-	67
Terms and order.....	138-	6
Title of purchaser.....	154-	42
	162-	55

	PAGE	PAGE
SALE IN PARTITION.		
Account after.....	368-	115
Confirmation	363-	102
Conversion	374-	122
Discharge of liens.....	369-	116
Form of appointment of trustee.....	351-	77
Judicial	350-	74
Order of Orphans' Court, security.....	362-	99
Orphans' Court, setting aside.....	363-	100
Public or private—terms.....	362-	100
Purchaser to give recognizance.....	364-	104
Purchaser's right to possession.....	364-	103
Proceedings for possession.....	Vol. 2-	504
Purparts left over, on partition.....	350-	75
Ratification by court.....	297-	40
Return	362-	80
Time, etc.....	351-	76
Title given.....	366-	111
SALES UNDER THE PRICE ACT.....	277-	4
Effect as bar.....	288-	21
Lands of minors.....	278-	5
Manner, etc.....	288-	20
Minor's vacant grounds.....	299-	45
Private, form of decree.....	299-	46
Purchase money, security.....	290-	24
SALE OF WARD'S REAL ESTATE, minor.....	242-	64, 5
SALE OF WARD'S REAL ESTATE, notice.....	243-	66
Confirmation of guardian's.....	247-	77
Land divided by county line.....	863-	11
Private, by guardian.....	863-	12
Statutory, by guardian.....	245-	70
SALE, REAL ESTATE FOR DISTRIBUTION.....	302-	1
Effect	308-	11
Form of petition.....	304-	5, 6
Petition	303-	3
SALE, REAL ESTATE, IN ESCHEAT.....	491-	23
SALE BY EXECUTORS.....	824-	8, 9
Contract by co-trustees as individual.....	829-	18
Conversion, effect.....	827-	16
Discharge of legacy by.....	741-	28
Form of petition to ratify.....	836-	39
Or mortgaging life estates with limited remainder....	830-	20
Powers of executors.....	821-	3

SALE BY EXECUTORS — (Continued)	PAGE	PAGE
Powers of executors.....	822-	4, 5
Powers of executors.....	823-	6
Purchase by executor voidable.....	829-	19
Purchaser at executor's, duty.....	826-	13
Executor's, setting aside and re-sale.....	826-	12
SALE BY TRUSTEE, CONTROL OF DISCRETION.....	943-	30
Arrears of annuity payable out of proceeds.....	741-	29
Real estate, duties of trustee.....	944-	32
Mortgaging, power of trustee.....	944-	31
SANITY, PRESUMPTION OF.....	609-	49
SATISFACTION OF DECREES, PHILA.....	98-	69
SATISFACTION, JUDGMENT.....	453-	77
SCANDALOUS AND IMPERTINENT MATTER.....	88-	40
SCI. FA. TO LEGAL REPRESENTATIVE BEFORE EXECU-		
TION	180-	11
Mortgage, parties.....	181-	12
Non-resident executors, etc.....	175-	4
Recognizance, Vol. II, Johnson.....	P. 803-	
Recognizance, Orphans' Court.....	Vol. II, P. 820-	36
Transcripts from Orphans' Court.....	Vol. II, P. 829-	9
SCRIVENER, EVIDENCE OF UNDERSTANDING INAD-		
MISSIBLE	668-	18
SEAL, NOT NECESSARY TO A WILL.....	537-	12
SEAL, OF ORPHANS' COURT.....	5-	7
SECURITIES, investment in, guardian.....	233-	47
SECURITY.		
Additional, proceedings for.....	62-	7
Corpus being converted.....	845-	8
Costs	449-	67
Costs on caveat.....	587-	4
Distributees, to refund.....	368-	114
Dissolution of writ.....	514-	18
Executrix marrying.....	835-	36
Fiduciary — removal	64-	10
Fixing in will contest.....	600-	39
Form of order.....	67-	16
Interests limited or conditional.....	716-	34
Legatee before decree effective.....	710-	19
Legatee, on taking corpus of estate.....	843-	6
Mortgaging or leasing.....	296-	38

SECURITY — (Continued)	PAGE	PAGE
Order to give—enforcement.....	63-	9
Personalty for, under act of 1871.....	844-	7
Protection of contingent interests.....	715-	33
Refund, estate of presumed dead.....	852-	8
Removal for failure to give.....	63-	8
Right lost by laches.....	845-	9
Before sale on order of Orphans' Court.....	362-	99
Sale under Price act.....	290-	24
Sale, real estate in escheat.....	491-	23
Trustee	932-	7
SEISIN, ACTUAL OR POTENTIAL, BY CURTESY.....	653-	1
SEPARATION BY AGREEMENT, NO BAR TO CURTESY..	657-	7
SEPARATE ORPHANS' COURTS.....	4-	4
SEPARATE ORPHANS' COURTS.....	5-	8
Bill of costs.....	9-	21
Clerks and assistants.....	5-	9
Costs in.....	102-	81
Judges of.....	8-	17
Prescribe form of notice.....	82-	29
SEPARATE SUITS IN PARTITION.....	316-	16
SEPARATE USE TRUST, CREATION OF.....	920-	42
Husband's relations.....	923-	46
Limitations on power of woman.....	922-	45
SEQUESTRATION.		
Duties of sheriff.....	517-	27
Form of writ.....	516-	26
Trust property, in Orphans' Court.....	516-	23
Widow's benefit.....	650-	15
SERVANTS — WAGES OF, PREFERRED.....	108-	8
SERVICE.		
Citation	80-	26
Citation, under Price act.....	287-	19
Partition, on lunatic.....	322-	23
<i>Sci. fa.</i> on non-resident executors, etc.....	175-	4
SERVICES.		
Anticipation of remembrance in a will.....	112-	15
Attendance, etc., claim for.....	111-	14
<i>Quantum meruit</i>	114-	19
SETTLEMENT.		
Family, nature of.....	407-	1

SETTLEMENT — (Continued)	PAGE	PAG.
Different from distribution.....	417-	7
Private, by guardian.....	255-	92
SETTING ASIDE.		
Partition for fraud.....	341-	60
Sale	363-	100
SET-OFF.		
Debt of distributee to estate.....	433-	24
Partition	356-	87
Ward's services to guardian.....	241-	61
SHARE, WIDOW IN PARTITION.....	355-	84
SHELLEY'S CASE, RULE IN.		
Answers to points of law, per L. C. J.....	751-	5
Applied to equitable estates.....	758-	21
Applied to personalty.....	759-	22
Challis' view, English.....	751-	6
"Children," word of limitation when.....	757-	18
Contingency at time of death, to avoid it.....	749-	2
Definition	749-	2
Facts of Wolfe v. Shelley.....	750-	3
Gross parallels.....	752-	8
"Heirs" as "heirs of the body".....	754-	12
Heirs, etc., in remainder.....	754-	11
"Heirs," word of purchase—exceptionally.....	755-	14
Life estate or fee in first taker.....	757-	18
Limitation over on failure of issue.....	757-	19
Origin—feudal system.....	748-	1
Pennsylvanian's view.....	751-	7
Questions of law for decision.....	750-	4
Remainder to "children".....	756-	17
Remainder to "issue," etc.....	755-	16
Rule of construction as to gifts absolute or limited....	742-	31
Rule of property.....	748-	1
Words of "purchase" or "limitation".....	752-	9
Words of restriction must be unequivocal.....	753-	10
Words of will or wish, commands.....	753-	10
SHERIFF AND APPRAISERS UNDER WILL, FEES.....	737-	17
SHERIFF, DUTIES, ON REQUESTRATION.....	517-	27
Return of inquest in partition.....	332-	43
SIGNATURE OF WILL, "at the end thereof".....	538-	19
Contest upon, Stinson case.....	593-	19
<i>In extremis</i> , at request.....	540-	21
Issue upon.....	548-	5
Mark, by,.....	539-	20

INDEX.

1115

SIGNATURE OF WILL — (Continued)	PAGE	PAG.
Proof of.....	556-	21
Proof of mark.....	556-	23
SITUS, PERSONAL PROPERTY.....	630-	22
SOJOURN DISTINGUISHED FROM DOMICIL.....	578-	1
SOLDIER, ARREARS AS ASSETS.....	129-	11
SON, RIGHT TO TAKE AT APPRAISEMENT UNDER WILL.....	735-	13
SPECIFIC LEGACY.....	677-	20, 21
SPECIFIC LEGACY DEFINED.....	676-	18
SPECIFIC PERFORMANCE, see "Contract of Decedent".....	187-	
SPENDTHRIFT TRUST.....	924-	49
Protection of fund.....	926-	53
Rights of trustee.....	927-	54
Should not be annexed to absolute gift.....	925-	51
Trustee, legal and equitable estates.....	926-	52
SPIRITUAL COURT EXPLAINED.....	545-	1
STATE TAX ON LETTERS.....	29-	11
STATEMENT AND DESCRIPTION, ESCHEAT OF LAND.....	487-	9
STATEMENTS OF COLLATERAL TAX, MONTHLY BY-REGISTER.....	206-	16
STATES ABROGATING THE RULE IN SHELLEY'S CASE.....	752-	n15
STATUTE OF LIMITATIONS RAISED IN APPELLATE COURT.....	445-	61
Repose, presumption of death.....	851-	6
STATUS OF DEBTS DETERMINED AT DEATH.....	129-	12
STAY OF EXECUTION, UNTIL EXECUTOR'S SALE.....	182-	13
Want of assets.....	712-	27
STARE DECISIS.		
Divided court.....	376-	n8
Doctrine.....	713-	n8
STENOGRAPHER, FEES OF.....	102-	83
STEP-CHILDREN UNDER WILL.....	722-	7
STEP-PARENTS, ALLOWANCE FOR MAINTENANCE.....	240-	59
STOCK, DIVIDENDS, ETC., FROM.....	795-	25

	PAGE	PAGE
STOCKS, ETC., TRANSFER BY TRUSTEE	937-	19
SUBPOENA, FORM	550-	9
Form of auditor's.....	708-	15
Penalty for disobedience.....	90-	43
SUBROGATION, DISTRIBUTION	434-	25
Guardian	249-	82
SUBSTITUTION.		
Claiming legacy by.....	788-	10
Defendant, form.....	185-	22
Defendant in judgment.....	186-	23
Effect on remainder.....	780-	34
Legal representatives.....	174-	2
Plaintiff, form.....	185-	21
Plaintiff in judgment when executor is defendant.....	186-	24
Purchase money for interests, Price act.....	290-	24
SUBSTITUTIONARY LIMITATION	773-	20
SUCCESSOR, TRUST, POWERS WHICH PASS TO	957-	57
SUIT IN COMMON PLEAS, TOLLS STATUTE OF LIMITATIONS	397-	25
SUNDAY, WILL MADE ON, VALID	549-	5
SUPERSEDEAS, APPEAL FROM ESCHHEAT	490-	17
SURCHARGE, HOW MADE OUT	460-	19
Executor, finality of decree.....	876-	25
Guardian, for profits.....	353-	88
SURETIES.		
Administrator, discharge of.....	883-	43
Approval in Phila.....	246-	74
Discharge from liability.....	223-	28
Effect of discharge of principal.....	61-	6
Fiduciaries, protection of.....	835-	35
Guardian's bond, liability	222-	25, 28
Liability on bond.....	145-	18
Liability for proceeds of land.....	223-	27
Personal representatives may cite trustee to account..	935-	12
Petition for removal of principal.....	65-	12
Right to demand statement from trustee.....	934-	11
Sole, surety company.....	962-	4
Trustee, liability when new bond required.....	936-	15
Trustee, rights and liabilities.....	934-	10
SURETY COMPANY AS SOLE SURETY	35-	23

	PAGE	PAGE
SURRENDER, MONEYS IN ESCHAT.....	491-	21
SURVIVORS, CLASS, ON DEATH OF MEMBER.....	725-	16
"SURVIVOR" CONSTRUED AS "OTHER".....	780-	35
"SURVIVOR" OR "SURVIVING" CONSTRUED.....	781-	36
SURVIVORS.		
Failure of issue.....	763-	8
Gifts to.....	725-	17
Trustees among.....	916-	35
Trustees, deeds by.....	298-	42
SURVIVORSHIP, ESTATE BY ENTIRETIES.....	473-	35
SUSPENSION, DISTRIBUTION.....	414-	2
SWEDENBORG, NEW CHURCH, CHARITABLE REQUEST	573-	6
TAX — COLLATERAL INHERITANCE, LIABILITY.....	198-	1
TAX SALE BONDS, SUITS ON, BY EXECUTORS.....	177-	8
TAX, STATE, ON LETTERS.....	29-	11
TAX TITLE SAVED IN ESCHREATS.....	493-	27
TAXES, MEANING IN WILL.....	201-	22
TAXES, PAYABLE BY GUARDIAN.....	262-	106
TENANCY IN COMMON, PARTITION.....	311-	
TENANCY IN COMMON, WIDOW'S SHARE.....	357-	89
TENANCY BY THE CURTESY IN ENGLAND.....	652-	1
TENANT BY CURTESY, BID IN PARTITION.....	338-	54
Legacies charged.. ..	739-	22
Right to bid in partition.....	317-	18
TENANT IN DOWER — DEFINED.....	354-	83
TENANTS IN COMMON.		
Form of certificate.....	286-	17
Contracts for sale of land.....	196-	17
Partition	315-	15
TENANTS BY ENTIRETIES — partition.....	342-	63
TERMINATION, SEPARATE USE TRUST.....	923-	48
TERMINATION, TRUSTS, VARIOUS WAYS.....	918-	39
TERMS AND RETURN DAYS, ALLEGHENY COUNTY....	77-	7

	PAGE	PAG.
TERMS IN PHILA.	78-	8
TERMS OF SALE , fixing in order.....	147-	24
TERMS AND ORDER OF SALE	154-	42
Must be followed.....	362-	100
TESTAMENT, DISTINGUISHED FROM A WILL	536-	9
TESTAMENTARY CAPACITY, ISSUE D.V.N.	606-	47
TESTAMENTARY GUARDIAN, APPOINTMENT OF	861-	6
Father loses right to appoint, when.....	861-	4, 5
TESTAMENTARY TRUST, CREATION	904-	6
TESTATE ESTATE, FORM OF PETITION FOR ADJUDICA- TION	440-	45
TESTATOR.		
Debts of, payment by executor.....	641-	12
Goods of, which come to an executor.....	633-	2
Intent in will.....	660-	3
TESTIMONY, INCOMPETENT	426-	12
Lost records, perpetuation of.....	96-	64
Nuncupation, reduced to writing within six months....	567-	3
Return by auditor.....	93-	55
THEOCRATIC SANCTION, ACT TO EVADE	612-	54
TIMBER AND COAL RIGHTS, PARTITION OF	312-	10
TIME.		
Accruing of remainder.....	772-	17
Annexed to gift, or time annexed to its payment.....	770-	11
Annuity for children.....	698-	15
Appeal, Orphans' Court.....	523-	2
Appeal, Vol. I, Johnson's Practice.....		
Citation to widow to elect, under a will.....	646-	6
Commencement of heir's dominion.....	458-	4
Death fixes rights of heirs.....	478-	48
Defend against decree, to.....	516-	24
Distribution of balance due from administrator.....	413-	1
Distribution fixed by will.....	414-	1
Escheats	484-	2
	485-	3
Filing exceptions to account.....	388-	14
Legacies, when due.....	694-	4
Letters, issuance after 21 years.....	28-	8
Limit on entering motion.....	78-	11
Partition, proceedings in.....	321-	22

TIME — (Continued)	PAGE	PAGE
Payment of debts.....	121—	25
Payment of legacies.....	692—	2
Payment of legacies.....	696—	10
Payment of owelty.....	330—	39
Payment of owelty.....	347—	68
Probate of will, as to conveyances.....	559—	27
Proper heir, when.....	458—	5
Reduction to writing of nuncupation.....	567—	3
Report of auditor, Phila.....	875—	20
Restraint on gift to charity, etc.....	570—	1
Review of account.....	400—	2
Sale in partition.....	351—	76
Traverse in escheat.....	493—	29
Vesting of trust estate.....	916—	33
Will speaks from what.....	559—	28
Will speaks from death of testator.....	659—	1
TITLE		
Allottee, in partition receives.....	342—	63
Decree at appraisement.....	737—	16
Effect of partition on.....	370—	118
Escheat — incumbrances	492—	24
Estoppel, by.....	163—	56
Irregularity of appointment not to affect.....	298—	43
Jurisdiction of.....	22—	10
Partition, revocation of letters does not affect.....	353—	81
Purchaser at Orphans' Court sale.....	162—	55
Question of, for Common Pleas.....	320—	21
Revocation of letters does not affect.....	168—	65
Sale in partition.....	366—	111
Unaffected by defective qualification.....	166—	66
TOLLING STATUTE OF LIMITATION.....	428—	15
TOMBSTONE OR MONUMENT.....	108—	7
TRANSCRIPT, ACCOUNT OF ADMINISTRATOR.....	393—	20
TRANSFER, FUNDS, BY EXECUTORS.....	632—	25
TRANSFER, LOANS, BY FOREIGN EXECUTOR.....	631—	24
TRAVERSE, ESCHIEAT, LIMITATION, PRACTICE.....	493—	29
TREATIES AND CONVENTIONS WITH FOREIGN STATES	885—	2, 3, 4, 5, 6
TRIAL, ISSUE D.V.N.....	605—	46
TRIAL, ISSUE D.V.N. FORM OF CERTIFICATE.....	614—	59

	PAGE	PAGE
TRIENNIAL ACCOUNT OF GUARDIAN.....	256-	93
TRUSTS.		
Active or passive.....	913-	28
Active, how created.....	904-	7
Annexed to absolute estate.....	925-	51
Burden of proof.....	432-	20
Burial company may accept.....	963-	10
Conveyance at end.....	919-	40
Creation of.....	903-	5
Cutting out legatee's husband.....	746-	242
Distribution of estate.....	919-	41
Estate, management.....	914-	29
Estate, sale of.....	278-	6
Estate, time of vesting.....	916-	33
<i>Ex maleficio</i> , under a will.....	912-	25
Funds, expenditure of.....	936-	17
Funds, protection of.....	926-	53
Funds, right to follow wherever found.....	869-	10
Funds, right to follow.....	917-	37
Joint tenancy.....	916-	34
Kinds of.....	903-	4
Moneys, investment.....	854-	14
Moneys, investment.....	855-	15, 16
Not to fail for want of a trustee.....	907-	13
Origin of.....	563-	1
Particular things in.....	903-	3
Parties necessary.....	907-	12
Power of married woman over trust estate.....	922-	45
Precatory words.....	907-	11
Property, orders and decrees as to.....	516-	21, 22, 23, 25
Property, sheriff to seize, when.....	514-	19
Protection of remainders.....	914-	30
<i>Pur autre vie</i>	958-	58
Resulting, limitation.....	912-	26
Retention of fund for needs.....	294-	31
Separate use.....	920-	42
Separate use, words, creation of.....	921-	43
Separate use, husband cut out.....	923-	46
Separate use, termination.....	923-	48
Spendthrift	924-	49
Spendthrift, <i>cestui que trust</i>	924-	50
Spendthrift, necessity for trustee.....	926-	52
Survivors may execute.....	916-	35
Termination of.....	958-	58
Termination of.....	918-	39

TRUSTS — (Continued)

	PAGE	PAGE
Termination by accomplishment.....	915-	31
Testamentary, executors may renounce.....	910-	20
Testamentary, how created.....	904-	6
Testamentary, origin.....	902-	1
Testamentary rule to determine when there is one.....	717-	34
Unconscionable, <i>Thellusson v. Woodford</i>	803-	47
Vacancy by declination, filling.....	909-	17
Words sufficient to create.....	908-	10

TRUSTEE.

Account of.....	945-	35
Account when also guardian.....	259-	102
Account, finality of.....	954-	48
Account, principal and income.....	949-	40
Appointment	930-	3
Appointment when co-executor is alive.....	908-	15
Assets in hands of.....	938-	21
Authorized by C. P. to expend trust fund.....	936-	17
Citation to account by personal representatives of sureties	935-	12, 13
Claim against <i>cestui que trust</i>	110-	11
Commissions in discretion of the court.....	951-	43, 44
Compensation	950-	42
Compensation, forfeiture.....	953-	47
Compensation, increase or decrease.....	952-	45
Completion of title after death of.....	367-	112
Control of discretion.....	943-	29
Control of discretion as to sales, etc.....	943-	30
Conveyance by attorney.....	831-	22
Counsel fees and legal expenses.....	950-	41
Credits and allowances.....	948-	38
Death of — devolution of legal title.....	916-	34
Deeds and mortgages by.....	945-	34
Discharge on his application.....	956-	53
Dismissal for misbehavior.....	908-	16
<i>Durante absentia</i> , appointment.....	910-	21
<i>Durante absentia</i> — bond.....	911-	22
Duties as to sale of realty.....	944-	32
Duty to make annual report of charges.....	841-	2
Equitable title, to successor.....	916-	34
Executor's powers as.....	832-	27
Expenditures by.....	940-	26
Foreign, removal of property.....	226-	37
Foreign, transfer of estate to.....	909-	18
Form of bond.....	933-	8
General liabilities and duties.....	940-	25
Gifts to charity, appointment.....	575-	9

TRUSTEE — (Continued)

	PAGE	PAGE
Heir, and.....	903-	2
How to become.....	928-	1
Interest and other expenses.....	949-	39
Investments by.....	941-	27
Joint or several liability.....	957-	55
Liability for funds deposited.....	939-	24
Liability for interest.....	942-	28
Liability for loss by negligence.....	938-	22
Liability for rents.....	939-	23
Liability of surety preserved.....	936-	15
Life estate, Phila, removal.....	909-	19
Married woman, power to convey.....	958-	59
Necessary to spendthrift trust.....	926-	52
Necessity for.....	922-	44
Non-resident funds may be paid over to.....	958-	60
Notice of petition for appointment.....	931-	5
Order appointing to sell in partition.....	351-	77
Orders to pay over balance.....	954-	49
Parties unknown, partition.....	374-	124
Partition, account after sale.....	368-	115
Petition for appointment.....	931-	4
Petition for citation to account.....	948-	37
Petition for discharge of.....	71-	23
Powers of.....	923-	47
Power to contract debts, etc.....	938-	20
Powers in general.....	936-	16
Power to invest in other real estate.....	281-	11
Powers over estate.....	937-	18
Power of sale and mortgaging.....	944-	31
Purchase of estates by.....	944-	33
Purchasing at his own sale, holds in trust.....	945-	33
Removal	65-	12
Removal and discharge.....	955-	50
Removal in Phila.....	955-	51
Removal for failure to give new bond.....	935-	14
Removal, insufficient grounds.....	956-	52
Removal, petition for.....	956-	54
Sale of minor's real estate by.....	242-	65
Security by.....	932-	17
Statement demanded by sureties.....	934-	11
Spendthrift trust, rights.....	927-	54
Substituted	917-	n1
Successor, powers which pass to.....	957-	57
Sureties, rights, etc.....	934-	10
Surviving, powers and duties.....	957-	56
Survivors to execute trust.....	916-	35
Transfer of stocks and securities.....	937-	19

TRUSTEE — (Continued)	PAGE	PAG.
Vacancy, filling.....	907-	14
Who may be.....	929-	2
Who may be appointed.....	932-	6
Who may demand account.....	947-	36
Want of, supplied.....	907-	13
TRUSTEES AND DONEES OF CHARITIES, ETC.....	576-	11
TRUST COMPANIES.		
Authorized to act as fiduciaries.....	961-	1, 2
Capital made liable.....	962-	5
Court may appoint examiner.....	962-	7
Deposit of money with.....	962-	3
Deposit of money paid into court.....	505-	9, 10
Distribution of assets, order.....	963-	11
Executors, etc., may deposit with.....	962-	6
Oath in execution of trust.....	963-	9
Rules in Allegheny county.....	963-	12 to 19
Rules in Philadelphia.....	966-	20 to 28
Sole surety, authority.....	962-	4
Trust funds to be kept separate.....	962-	8
"TWELVE TABLES"—INHERITANCE AND GUARDIAN-		
SHIP	457-	2
"UNDUE INFLUENCE," PROCURING WILL BY.....	609-	50
VACANCY, FILLING OF IN ADMINISTRATION.....	28-	9
Trustee, filling of.....	907-	14
Trustee, filling, when declined.....	909-	17
VACANT GROUND OF MINOR, SALE OF.....	299-	45
VALIDATION, PARTITIONS.....	375-	125
VALUE, REAL ESTATE, AFFIDAVIT.....	162-	35
VALUATION.		
Partition	330-	40
Partition	335-	47
Real estate	302-	2
Real estate, under will.....	836-	37, 38
Widow's interest.....	354-	83
VEND. EX. FORM.....	519-	31
VEND. EX. SALE OF WIDOW'S INTEREST.....	361-	96
See "Executions," Vol. II, Johnson.		
VENDUE LIST, FILING OF.....	57-	35

	PAGE	PAGE
VENUE, SUITS AGAINST NON-RESIDENT LEGAL REPRESENTATIVES	185-	20
VERDICT, DECREE, ON ISSUE.....	894-	4
VERDICT, JUDGMENT, COSTS, ISSUE D.V.M.....	614-	58
VESTED AND CONTINGENT INTERESTS.....	770-	n17
VESTED BUT DEFEASIBLE INTERESTS.....	745-	36
VESTED GIFTS.....	743-	32
VESTED LEGACIES AND DEVISES.....	742-	31
VESTED REMAINDER.....	768-	6
VESTED REMAINDER DEFINED BY THE COURTS.....	769-	11
VESTED RIGHT AT DEATH OF DECEDENT.....	478-	48
VIS MAJOR — CONDITIONS IMPOSSIBLE BY.....	785-	4, 5
VOID GIFTS TO CHARITIES, ETC.....	570-	1, 2
VOID GIFTS TO CHARITIES, ETC.....	572-	6
VOID GIFTS, WHEN THEY GO TO LEGATEE OR NEXT OF KIN	574-	7
VOID GIFTS, WHEN THEY GO TO LEGATEE OR NEXT OF KIN	575-	8
VOID AND LAPSED LEGACIES.....	680-	29
WAGES OF SERVANTS.....	104-	2
WAGES OF SERVANTS AND LABORERS.....	108-	8
WARD AND GUARDIAN.....	209-	
Allowance of maintenance.....	238-	55
Allowance to father for maintenance.....	239-	57
Allowance to mother for maintenance.....	240-	58
Allowance to step-parents and grandparents.....	240-	59
Amount of maintenance.....	242-	63
Change of domicil.....	214-	4
Choosing of guardian.....	216-	6
Custody of person.....	229-	41
Effect of guardian's acts on.....	254-	89
Female, effect of marriage.....	270-	122
Form of petition for execution against guardian.....	518-	29
Funds due, collection of.....	229-	42
Improvement and repairs of estate.....	248-	79
Loss of right to account.....	259-	100

WARD — (Continued)	PAGE	PAGE
Maintenance of.....	237-	53
Maintenance by guardian, allowance.....	239-	56
Maintenance, time of allowance.....	240-	60
Maintenance without prior order.....	238-	54
Married, bond to guardian.....	451-	72
Order to maintain.....	234-	48
Relation of guardian to.....	228-	40
Release of guardian by.....	273-	133
Residence, change of.....	221-	22
Sale of real estate of.....	242-	64-6
Services set off for maintenance.....	241-	61
See "Guardian."		
WARRANT, PARTITION, FORM.....	380-	136
WASTE.		
Executor, as to debts due testator.....	636-	6
Process against executor.....	833-	31
Removal of guardian for.....	271-	127
Trust property — seizure of.....	514-	19
WEAK-MINDED PERSON, WILL.....	609-	49
WEST VIRGINIA, EXECUTION OF WILL.....	643-	27
WIDOW'S RIGHTS AND INTEREST.		
Abatement after election.....	650-	15
Appraisement of exemption.....	47-	12
Appraisement, Allegheny county.....	51-	18
Appraisement, conclusiveness.....	51-	19
Assignee of devisee liable to.....	739-	22
Charge on land for share.....	357-	90
Citation to elect as to dower.....	358-	91
Compensation to the disappointed, by election.....	650-	13
Construed	774-	21
Devise to, in lieu of dower.....	649-	11
Devisee, right to have mortgage paid out of personal estate	645-	4
Dower, collection.....	360-	95
Dower interest, valuation and charge.....	354-	83
Dower not defeated by covinous judgment of husband..	646-	5
See "Dower" and "Partition."		
Effect upon, of her election against the will.....	651-	15
Election for or against a will.....	644-	1
Election by, how required.....	646-	6
Election, forms.....	647-	7, 8
Election to retain choses in action.....	55-	28
Election of — rights of remaindermen.....	649-	12
Exemption	641-	11

WIDOW'S RIGHTS AND INTEREST — (Continued)	PAGE	PAGE
Exemption extended.....	54-	27
Form of claim for exemption.....	50-	13
Forms, election of dower.....	359-	92-3
Form of election of dower.....	360-	94
Form of notice of election.....	648-	10
Heirs, etc., to be made parties to action.....	181-	12
Interest on legacy.....	697-	12
Interest, status of.....	355-	85
Legacy or devise to.....	788-	11
Loss of right to elect.....	645-	5
Petition for partition.....	312-	8
Power to consume — remainder.....	733-	7
Priority in accepting legacy.....	690-	43
Privileges reserved in will.....	738-	19
Property she may take and effect.....	648-	10
Recording of election.....	651-	16
Restriction of interest.....	799-	36
Right to bid in partition.....	334-	46
Right to bid in partition.....	339-	54
Right to occupy mansion house.....	645-	4
Right to take real estate.....	644-	2
Sale of dower interest.....	361-	96
Share charged in partition.....	353-	82
Share in lieu of dower.....	644-	2
Share in partition remains a charge.....	355-	94
Share in tenancy in common.....	357-	89
Share when more than one tract.....	357-	88
Takes through executor.....	640-	10
WIDOW, WITHOUT ISSUE OF EITHER, INHERITANCE		
ACT OF 1909.....	648-	10
WIDOW AND CHILDREN, ART I.....	458-	6
WIDOW AND HEIRS, PETITION TO SELL REAL ESTATE	302-	1
WIDOW AND NO ISSUE, ART II.....	458-	6
WIFE DIVORCED, GIFT IN WILL.....	723-	10
WIFE, HEIRSHIP.....	466-	21
WIFE, PROCEEDINGS TO OBTAIN INHERITANCE.....	467-	23
WILD'S CASE, 6 COKE, 166, RULE IN.....	758-	20
WILD'S CASE, RULE IN.....	771-	14
"WILD LANDS," WILL AS TO.....	732-	4
WILL		
Absolute bequest of personalty.....	800-	41
Acceptance or refusal at appraisement.....	736-	15

WILL — (Continued)	PAGE	PAG.
Acts of beneficiaries and others.....	610-	51
Adopted children.....	724-	13
After-acquired property embraced.....	660-	2
Age of competency in various states.....	818-	33
Age required to make.....	537-	14
Agreements as to construction of.....	791-	15
Agreements, family, concerning.....	411-	6
Agreements or promises to devise or bequeath.....	790-	13
Alterations, erasures and interlineations.....	557-	24
Annuities, funds for.....	696-	8
Appeal, when it lies.....	601-	40
Appeal from order granting an issue.....	589-	8
Appeals, Allegheny county.....	589-	10
Appeals, Phila.....	589-	9
Appointment of appraisers of realty.....	735-	10
Appointment on books of society.....	534-	6
Apportionment of income.....	796-	26
Appurtenances, fixtures, etc.....	797-	29
"Authorize" means direct.....	717-	34
Beneficiaries, uncertain designation.....	718-	1
Burden of proof.....	610-	52
Caveat against probate.....	586-	1
Caveat, duties of register.....	588-	7
Certificate after trial of issue.....	614-	59
Charge on land, created by.....	700-	1
Charge on land, created by.....	701-	3
Charitable gifts, attestation by witnesses.....	572-	4
See act June 7, 1911.		
Charitable gifts, when not to fail.....	574-	8
Charitable or religious use, restraint of time.....	570-	1
Charity and religion — donees and trustees.....	576-	11
Charity, etc., effect of codicil or new will.....	571-	3
Children, illegitimate.....	724-	12
Citation to widow, after a year.....	646-	6
Codicils to — origin.....	563-	1
See "Codicils."		
Commission or letters rogatory.....	545-	1
Common form.....	806-	1
Competency to make.....	537-	13
Competency and credibility of witnesses.....	555-	19
Compromise of contest.....	791-	16
Conclusiveness of probate.....	557-	26
Condition, forfeiture.....	786-	6
Condition with a limitation.....	675-	15
Condition in restraint of marriage.....	786-	7
Conditional and joint.....	535-	8
Conditions in.....	783-	1

WILL — (Continued)	PAGE	PAR.
Conditions precedent.....	784—	2
Conditions subsequent.....	786—	3
Consideration as a whole.....	665—	11
Construction favorable to heir and widow.....	664—	8
Contest, see "Issues."		
Contest, appeals.....	615—	61
Contest, costs.....	615—	62
Contest, DeHaven's Ap. discussed.....	603—	43
Contest, effect.....	616—	63
Contest, notice to parties interested.....	599—	34
Contest, orders as to costs — appeal.....	595—	24
Contest, <i>res judicata</i>	616—	64
Contest, verdict and judgment.....	614—	58
Contingent gifts.....	744—	35
Contingent interests protected, security.....	715—	33
Conversion of realty into personalty.....	828—	17
Corpus or chattels in specie.....	794—	23
Correction of language.....	667—	17
Curtilage of reservation, how determined.....	846—	10
Custody of minor child by father.....	537—	16
Cutting down absolute gift.....	801—	42
Death of member of class — survivors.....	725—	16
Death, time of speaking, see "Time."		
Decree, adjudging title at appraisement.....	737—	16
Decree of real estate at a valuation.....	836—	37, 38
Declarations of testator and beneficiaries.....	613—	55
Delusions and aberrations.....	608—	48
Deductions from devises and legacies.....	787—	9
Description, what embraced.....	731—	4
Devise to husband or wife, divorced.....	723—	10
Devise passes whole estate.....	730—	4
Devise in restraint of marriage.....	740—	27
Devise to widow in lieu of dower.....	649—	11
See "Devise."		
Devises, nature of.....	730—	3
Devises, right to take at appraisement.....	735—	13
Different forms.....	533—	6
See "Forms."		
Direction to appraise land.....	734—	8
Direction to sell — exclusion of gifts.....	799—	34
Discharge of debtor by — Justinian.....	679—	26
Discharge of land from charges.....	846—	13
Discovery of not to impeach administration.....	29—	12
Disinheritance, rule as to.....	663—	7
Dismissal of caveat for want of bond.....	588—	6
Disposing memory.....	538—	18
Distinguished from gift.....	531—	2

WILL — (Continued)	PAGE	PAR.
Distinguished from testament.....	536-	9
Distinction between estate and easement.....	732-	7
Distribution under.....	435-	26
Distribution by agreement under.....	416-	5
See "Distribution."		
Dividends, etc., from stock.....	795-	25
Division "between" and "among".....	727-	19
Doctrine of <i>cy pres</i> applied.....	575-	10
Domicil in.....	579-	2
Domicil, residence, etc.....	578-	1
Duration of power to sell.....	827-	15
Effect of annexing a condition.....	785-	3
Effect of codicil.....	670-	20
Effect as to debts of decedent.....	429-	16
Effect given to words — in construing.....	661-	4
Effect of illicit relation, etc.....	610-	50
Effect on lineal issue of death of lineal legatee.....	746-	37
Effect of widow's election on different classes.....	650-	15
Election of dower by widow.....	358-	91
See "Election."		
Equality of standing of beneficiaries.....	664-	10
Emblements by life tenant.....	538-	17
"Estate," "portion," etc.....	800-	38
Estate, when not cut down by restraint or alienation..	802-	44
Estate <i>pur autre vie</i>	794-	21
Estates tail and failure of issue.....	803-	46
Estoppel by election to take under.....	789-	12
Evidence of writing itself.....	613-	56
Exemplification to another county.....	562-	32
Execution and circumstances.....	548-	5
Execution in Delaware.....	543-	29
Execution in Maryland.....	543-	28
Execution in New Jersey.....	541-	24
Execution in New York.....	542-	25
Execution in Ohio.....	542-	26
Execution in West Virginia.....	543-	27
Executor not named.....	536-	11
Executor's power to sell.....	821-	3
	822-	4, 5
Expert testimony, worth little.....	612-	54
Express words yield not to doubtful implication.....	666-	13
Extent of liability of land charged.....	737-	19
Failure of issue — construction.....	746-	38, 39
<i>Falso demonstratio</i> — application.....	796-	27
Family agreement, as to.....	411-	6
Final decree, contents, on appeal.....	594-	23
First-taker favored.....	664-	9

WILL — (Continued)	PAGE	PAG.
Fixing security for costs of contest.....	600-	39
Force of general intent,.....	665-	12
Foreign, copies admitted to probate.....	560-	30
Forfeiture by contesting,.,.,.....	787-	8
Form of appeal from probate.....	590-	11
Form, appeal from register.....	591-	14
Form of caveat against,.,.,.....	587-	2
Form, citation to produce,.,.,.....	550-	8
Form, commission to take depositions.....	553-	15
Form of decree of probate.....	595-	27
Form of decree for issue <i>d.v.m.</i>	592-	16
Form of interrogatories.....	554-	16
Form of letter.....	533-	5
Form of order awarding citation on contest.....	593-	18
Form of order dismissing appeal.....	595-	26
Form of order to file decision in Orphans' Court.....	614-	60
Form, petition for citation to produce will.....	549-	7
Form, petition for citation on appeal for illegal execu- tion	592-	17
Form of petition for citation to widow to elect.....	647-	7
Form of petition for precept to Common Pleas.....	596-	29
Form of petition to value real estate.....	734-	9
Form of precept to Common Pleas.....	596-	30
Form, proof of, made in <i>extremis</i>	552-	14
Form of proof of signature of deceased witness.....	552-	13
See "Forms."		
Formal proof before register.....	551-	11
Fund for disappointed beneficiaries, after election.....	650-	14
General devise carries after-acquired land.....	732-	5
Gift to charities or religious uses.....	572-	6
Gift to child unborn.....	724-	11
Gift to children.....	721-	6
Gift of income, when it carries the corpus.....	792-	17
Gift of interest or proceeds.....	732-	6
Gift to "issue".....	722-	8
Gift to "legal representatives".....	721-	5
Gift to next of kin, etc.....	723-	9
Gift over in event of death before time of payment.....	744-	33
Gifts <i>per stirpes</i> and <i>per capita</i>	726-	18
Gifts by reference.....	724-	14
Gifts of the same class of property.....	796-	28
"Goods," "chattels," "movables," etc.....	797-	30
Granting or refusing issue, appeal.....	595-	28
Great-grandchildren and step-children.....	722-	7
Hearing on request for issue.....	601-	42
"Heirs" and equivalent words.....	754-	11, 12
"Heirs" and similar words.....	719-	2

WILL — (Continued)	PAGE	PAG.
"Heirs" and similar words.....	720—	3, 4
Husband and wife, equal right of election.....	655—	4
Implied gifts.....	744—	34
Implied gifts.....	792—	18
Incapable of being split for devisee.....	789—	12
Incapacity and undue influence.....	604—	43
"Inclusive" and "exclusive" applied.....	799—	34
Income, rents, profits, etc.....	797—	31
Indefinite failure of issue.....	802—	45
<i>In extremis</i> — not signed.....	540—	22
Intention of testator governs, except.....	660—	3
Intention and power to pass estate.....	728—	1
Interpretation of.....	659—	1
Interpretation of "or," and "and".....	773—	19
Issue <i>d.v.n.</i> , form and scope.....	604—	44
Issue, evidence of incapacity, etc.....	612—	53
Issue, when it will or will not be awarded.....	602—	43
Issue upon the right to contest.....	598—	33
Judge to determine appeal, <i>nisi</i> , Phila.....	594—	22
Kinds of, making.....	536—	10
Knowledge of contents by testator.....	547—	4
Latest clause as final intent.....	666—	14
Law of domicile as to personalty.....	579—	3
Law of <i>situs</i> as to land.....	580—	4
Legacies, see "Legacy."		
Legacies and devises to widows.....	788—	11
Legatees claiming by representation or substitution....	788—	10
Legatee's interest in personalty.....	733—	18
Letters testamentary, see "Letters."		
Life estate or interest, creation of.....	793—	20
Life estate, without devise over.....	800—	40
Literal meaning to give way to actual meaning.....	662—	6
Lord Coke on making, rules.....	536—	12
Loss of right to contest, by laches.....	600—	38
Made in New York, probate in Penna.....	629—	21
Made in sister state, filing certified copy.....	561—	31
Maintenance provisions for.....	799—	37
Manner of execution.....	538—	19
Marriage and birth of children, effect.....	583—	13
Marriage, effect on female's will.....	583—	12
Married woman.....	557—	25
Married woman, competency to make.....	537—	15
Money, what passes.....	796—	32
Nuncupative, character.....	566—	1
Nuncupative, manner of making.....	566—	2
See "Nuncupative will."		
One presumed dead, probate.....	853—	11

WILL — (Continued)	PAGE	PAGE
"Or," "and," "but," etc, use of.....	667-	17
Order of contested — Stinson case.....	593-	19
Parol evidence, when admissible.....	668-	18
Particular conditions.....	785-	4
Parties to contest.....	605-	45
Parties to contest, addition, etc.....	599-	37
Parties who may contest.....	597-	32
Partition under.....	310-	4
Partition under, jurisdiction.....	15-	4
Partnership, interest in.....	798-	33
Petition on appeal, request for issue, etc.....	601-	41
Petition to be filed on appeal.....	590-	12
Petition for issue <i>d.v.n.</i> , undue influence, etc.....	591-	15
See "Forms."		
Power of appointment.....	805-	48
Power over real estate.....	795-	24
Precatory and explanatory words.....	801-	43
Precedents, how far weighty.....	661-	5
Presumptions and burden of proof.....	609-	49, 50
Probate, see "Probate," and "Proof," <i>infra</i> .		
Probate after letters.....	562-	33
Proceedings before the register.....	597-	31
Production, register's power.....	549-	6
Proof and probate.....	544-	1
Proof of hand-writing of witnesses.....	556-	20
Proof of lost writing.....	545-	2
Proof of testator's mark in signature.....	556-	23
Proof of testator's signature.....	556-	21
Proof of unsigned writing, as.....	556-	22
Proof, witnesses required.....	546-	2
Protection in equity.....	616-	65
Province of court and jury.....	613-	57
Provision for after-born child.....	583-	14
Publication not required in Pennsylvania.....	541-	23
Record of, when probated.....	559-	29
Reference clause, effect of.....	666-	15
Referring disputes to persons named.....	790-	14
Remainders, see "Remainder," <i>supra</i> .		
Repetition and exchange of words.....	667-	16
Republication of.....	585-	18
Republication by codicil.....	565-	5
Residuary clause, interpretation.....	669-	19
Residuary clause, use of.....	663-	6
Restriction on married woman's power.....	459-	7
Restriction of widow's interest.....	799-	36
Revival of earlier one.....	582-	10
Revocation under act of 1833.....	581-	7

WILL — (Continued)

	PAGE	PAG.
Revocation by cancellation and destroying.....	582-	9
Revocation by codicil.....	670-	21
Revocation of female's by marriage.....	583-	12
Revocation, personal estate.....	581-	8
Revocation <i>pro tanto</i> , by alienation.....	582-	11
Revocation must be substantive.....	585-	17
Revocation by will or codicil.....	580-	6
Revoked by implication.....	584-	16
Revoked <i>pro tanto</i>	584-	15
Rule against perpetuities.....	803-	47
Rule in Shelley's case.....	748-	1
See "Shelley's Case."		
Rule in Wild's case, see "Wild's Case."		
Security for costs on caveat.....	587-	4
Signature by another at testator's request.....	540-	21
Signature by mark.....	530-	20
See "Execution," <i>supra</i> .		
Single woman's revoked absolutely by marriage.....	584-	15
Speaks from death of testator.....	559-	28
States requiring three witnesses.....	579-	28
Substitutionary limitations.....	779-	32
Survivors, gifts to.....	726-	17
Sustained partly and set aside partly.....	611-	52
Terms in, meaning.....	729-	1, 2
Testamentary capacity.....	606-	47
Time fixed for distribution.....	414-	1
Time fixed for payment of legacy.....	606-	10
Time of hearing appeals, Phila.....	594-	20
Time within which to be probated.....	559-	27
Time from which it speaks.....	559-	28
Time of vesting.....	916-	33
Trial of issue <i>d.v.n.</i>	605-	46
Trustee, gifts to charity.....	575-	9
See "Testamentary trusts."		
"Undue influence".....	609-	50
Unique character.....	567-	24
Various forms of.....	529-	1
See "Forms."		
Vested gifts.....	743-	32
Vested and contingent devises and legacies.....	742-	31
Vested but defeasible interests.....	745-	36
See "Vested," etc., interests.		
Void gifts to charities, etc.....	574-	7
Widow's election to take under or against.....	644-	1
Widow's election, compensation to disappointed benefi- ciaries	650-	13
See "Widow" and "Election."		

WILL — (Continued)

	PAGE	PAGE
What constitutes written one.....	529-	1
Words of exclusion from a class.....	725-	15
Words necessary to pass an absolute estate.....	793-	19
Words of restriction must be unequivocal.....	753-	10
See "Heirs," "Children," etc.		

WILLS, REGISTER OF, see "Register."

Register of, duties, etc.....	26-	1
Register, power to compel production.....	549-	6
Register, power to require witnesses to attend.....	550-	9

WITNESSES.

Adverse interest.....	118-	24
Aged, etc., depositions.....	92-	49
See Vol. I, Johnson.....	632-	1
Compelled by register to attend.....	550-	9
Compelling attendance, Phila.....	426-	13
Competency of.....	91-	47
Competency and credibility.....	555-	19
Competency enlarged.....	117-	23
Competency, scope of acts.....	117-	24
Competency to prove claim.....	116-	22
Competency, to will giving to charity.....	572-	4
See act June 7, 1911.		
Competent, though interested, in estate of one pre-		
sumed dead.....	851-	4
Depositions beyond the state.....	92-	50
See "Commissions" and "Letters Rogatory."		
Examination before auditor.....	90-	43
Fees.....	102-	84
Proof of hand-writing.....	556-	20
Proof of will.....	547-	3
States requiring three, in will.....	579-	n8
Will to charity, subscribing.....	572-	4

WOMAN.

Common law, ages of.....	860-	2
Married, inheritance of personalty.....	459-	8
Married restriction on right to will.....	459-	7
Married, will of.....	537-	15
Married, will of.....	557-	25
Separate use trust.....	920-	42
Single, will revoked by marriage.....	584-	15

WORDS.

Common or technical use.....	719-	2
Common or technical use.....	720-	3
Effect given in will.....	661-	4

WORDS— (<i>Continued</i>)	PAGE	PAGE
Purchase or limitation.....	756-	16
Purchase or limitation, when.....	683-	33, 34
Repetition and exchange in will.....	667-	16
Will, precatory and explanatory.....	801-	43
WRIT OF INQUEST IN PARTITION, FORM.....	325-	29
WRITING, CONSTITUTING A WILL.....	529-	1
WRITINGS, FORMS NOT CONSTITUTING WILLS.....	530-	1
WRONGS DONE TO THE PERSON.....	175-	5
YORK COUNTY, PARTITION.....	313-	11



